SUPREME COURT OF QUEENSLAND

CITATION:	*Cragcorp Pty Ltd v Qld Civil Engineering Pty Ltd & Ors* [2018] QSC 203
PARTIES:	**CRAGCORP PTY LTD ACN 077 429 960 t/a QUEENSLAND BRIDGE AND CIVIL** (Applicant) **v** **QLD CIVIL ENGINEERING PTY LTD ACN 145 104 605** (First Respondent) AND **BRYDGET BARKER-HUDSON ADJUDICATOR No. J1087549** (Second Respondent) AND **CHERIDEN FARTHING AS THE ADJUDICATION REGISTRAR AND THE ADJUDICATION REGISTRY: QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (Third Respondent)
FILE NO/S:	BS No 1854 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2018
JUDGE:	Lyons SJA
ORDER:	**1. I will hear from the parties as to the form of the orders and as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant seeks a declaration that the adjudication application of the first respondent to the third respondent is void, either in whole or in part - where the applicant seeks a declaration that the adjudication decision of the second

respondent pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) is void, either in whole or in part – where the applicant seeks a declaration that the payment claim made by the first respondent to the applicant is void or is of no effect for the operation of the *Building and Construction Industry Payments Act* 2004 (Qld) – where the second respondent was engaged by the applicant as a subcontractor for a construction project – where the second respondent lodged a payment claim that was subsequently disputed by the applicant – where the applicant argues that the Adjudication Decision is affected by jurisdictional error – whether the decision was affected by jurisdictional error – whether the adjudicator failed to perform the statutory task of valuation – whether the adjudicator denied the applicant natural justice and failed to give proper written reasons

Building and Construction Industry Payments Act 2004 (Qld)

Civil Proceedings Act 2011 (Qld)

Judicial Review Act 1991 (Qld)

Annie Street JV Pty Ltd v MCC Pty Ltd & Ors [2016] QSC 268

Ball Construction Pty Ltd v Conart Pty Ltd [2014] QSC 124

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2013] QCA 394

City of Ryde v AMFM Constructions Pty Ltd & Anor [2011] NSWSC 1469

G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors [2006] QSC 399

John Holland Pty Ltd v TAC Pacific Pty Ltd & Ors [2010] 1 Qd R 302

Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525

Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors [2016] QSC 240

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4

South East Civil & Drainage Contractors P/L v AMGW P/L & Ors [2013] QSC 45

Southern Han Breakfast Point Pty Ltd (In liq) v Lewence

Construction Pty Ltd (2016) 91 ALJR 233

Thiess Pty Ltd and John Holland Pty Ltd v Civil Works Australia Pty Ltd & Ors [2011] 2 Qd R 276

Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors [2015] QSC 307

COUNSEL: B E Codd for the Applicant
M H Hindman QC with H Clift for the First Respondent

SOLICITORS: Batch Mewing Lawyers for the Applicant
HWL Ebsworth for the First Respondent

The dispute

[1] The Brisbane City Council engaged the applicant (Cragcorp) as the head contractor of a construction project. Cragcorp engaged the first respondent, Qld Civil Engineering Pty Ltd (QCE), as a subcontractor in relation to those works. This application relates to a dispute about an Adjudication Decision under the *Building and Construction Industry Payments Act* 2004 (Qld) *(BCIP Act*) which required Cragcorp to pay $205,218.53 to QCE. Cragcorp argues that the Adjudication Decision should be declared void or quashed.

This application

[2] By application filed on 20 February 2018, Cragcorp seeks the following declarations:

(a) The adjudication application of the first respondent made to the third respondent (number QBCC 334008) on or about 19 December 2017 (the Adjudication Application) is void, in whole or in part;

(b) The Adjudication Decision of the second respondent purportedly pursuant to the *BCIP Act* given in respect to the Adjudication Application on 6 February 2018 (the Adjudication Decision) is void, in whole or in part;

(c) The payment claim made by the first respondent to the applicant on or about 30 November 2017 is void (the Payment Claim) or of no effect for the operation of the *BCIP Act.*[1]

[3] The application for the declaration in (c) is no longer maintained by the applicant and should be dismissed. In relation to the relief claimed in (a), I do not consider that there is any basis for a declaration that the adjudication application itself, as opposed to the Decision, should be declared void. That aspect of the application should therefore also be dismissed.

[4] Accordingly, the only aspect of the application to be considered is whether the Adjudication Decision is void in whole or in part. The applicant relies on section 10 of the *Civil Proceedings Act 2011* (Qld) as the basis for their application. In the

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1 Court File Document 1.

alternative, Cragcorp seeks an order pursuant to s 41 of the *Judicial Review Act* 1991 (Qld) quashing the Adjudication Decision.[2]

[5] The second and third respondents were not actively involved in the proceedings and in accordance with the usual practice, will abide the order of the Court.

[6] The real dispute between the parties relates to whether the Adjudication Decision should be declared void for jurisdictional error.

Background

[7] Cragcorp was engaged to replace the bridge over Wolston Creek and it engaged QCE as a subcontractor to construct a sewer main and make modifications to a water main across the creek.[3] QCE signed a subcontract with Cragcorp on 5 July 2017 and Cragcorp signed on 13 July 2017. The subcontract provided that that it was a combination Lump sum/Schedule of Rates contract with a subcontract price of $729,080.25 (plus GST).[4]

[8] A letter of commencement was issued by Cragcorp on 17 July 2017 and works commenced two weeks later on 31 July 2017.[5]

[9] The current issues arose when QCE lodged a payment claim of $250,649.69 (including GST) dated and served on 30 November 2017 under the *BCIP Act*.

[10] On 5 December 2017, Cragcorp served QCE with a payment schedule that indicated the scheduled amount was $49,016.01 (including GST).[6] Cragcorp disputed amounts claimed in respect of some variations and had set off liquidated damages of $36,454.01 and deducted retentions of $36,454.01.

[11] QCE lodged an application for adjudication on 19 December 2017.[7] This was then referred by the third respondent to the second respondent for determination under the *BCIP Act*.[8]

[12] On 19 December 2017, QCE provided its Adjudication Application which contained a calculation that deducted the retention amount of $36,454.01 and indicated that the amount in issue was $212,297.85.

[13] On 22 January 2018 Cragcorp provided its adjudication response and argued for the first time that QCE was not entitled to the progress payment claimed despite the fact that the Payment Schedule detailed the scheduled amount as $49,016.01.

[14] On 6 February 2018, the second respondent made an Adjudication Decision under the *BCIP Act* which required that Cragcorp pay QCE the amount of $205,218.53 (including GST).[9]

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2 Court File Document 1.
3 Court File Document 18 at [12] and [13]; Court File Document 13 at [5] – [6].
4 Court File Document 13 at [7]; Court File Document 18 at [13]; Court File Document 3, Exhibit DL-3 at 65.
5 Court File Document 3, Exhibit DL-2 at 25.
6 Court File Document 13 at [10].
7 Court File Document 13 at [8] – [11]; Court File Document 18 at [29].
8 Court File Document 13 at [11].
9 Court File Document 18 at [1] and [31].

[15] Cragcorp seeks to have that Decision declared void, of no effect or quashed, and argues that three aspects of the Adjudication Decision are affected by jurisdictional error; namely, the decisions made with respect to Variation 1, Variation 2 and the decision in relation to liquidated damages.

The *BCIP Act* regime

[16] The *BCIP Act* provides a legislative scheme for the resolution of payment claims for construction work, pursuant to a construction contract.[10] The scheme has been variously described as "pay now, argue later" and as a "simple expeditious and robust mechanism for ensuring the payment of progress claims."[11] The process is triggered by the claimant serving a 'payment claim' upon the respondent. The respondent can resist this claim by serving on the claimant a 'payment schedule' which must contain: identification of the relevant payment claim; the amount the respondent proposes to pay, if any, and the reasons for refusing to pay the remaining amount.[12]

[17] If the respondent fails to pay the amount in the claim, the claimant can make an 'adjudication application' under the *BCIP Act* to the registrar who can then appoint an adjudicator to make a determination on the application.[13]

[18] It is then the adjudicator's task to value the payment claim, in accordance with the relevant legislative provisions of the *BCIP Act*.[14] There is no appeal from an adjudicator's decision however a decision can be declared void for jurisdictional error.[15]

[19] As the High Court made clear in *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd,*[16] there is a significant limitation in the scheme created by the various *BCIP Act* regimes. That is, that the schemes provide a statutory mechanism for securing payment for an amount claimed to be payable pursuant to an obligation to pay for work under a construction contract. The High Court made clear that the scheme is not a scheme which provides security for payment of an amount claimed for damages for breach of a construction contract nor is it concerned to provide security for payment of an amount which might be claimed as an alternative to damages by way of restitution.[17]

[20] Cragcorp argues that this is, in reality, an impermissible claim for restitution and seeks orders for costs as well as orders:

(i) that the amount paid in to Court of $169,875.71 be released; and

(ii) the amount of $49,580.03 paid to QCE be repaid.

The factual issues giving rise to the dispute

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[10] Court File Document 13 at [13]; *BCIP Act* ss 5 and 10.
[11] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2015] 1 Qd R 228 at [67] and [68].
[12] Court File Document 13 at [14]; *BCIP Act* s 18.
[13] Court File Document 13 at [15]; *BCIP Act* ss 21, 12 – 14, 25 and 26.
[14] *BCIP Act* ss 12, 13, 14, 25, 26 and 27.
[15] *Chase Oyster Bay Pty Ltd v Hamo Industries Pty Ltd* (2010) 272 ALR 750 at 752 – 755; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.
[16] (2016) 91 ALJR 233.
[17] Ibid at [66].

[21] QCE commenced work on 31 July 2017. Rock was encountered shortly thereafter at about 4 metres from the surface. The geotechnical information provided by Cragcorp indicated that rock was at a depth of 10 metres. The documents provided to the adjudicator in support of the application indicated that on 3 August 2017 QCE submitted 2 requests to Cragcorp. They were referred to as variation requests in relation to latent conditions in the accompanying email as follows "VO 001-Latent Condition, Northern Bore pit-Identified 1/8/2017" and "VO 002 Latent Condition, Additional bore length-Identified 1/8/2017."[18]

[22] Each request stated that it was made "In accordance with Part B- Clause 30 (C) of the A017 Subcontract agreement" and was a "variation request for the additional time and cost expected to be incurred."[19] Each request gave an estimated value of additional works, which in relation to VO-001 was $37,373 ex GST with an extension of time request of 4 days and $19,478.60 ex GST with no request for an extension of time in relation to VO-002.[20]

[23] Clause 30 in Part B of the Subcontract provided:

> "Clause 30 – Notices:
>
> Any notice to be given under or in connection to this Subcontract Agreement shall be in writing and shall be delivered by hand, post or facsimile or email at the address for the contact person nominated in Part A – Item 1 and for payment claims, in accordance with Clause 11.
>
> The subcontractor shall, within three (3) business days after the first day upon which the Subcontractor could reasonably been aware, provide written notification to the Contractor of:
>
> a. a breach of Contract;
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> b. an act, omission, direction or approval by the Contractor;
>
> c. an event or circumstance that has occurred
>
> where it may give rise to a claim in respect of or arising from any or all of the above.
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> This notice shall provide sufficient details to identify it as a notification of claim and particulars of the following:
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> a. the breach, act, omission, direction, approval, event or circumstance in which the notice relates;
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> b. the contractual reference and basis for the claim; and
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> c. the likely quantum of the claim.

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[18] Court File Document 17, Exhibit DL-1 at 4-5.
[19] Court File Document 17, Exhibit DL-1 at 4-5.
[20] Court File Document 17, Exhibit DL-1 at 2 – 5.

> The Contractor shall not be liable upon any claim by the Subcontractor in respect to any of the above items unless the provisions of this Clause are met."[21]

[24] The contract did not contain a provision in relation to latent conditions. Both requests mistakenly referred to "AS4000-1997, Clause 25 Latent Condition" which was not in fact part of the subcontract.

[25] Clause 7 stated that the subcontractor was deemed to have inspected the site including "physical indications of above and below surface conditions prior to commencing work." Part C of the Subcontract also contained Special Conditions and clause 3.2 provided:

> "The Subcontractor is deemed to have inspected the site and all relevant contract documents and has made due allowances in its rates/price for all reasonable site conditions, site obstacles, accesses and obstructions which may affect any aspect of the Works."

[26] Clause 13 related to Variations and was in the following terms:

> "The Contractor may, at any time prior to completion of the Works, vary the scope or the extent of the Subcontract Works by written direction to the Subcontractor. The Subcontractor shall be bound to execute such variation where it is within the general scope of the Works.
>
> If the Subcontractor believes that they are entitled to a variation, they shall notify the Contractor pursuant to Part B – Clause 30 of this agreement. To remove any doubt, the Subcontractor shall not vary the Works unless it is approved in writing by the Contractor.
>
> The price for the variation must be agreed wherever possible prior to the execution of the variation. In the absence of agreement, the price for a variation must be a reasonable price determined by the Contractor. The price for any variation shall be added to or deducted from the Subcontract Sum."

[27] The submissions of Counsel for QCE sets out the relevant background correspondence in relation to the additional works. I shall adopt this as a convenient summary of the facts in relation to the request for and notice of those additional works. On 28 August 2017, in response to QCE's letter of 3 August 2017 requesting the variations, Cragcorp sent an email in the following terms:

> "Just checking how you are progressing with finalising the latent condition relating to the rock excavation for the north pit and switching of pits from jacking to receiving and vice versa for your VO#001. Would you be able to supply this in the next day or so?"[22]

[28] The following day another email was sent to QCE as follows:

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[21] Court File Document 3, Exhibit DL-3 at Clause 30 of the Subcontract Agreement.
[22] Court File Document 17, Exhibit DL-1 at 20.

> "You mentioned yesterday that you have not received any confirmation from QBC for the rock excavation and the switching of the jacking and receiving pits as of yet. Please refer the below email from Brett confirming the direction to proceed with these works".[23]

[29] The email referred to was an email to QCE dated 8 August 2017[24] which directed QCE to proceed with the variations sought. That email gave a direction to proceed with (1) the "Change to Locations of Entry and Receiving Pits" and (2) "Effects to Excavation of Northern Side Entry Pit Due to Underlying Rock Layer" and concluded:

> "The above is deemed to be the Contractor's Direction for the Subcontractor to proceed with contract works on site. Once Equipment and Labour hours have been receive (sic) I will organise a meeting with Dave Bloomfield to finalise the quantum. This will then formulate the Contractors assessment for Item 2-Additional Works to Stabilise the Excavation of the submitted VO-001. In regards Item 1 of VO-001 I will provide my formal response by COB Wednesday."[25]

[30] On 29 August 2017, David Bloomfield (QCE) emailed Reece Doyle (Cragcorp) with documentation regarding variation 1.

[31] On 29 September 2017, Darren Hausknecht (QCE) emailed Doyle (Cragcorp) enquiring as to what was happening with variation 1.

[32] On 31 October 2017, Hausknecht (QCE) wrote to Brett Lukritz (Cragcorp) to provide documentation, including a variation and documentation to support the valuation regarding variation 2. He wrote: "In accordance with Part B- Clause 30 (C) of the A017 Subcontract agreement, and following our *original notice issued 3 August 2017 and QBC's acceptance of the latent condition on 29 August 2017, QCE submit to QBC the variation for the additional time and cost incurred to overcome the latent condition."*[26] (my emphasis). The letter then provided details of the claim, which were that:

> (a) Rock was encountered at approximately 4 metres from surface level at the northern bore pit. Geotechnical information had identified that the rock layer was about 10 metres from surface level;
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> (b) Direction was provided to relocate the pit to minimise excavation and expedite works. Relocation and stabilisation were claimed under variation 1; and
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> (c) The construction process was materially different from what was planned prior to commencement.

[33] On 6 November 2017, Doyle (Cragcorp) wrote to Hausknecht (QCE) in relation to variation 1 as follows:

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[23] Court File Document 17, Exhibit DL-1 at 22.
[24] Court File Document 17, Exhibit DL-1 at 24.
[25] Court File Document 17, Exhibit DL-1 at 24.
[26] Court File Document 17, Exhibit DL-1 at 130.

> "In accordance with Part B Clause 13 of the Standard Subcontract of the Subcontract Agreement, the Contractor has assessed Variation 001 (VOR001 – Latent Condition – North Bore Pits) and herewith approves the value of $14,616.00… Please find attached the valuation breakdown for the above mentioned Latent Condition Variation."[27]

The cost of the variation was based on the value under the contract of an Enveloper bore.

[34] On 14 November 2017, Lukritz (Cragcorp) wrote to Hausknecht (QCE) regarding extension of time (EOT) requests. In a letter regarding EOT#01 he wrote, "Pursuant to clause 14 of Subcontract Agreement 195-005, the Contractor herewith provides an extension of time due to the advised latent condition for rock encountered in the northern bore pit."[28] In another letter, he wrote that EOT#03 was provided "as a consequence of the delay to works due to rock encountered in the SRM Enveloper bore."[29]

[35] The parties exchanged further correspondence which resulted, on 12 December 2017, in two letters from Cragcorp to QCE. The first regarding a revision to the valuation of variation 1 ($15,789.15 excluding GST); the second regarding a valuation of variation 2 ($38,198.21 excluding GST).[30]

Adjudication Application Submissions

[36] In its Adjudication Application, QCE contended they had demonstrated that they had performed the variation work and was entitled to be paid for that work under the subcontract. It summarised the matters in dispute in relation to the variations required and set out the terms of the contract relied upon, particularly clause 13. Reliance was placed on the emails and letters referred to above. QCE then argued that Cragcorp had approved the variations and paid amounts in relation to Variation 1 and 2 'on account' but that the amount payable was in issue.

[37] At 2.1 of the Adjudication Application Submissions, QCE summarised the matters in dispute, indicating that the total progress payment payable was $250,646.69. However, they also indicated that the amount claimed by the Adjudication Application was $212, 297.85. The submissions noted that Cragcorp had delivered a revised assessment of $15,789.15 (ex GST) in relation to Variation 1 and $38,198.21 in relation to Variation 2 in correspondence, which was 7 days after the Payment Schedule was lodged.

[38] It was also submitted that, pursuant to s 24(4) of the Act, the Adjudication Response could not include any reasons for withholding payment unless they had been included in the Payment Schedule when served on QCE. It was argued therefore that the new reasons set out in the letter delivered to QCE on 12 December 2017 could not be considered by the Adjudicator. The various terms of the Contract relied upon were outlined in the Adjudication Application.

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27 Court File Document 17, Exhibit DL-1 at 62.
28 Court File Document 17, Exhibit DL-1 at 73.
29 Court File Document 17, Exhibit DL-2 at 256.
30 Court File Document 18 at [25]; Court File Document 17, Exhibit DL-2 at 103 and 263.

[39] In respect to the position on liquidated damages, QCE asserted that it was entitled to extensions of time and that the provision for liquidated damages was a penalty.

[40] QCE also argued that the operation of cl.14 of the Contract is conditioned by cl.31 and that the unadjusted date for completion under the Contract was 4 September 2017 but that completion was not achieved as at 30 November 2017 and the adjusted date for completion was 18 December 2017.[31]

Adjudication Response

[41] Cragcorp's adjudication response contended that the entitlement to claim under the *BCIP Act* was limited to entitlements arising under the Contract and it was exclusive of any other legal entitlement. Cragcorp argued the Contract did not include an entitlement to be paid for additional work arising from latent conditions. It was therefore argued that as QCE had no entitlement to be paid for latent condition then the adjudicator had no jurisdiction to award payments in relation to the contentious variations.

[42] It was also argued that the scheduling of an amount "*on account"* without an admission of liability by the applicant did not relieve the first respondent from the obligation to make a determination as to the entitlement under the Contract. Furthermore, the date for completion under the Contract as adjusted was 26 September 2017 and the date of completion was 10 October 2017.

[43] Cragcorp also argued that it was entitled to liquidated damages as a setoff to the amount claimed. [32]

[44] It was further argued that if there was an entitlement to a payment claim established under the contract, the amount payable was the scheduled amount and not the amount claimed in the Payment Claim.

The Adjudication Decision

[45] On 6 February 2018, the Adjudicator made the Adjudication Decision which provided for an amount of $205,218.53. The contentious aspects of the Adjudication Decision and the reasons of the adjudicator related to the determination that the absence of a latent condition provision in the contract was irrelevant and the conclusion that it was a valid payment claim for variations under the Contract, albeit for a latent condition. The adjudicator noted that Cragcorp used the terms "latent condition" when referring to some of the variations but paid a scheduled amount where a variation had been accepted and in some instances had granted extensions of time. The contractual requirement that the parties treat each other in good faith was also considered. The adjudicator also held that the liquidated damages claim is equal to and negated the Retention held by Cragcorp.[33]

[46] I shall deal with the contentious aspects of the Adjudication Decision in more detail as set out below.

Essential Issues

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[31] Applicant's Amended Outline at [43] – [45]; Court File Document 3, Exhibit DL-2 at 56.
[32] Applicant's Amended Outline at [46].
[33] Court File Document 17, Exhibit DL-7 at [155].

[47] Under the Act, there is no appeal from an adjudicator's decision and there is no general jurisdiction to set aside the decision for error. There is a line of authority, however, which establishes that an adjudication decision under the *BCIP Act* may be set aside for jurisdictional error in the performance of that function. This principle was most recently discussed by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[34] where the majority held that the principal basis for making an order to set aside a decision or have it declared void is jurisdictional error, which enforces the limits of a decision-makers functions and powers. The majority declared that: "The jurisdiction of a State Supreme Court to review an exercise or purported exercise of power for jurisdictional error, and to grant relief in the nature of certiorari (and prohibition and mandamus) where jurisdictional error is found, serves to enforce the limits of State executive and judicial power."[35]

[48] Once established, jurisdictional error vitiates the whole of a decision and there is no discretion as to the nature of the remedy and a declaration that the decision is void or an order quashing the decision must follow except to the extent that severance is permitted pursuant to the amendments to the Act. The applicant argues that the Decision of the adjudicator in this case was not a valid exercise of jurisdiction because she failed to identify and apply the terms of the contract, failed to make a decision within the scope of ss 25 and 26 of the Act and denied the applicant natural justice.

[49] The specific grounds upon which the applicant relies in this application are:

(a) Ground 1 – The Adjudication Decision determined amounts as payment beyond the jurisdiction of the second respondent.

(b) Ground 2 – The second respondent failed to perform the statutory task by applying the terms of the Contract and by failing to have regard to properly made submissions of the applicant.

(c) Ground 3 – The second respondent denied the applicant natural justice.

(d) Ground 4 – The second respondent failed to give proper written reasons in non-compliance with s 26(3) of the *BCIP ACT*.

(e) Ground 5 – The Adjudication Application is an impermissible claim for restitution in the face of no contractual entitlement.[36]

[50] The applicant essentially submits that this Decision can be declared void or set aside due to jurisdictional error or the Decision can be quashed.[37] If there has been such an error, the next consideration is whether, pursuant to s 100(4) of the *BCIP* Act, that part of the Decision can be severed.

The entitlement to variations under the contract

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34 [2018] HCA 4.
35 Ibid at [29].
36 Court File Document 13 at [3].
37 Court File Document 13 at [18] – [19]; *Civil Proceedings Act 2011* (Qld) s 10; *Judicial Review Act 1991* (Qld) ss 41, 43 and 47.

[51] Whilst five grounds are listed, many of those grounds are interrelated and overlap, as counsel for QCE argues. The major complaint by Cragcorp seems to be with the way in which the adjudicator dealt with the liquidated damages aspect of the claim and what QCE referred to as VO-001 and VO-002 and Cragcorp's argument that those claims did not properly arise under the contract. This was because they were latent conditions and as the subcontract provided no entitlement to payment for latent conditions, QCE had no contractual basis for the payment claim.

[52] Cragcorp argues that the reasons do not disclose the contractual or factual basis on which the second respondent determined the adjudication, arguing that they are no more than statements of conclusion which are unsupported by an analysis of the facts or submissions that were before the adjudicator. In particular, in relation to VO002, the applicant argues that the adjudicator did not have regard to the submissions of the applicant.

[53] It is also argued that the Adjudicator failed to base her reasons on an analysis of the contractual terms or an identification of the manner in which they are said to operate. The applicant also argues that the Adjudicator wilfully departed from the evidence and submissions made by the parties without putting any of the matters before the parties for submissions and that the reasons involved a rewriting of the contract.

Grounds 1 and 2: failure by the adjudicator to perform the statutory task of valuation

[54] It is uncontentious that in the context of the *BCIP Act,* the essential question in determining whether there is jurisdictional error is whether the adjudicator has actually performed the function required on the adjudicator under the Act. The relevant principles were outlined by White JA in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd:*[38]

> "The discussion in *Minister for Immigration and Citizenship v SZMDS* concerning the relationship between jurisdictional error in respect of reasoning which is "clearly unjust", "arbitrary", "capricious" and "Wednesbury unreasonable" demonstrates that attaching these descriptors to the good faith debate possibly adds little more than did the original understanding of good faith in the review of statutory decision making that the power must be exercised honestly for the purpose for which it was given. As the New South Wales Court of Appeal did in Holmwood, *the enquiry should focus more on whether the adjudicator has performed the function demanded by the Payments Act and less on pursuing elusive synonyms,* keeping always in mind that the legislative intent dictates a person with recognised expertise in the area be selected for the task by an informed body and this, necessarily, facilitates the rapid decision making required."[39] (my emphasis)

[55] Cragcorp argues that the adjudicator failed to have regard to and apply the contract in assessing the Payment Claim and that such failures were material jurisdictional errors. Cragcorp argues that Items 1 and 2 of the alleged Variations were articulated to them in the administration of the Contract, the Payment Claim and in the Adjudication

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38 [2012] 1 Qd R 525.
39 Ibid at [96].

Application as latent conditions which were said to arise pursuant to Clause 25 of AS4000. In this regard there can be no doubt that the contract does not in fact import and is not otherwise informed by AS4000. I also accept that the contract makes no provision for entitlement for a payment for a latent condition. Cragcorp argues that a submission in these terms was squarely made but ignored by the Adjudicator without any explanation.

[56] Cragcorp also submits that at common law there is no right to payment for an unforeseen condition encountered in a building project unless the contract expressly provides for payment for such an unforeseen condition. Furthermore, it is argued that the mere fact that the contract was more difficult to perform as a result of unforeseen circumstances does not relieve QCE from the obligation to perform the contract. It also is argued that such an unforeseen circumstance did not engage an entitlement to an implied term for payment.

[57] Whilst the Adjudicator summarised the position put by the applicant at paragraph 71 and 72 of the Decision, Cragcorp maintains that the adjudicator then determined that she could treat VO001 and VO002 as variations but without any analysis as to whether or not the direction relied upon in terms of Clause 13 of the Contract involved a variation of scope or extent of the subcontract works.

[58] In this regard I note that work is defined in Clause 1 as:

> "*Works* means the work to be executed by the Subcontractor for the Contractor, as evidenced by the documents set out within the Subcontract Agreement."

[59] Variation is defined in Clause 1 as:

> "*Variation* means a direction by the Contractor to the Subcontractor prior to completion to vary part or all of the works. The direction is to be made pursuant to Part B – Clause 13 and shall be within the general scope of the work."

[60] In relation to VO002, Cragcorp argues that by proceeding to value the drilling work as a variation, the Adjudicator engaged in jurisdictional error by wrongly assuming jurisdiction to determine an amount which did not give rise to an entitlement to payment under the Contract.

[61] Cragcorp argues that the Adjudicator purported to value Variations 1 and 2 as variations, whereas an entitlement to a claim for a variation under the contract was regulated by Clause 13, with the definitions which were to be considered for variation works in Clause 1. Clause 30 was also relevant in relation to the provision in relation to notices. Cragcorp argues, therefore, that on a proper construction of the contract, taking into account those clauses, it was necessary for there to be:

(a) a direction in writing from the Contractor;

(b) which was a direction which "varies part or all of the works"; and

(c) the direction must either state that it is to "vary the scope or extent of the Subcontract Works"; or

(d) the Subcontractor must have given notice within three business days of the relevant direction that it was claiming a variation.

[62] In order to ascertain whether there has been jurisdictional error, it is necessary to refer to the way in which the Adjudicator approached her task and the key findings that were made with respect to the issues which are in dispute in this proceeding. The question is not whether the Court would have come to the same conclusion as the Adjudicator but whether the Adjudicator performed the functions required by the Act.

[63] A consideration of the Adjudicator's Decision indicates that, as required by the Act, the Adjudication Decision outlined the objects of the Act and then referred to s 26 and the matters an Adjudicator is to decide; namely, the valuation of the payment claimed. The Decision noted that the only matters the Adjudicator was able to consider were the Act, the contract, the Payment Claim and Payment Schedule, as well as properly made submissions in support of the Claim and the Schedule. A perusal of the Decision indicates that the Adjudicator approached her task in the proper way, conscious of the relevant legislation as well as relevant documents, particularly the subcontract. She then noted the key dates and the essential matters in dispute and then turned to a consideration of matters that an adjudicator may consider and is to decide.

[64] The Adjudicator was satisfied that the Payment Claim was valid and dealt, as a preliminary matter, with the issue of whether there was a contractual right to variations. In particular, at paragraph 22, she referred to the contract provisions and later in the Decision she specifically referred to QCE's Adjudication Application Submissions and Cragcorp's Adjudication Response.[40] She was therefore acting within jurisdiction when she concluded after an examination of the contract, that the absence of a latent condition clause in the subcontract was irrelevant to a consideration as to whether they in fact constituted variations under the subcontract, albeit for a latent condition.

[65] In relation to the ability to claim variations, an analysis of the Decision, particularly the initial determination in relation to jurisdiction, indicates that the adjudicator specifically considered the subcontract. Particular reference was made to QCE's claim that the amounts claimed were variations pursuant to the subcontract and Cragcorp's response that the payment claim was made without jurisdiction on the basis that QCE had no contractual right to the variations claimed as they were latent conditions and QCE had not demonstrated how the work claimed was in fact a variation work within the meaning of clause 13 of the Subcontract and was not subject to the express risk allocation expressed in clause 7.

[66] In my view, a fair reading of the Decision indicates that the Adjudicator did address the issue as to whether there was an ability to claim variations under the subcontract and correctly noted that the term 'latent conditions' appeared not to have been used in the contract but that it provided for variations and there was a requirement that the parties were to deal with each other in 'good faith'. The Adjudicator in particular accepted that "The email of 8 August 2017 from the [Cragcorp] Project Manager, directed Qld Civil to proceed to swap the pits and sought details of any costs incurred to be submitted and once agreed, to be paid as an 'over activity'."[41]

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[40] Court File Document 3, Exhibit DL-7 at [63] – [91].
[41] Court File Document 3, Exhibit DL-7 at [83].

[67] The Decision referred to the subcontract not only providing for variations but how they were to be claimed and answered by adjustment of the contract price and EOTs. Reference was then made to Cragcorp's Adjudication Response which referred to the fact that it scheduled amounts for VO1, VO2 (and VO4) in the payment schedule and that the amounts were scheduled 'on account' and 'in good faith'. In this regard the adjudicator noted that Cragcorp referred to them as "Variations being in respect of 'latent conditions'" and gave a scheduled amount where a variation had been accepted and in some case had granted extensions of time in respect of them.[42]

[68] The Adjudicator had before her all of the all of the supporting documentation in relation to QCE's claims for variations as outlined above, which included evidence of 'directions' to QCE in accordance with the contractual requirements. The Adjudicator's Decision was clearly based on a consideration of the documentary material which indicates that whilst QCE used the term latent condition in some of their correspondence, it was always in relation to a variation. That documentation revealed that QCE had made it very clear that they were seeking variations and that they were giving notice pursuant to Clause 30(c) of the contract. The emails of 3 August 2017 specifically referred to Clause 30(c) of the Subcontract and stated "QCE submit to the Contractor (QBC) a variation request."[43] Those requests for variations could not have been more explicit.

[69] Furthermore, the correspondence from Cragcorp also adopted that terminology. Indeed, the letters from Cragcorp of 8 and 28 August 2017 made it clear that Cragcorp was giving a direction to QCE to proceed with the work as a variation. As Counsel for QCE submits, the letter from Cragcorp of 8 August 2017 specifically indicated that any costs incurred for "rectification of the unstable ground needs to be submitted for approval."[44] Accordingly, it was not just a direction to do the work, which would of course be unnecessary given the terms of the contract. Rather, as Counsel for QCE put, it was in clearly relation to a variation: "Here's a direction. I'm directing you. If you've got claims for costs get them to us."[45] The entitlement to a variation was contingent on a direction. The adjudicator considered not only the terms of the contract, but the factual circumstances surrounding the performance of the work and was clearly satisfied on the material that a direction was given and it was a variation in terms of the subcintract.

[70] All of the supporting documentation was provided to the Adjudicator and clearly was considered by her in coming to her Decision. Cragcorp indeed accepts that it directed QCE in writing to swap the locations of the entry and receiving pits the subject of VO001 and that the excavation of the pits involved excavation in rock but argues it was simply a direction to proceed with the works and not a direction in relation to a variation. There can be no substance to the argument that the adjudicator failed to have regard to and apply the contract in assessing the Payment Claim and that she ignored Cragcorp's submissions.

[71] I note that Counsel for Cragcorp sought to rely on a series of decisions including *BM Alliance Coal Operations Pty Ltd v BGC Contracting*[46] (where the contracts contained

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42 Court File Document 3, Exhibit DL-7 at 135.
43 Court File Document 17, Exhibit DL-1 at 4.
44 T 1-44: 1 – 6.
45 T 1-44: 9 – 10.
46 [2013] QCA 394.

specific clauses in relation to latent conditions), to argue that the work done here was in fact work done because of a latent condition. Counsel argued that the works done when rock was encountered have "All the hallmarks of a latent condition as described by Justice Muir in *BM Alliance Contracting*."[47] As there was no specific clause in relation to latent conditions in this case, those decisions need to be read in that context and were therefore of limited assistance in the circumstances of this case.

[72] Cragcorp argued in the Adjudication Response for the first time that QCE had no claim for a latent condition and could only make claims for payment under the contract provision. The adjudicator noted that the issue of latent conditions was not raised in the Payment Schedule and she determined that under s 24 of the Act she could only refer to issues raised in the Schedule and not those raised for the first time in the Response. Significantly, in the Payment Schedule, Cragcorp had not disputed the existence of the variation claims. I note that Cragcorp's Payment Schedule contained a heading "Approved Variations" and records at VAR001 that $14,616 had been previously approved and therefore, of the total of $29,025.25 claimed by QCE, the amount of $15,263.40 was in dispute with a notation under the heading "Justification/Reason for Difference" that it was 'paid on account'.[48]

[73] Similarly, VAR002 shows that the total claimed was $143,911.66 and $28,782.33 had been previously claimed and therefore the amount claimed was $115,129.33. It was accepted that $14,391.17 was to be paid and therefore $100,738.16 was in dispute with a similar notation that it was 'paid on account'. Variations 5, 6, 7 and 8 referred to in the Schedule are not in dispute. Cragcorp argues now that whilst the term "on account" was used that was "without any admission of liability."[49] There is a line of authority including *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors,*[50] *Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors*[51] and *Thiess Pty Ltd and John Holland Pty Ltd v Civil Works Australia Pty Ltd & Ors*[52] supporting the principle that an adjudicator should not take into account reasons for withholding payments that were not raised in the Payments Schedule. It is clear, however, that an adjudicator is still required to perform an adjudication in accordance with the Act and the contract under consideration irrespective of whether the parties had made submissions about the particular issue. In *South East Civil & Drainage Contractors P/L v AMGW P/L & Ors*[53] Jackson J held that s 17(4) of the Act had not been complied with and the mere fact that the submissions of the respondent did not take the point did not excuse compliance with the requirements of the Act.[54]

[74] The adjudicator clearly considered the terms of the contract and the requirements of the legislation as she was required to do but was entitled to disregard any new reasons submitted for the first time in the Payment Schedule in that context. There can be no doubt that the Payment Schedule did not dispute entitlement to either variation but rather accepted the entitlement. Whilst the Adjudicator stated that she was barred from

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47 T 1-18: 44- 45.
48 Court File Document 3, Exhibit DL- 5 at 104.
49 Court File Document 13 at [46].
50 [2006] QSC 399 at [36].
51 [2015] QSC 307 at [51].
52 [2011] 2 Qd R 276.
53 [2013] QSC 45.
54 [2013] QSC 45 at [45].

"taking account of the material in the Adjudication Response"[55] in relation to this issue, she clearly considered whether there was indeed an entitlement under the contract as she was required to do and she had all the relevant primary documentation before her. The documents speak for themselves.

[75] In my view, the use of the words 'on account' would support an inference that a variation had been approved at the time and that only quantum is in dispute. Whilst paragraphs 107 and 108 of the Decision indicate that the Adjudicator considered Cragcorp's reasons in the Payment Schedule were sparse and the submissions in the Adjudication Response would not be taken into account pursuant to s 24(4) of the Act, the issue was clearly considered. The submissions in the response effectively tried to assert a different factual basis for the use of the term "on account" and the Adjudicator was entitled to disregard those submissions. As the Adjudicator noted, even a quick assessment by Cragcorp in the Payment Schedule would have indicated the main areas of disagreement as the Act requires.

[76] I consider therefore that the adjudicator performed the task required of her under the Act. She made a decision that QCE's payment claim was a claim for a variation under the contract after considering the contract, the Act and all supporting documentation. Counsel for Cragcorp sought to rely on the decision of Douglas J in *Ball Construction Pty Ltd v Conart Pty Ltd*[56] to argue that the adjudicator engaged in jurisdictional error by failing to apply the terms of the contract. In my view, consistent with the statements of principle by Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors,*[57] the adjudicator has found a legal source for the entitlement to a variation in the construction contract, albeit for a latent condition which was not otherwise specifically dealt with in the subcontract. I also consider that the Adjudicator provided sufficient reasons in relation to this aspect of her Decision.

[77] I do not consider that the adjudicator has fallen into jurisdictional error in this regard. The adjudicator was entitled to reach that conclusion based on a consideration of the material before her.

Grounds 3 and 4: the adjudicator denied Cragcorp natural justice and failed to give proper written reasons in non-compliance with s 26(3) of the *BCIP ACT*.

[78] Cragcorp argues that the Adjudicator denied Cragcorp natural justice because in interpreting the contract in a manner not contended for by either party, she has failed to provide Cragcorp with the opportunity to make an argument which might have persuaded the Adjudicator to reach a different decision. It is contended that this occurred particularly in relation to the claim for liquidated damages where it is alleged that the Adjudicator made a decision in the absence of submissions from the parties.

[79] The Adjudicator's Decision sets out the history of this aspect the dispute. Cragcorp had argued in the Adjudication Response that they were entitled to deduct liquidated damages because QCE failed to reach completion of the works by the Adjusted Date for Completion of 26 September 2017. The amount of $36,454.01 was therefore calculated

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55 Court File Document 3, Exhibit DL-7 at [110].
56 [2014] QSC 124.
57 [2012] QSC 346 at [56].

from 26 September to 10 October 2017. Cragcorp argued that pursuant to Clauses 11.6 (Set-off) and 15 (Liquidated damages), it was entitled to elect to withhold payments.

[80] In the Adjudication Application Submissions, QCE had made it clear that there was no mention of Liquidated Damages in the Payment Claim but that the Payment Schedule sought to impose a set-off for liquidated damages of $36,454.01. QCE accepted that the subcontract allows for liquidated damages which was capped under the contract at no more than 5% of the contract price which was $36,454.01. QCE submitted, however, that the attempt to impose liquidated damages was misconceived and ignored the terms of the contract in circumstances where the adjusted date for completion was no earlier than 18 December 2017. A date which was expressly directed by Cragcorp. The submission then contained 4 pages of references to emails and other factual material outlining the history and duration of the delays in relation to the claimed variations which they argued substantiated the date of 18 December 2017. QCE argued that 10 October 2017 was an arbitrary date.

[81] QCE also argued that the liquidated damages regime was a penalty in circumstances where Cragcorp's liability to Brisbane City Council relates to practical completion and it therefore had the ability to penalise QCE for minor non–conformance. They concluded at paragraph 20.33 in the following terms:

> "Reading clause 15 and the rate for liquidated damages together with fairness, reasonableness and good faith principles at clause 31, the liquidated damages regime ought to be found to be unenforceable by virtue of it being a penalty."

[82] In the Decision, the Adjudicator considered that QCE's position was that it was entitled to extensions of time and that whilst the date for completion under the Contract was 4 September 2017, the operation of clause 14 in relation to extensions of time was conditioned by clause 31 which contained the good faith clause. In this respect the extensions were required as a result of events beyond their control. QCE had submitted that Cragcorp had given an EOT until 18 December 2017 but had misidentified it as 10 October. QCE argued that completion was the completion of all work, with there being no link between practical completion and liquidated damages. Alternatively, it was argued that completion was achieved when the sewer became live which was not until which was not achieved until 30 September 2017.

[83] It was noted that QCE argued that as the EOT's were events beyond their control Cragcorp was required to reasonably assess the validity of the EOT claim. It was also argued that Cragcorp had not properly applied the subcontract and that determining the date of completion as "Practical Completion" is not a term of the contract. Furthermore, the date for completion was adjusted several times with the last adjustment on 20 November when Cragcorp directed QCE complete the works by 18 December 2017.

[84] The Adjudicator then set out the response by Cragcorp noting that it was argued by Cragcorp that QCE was required by the contract to complete the work by the date set by Cragcorp. This was defined as completion which was the point of time determined by Cragcorp. The date of 18 December could not thereby be sustained.

[85] Cragcorp claimed that, rather than be a penalty, the liquidated damages were not out of proportion with Cragcorp's foreseeable loss but a genuine pre-estimate of loss. It was

noted that on 14 November 2017 Cragcorp had given QCE a Certificate of Completion for 10 October at the same time it had provided an EOT in relation to the scour pit variation VO005 of 18 December 2017. The EOT of 18 December was only relevant to variation 5.

[86] The Adjudicator, in assessing that aspect of the adjudication, stated she had considered clauses 14 and 15 of the Subcontract and noted that Practical Completion was not defined in the Subcontract. She referred to Cragcorp's argument that the giving of the Certificate "indicates completion"[58] and the fact that the sewer became live on 30 September was irrelevant. The Adjudicator noted the four dates which were proposed as the date of Practical Completion namely 26 September 2017 (certified by Cragcorp as an EOT), 30 September (the date the sewer went live), 10 October 2017 (the date certified as practical Completion by Cragcorp and QCE demobilised), 18 December 2017 (date for completion of scour pit by EOT).

[87] The Adjudicator then stated that the terms of the contract included "good faith" provisions but that liquidated damages were not generally seen as a penalty if applied within the contract. Reference was made to the fact that unscheduled meetings must have been occurring during a "contentious time when decisions were being made and rescinded"[59] and that during this time liquidated damages of 14 days was raised by Cragcorp. It was noted that work continued to 10 October when QCE demobilised with an agreement that the scour pit would be treated as a defect with a formal EOT of 18 December. The Decision continued:

> "176. In a situation where the parties have agreed to deal with each other in 'good faith' could the subcontractor have taken this acceptance as the date after which the liquidated damages provisions became applicable? I think they could.
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> …
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> 178. In this situation, I consider that the parties came to a general understanding under this 'good faith"-based contract. The work was 'live' seemingly within the requirements of the Brisbane City Council and I have no information that [Cragcorp] suffered a penalty for the work being delivered late.
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> ….
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> 180. In these circumstances, I determine that [Cragcorp] cannot reasonably impose liquidated damages on [QCE].
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> 181. Adjudicated amount- I reject the payment and do not deduct a sum in this regard from the Collection"[60]

[88] In relation to Retention, the Adjudicator considered that QCE appeared to claim the Retention from Cragcorp based on the assertion that the works were complete by the

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[58] Court File Document 3, Exhibit DL-7 at [169].
[59] Court File Document 3, Exhibit DL-7 at [173].
[60] Court File Document 3, Exhibit DL-7 at [176], [178], [180] – [181].

date of the Payment Claim, which was 30 November 2017. She considered that was contrary to the reality that the work in relation to VO005 was to be completed by 18 December and was in fact completed by 5 December 2017. Accordingly, she considered that seeking the Retention with the Payment Claim was premature and she rejected the claim to the Retention.

[89] There can be no doubt, as Counsel for QCE contends, that for Cragcorp to establish a denial of natural justice the denial must be substantial. Has there been such a material or substantial denial? As Applegarth J put the question in *John Holland Pty Limited v TAC Pacific Pty Ltd & Ors*[61] whether "the matter about which the adjudicator did not provide an opportunity to be heard was a point upon which the adjudicator based his or her decision and was significant to the actual determination."[62] A perusal of the Decision indicates that the basis of the Adjudicator's Decision was the submission from QCE but that a different conclusion was reached to the one contended for. As Counsel for QCE argues, Cragcorp had the opportunity to respond to those submissions and had indeed done so.

[90] Furthermore, there must be a consideration of the substantial effect of the denial of natural justice and whether providing an opportunity to be heard would in fact have made a difference to the outcome. There is no indication that this would in fact have been the case here as whilst the affidavit material indicates that further submissions would have been provided if called for, there is no evidentiary basis to conclude that the adjudicator would have made a different decision. Whilst an Adjudicator may ask for further submissions, there is no obligation to do so and this was not a case where the adjudicator was minded to decide a significant issue of law on a basis for which neither party had contended.

[91] There is no doubt that the reasons in relation to liquidated damages and the issue of Retention are brief, however, in my view, the Adjudicator considered the terms of the contract and the documentary material before her as required by the Act. No jurisdictional error is shown in this regard.

[92] It is also argued that the Adjudicator relied on the good faith obligation under the contract to allow QCE to claim a latent condition as a variation and that an opportunity for further submissions would have meant that conclusion would not have been reached. An analysis of the Decision, however, reveals that the conclusion in relation to whether there had been a variation was based on a consideration of all of the contractual terms and there was no particular reliance on this provision as contended.

[93] It is also argued that the Adjudicator's reasons failed to provide sufficient reasons which explained the basis of her Decision and that this was jurisdictional error. Reliance was placed on the decision of Flanagan J in *Annie Street JV Pty Ltd v MCC Pty Ltd & Ors*[63] where it was held that if the reasons do not reveal any foundation or logical basis for a decision then there has been a failure to exercise jurisdiction.[64]

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61 [2010] 1 Qd R 302.
62 Ibid at [40].
63 [2016] QSC 268.
64 Ibid at [30].

[94] Cragcorp argues that in relation to Variation VO001 the controversy relates to the difference between the amount claimed in the Payment Claim of $29,979.40 and the updated Scheduled amount of $15,789.15 but that the reasons "fail to have regard to, or even mention, the $15,789.15 conceded."[65] In this regard I note that at paragraph 78 that amount is in fact specifically referred to and it was noted that Cragcorp "had raised the assessment to $15,789.15."[66] I accept, however, that whilst the Adjudicator discusses the submissions in the Decision, at no point is there an identification of:

(a) conclusions as to amounts for each element of work claimed;

(b) the basis of the total amount assessed from the elements of work she concluded;

(c) from which parties' evidence she deduced the elements of work said to be part of the variation; and

(d) from which parties' evidence she calculated the value as against the contractual standard.

[95] However, as QCE argues, there is no contractual basis for Cragcorp's submission that the adjudicator was required to determine the extra work by the particular item and then value the extra work on the basis of identifying a reasonable price. The requirement was to identify a reasonable price. Whilst the adjudicator was required to consider and decide between the parties the competing positions on each part of VAR001, she was entitled to ignore their submissions that were made in support of the contention that the amounts claimed were not variations. As previously noted, the submissions which must be considered are submissions which are properly made. They submit that properly made means "submissions that support what you have said in your payment schedule and if you haven't said in the payment schedule 'This isn't in fact a variation,' then the submission isn't properly made and it's not a matter that ought be considered."[67]

[96] Furthermore, it not necessary that there be precision in relation to every factual matter and in my view, the reasons provided in this regard indicate that the Adjudicator considered all the material she was required to and she gave a clear conclusion. It must be remembered that the Adjudicator is required to make a decision within exceedingly tight timeframes in circumstances where a large volume of material is provided. The Adjudicator makes a decision on the material provided in accordance with the Act and whilst the reasons are scant, I do not consider there has been a denial of natural justice because the reasons do not go into precise detail. It is clear enough from the reasons the conclusions reached and why. The adjudicator allowed $20,724.75 in circumstances where the scheduled amount was $15,789.15.

[97] In relation to VO002 there is no doubt that the Adjudicator dealt with that issue briefly but as already noted the Payment Schedule did not disclose a reason for withholding payment. Whilst reasons were later put forward by Cragcorp which endeavoured to argue a different interpretation for the words "on account", the Adjudicator considered the submissions before her that had been properly made and concluded that it was a

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65 Court File Document 13 at [93].
66 Court File Document 3, Exhibit DL-7 at [78].
67 T 1-50: 22 – 24.

variation. The Adjudicator was also satisfied that the value of that variation was properly supported on the material and was $143,000 as claimed. No jurisdictional error has been revealed in this regard as once again the Adjudicator performed the task she was required to perform under the Act.

[98] Even in cases where it has been considered that the reasons were inconsistent and illogical, that has not been sufficient to establish jurisdictional error if there was at least some process of reasoning disclosed in the reasons. As Brereton J held in *City of Ryde v AMFM Constructions Pty Ltd & Anor:*[68]

> "As to the first of these, the inadequacy, insufficiency, inconsistency or illogicality of reasons for a decision, even when the governing statute requires a decision-maker to give reasons in conjunction with and contemporaneously with the decision, does not of itself amount to jurisdictional error. The significance of the reasons, or their inadequacy, is that in the context of the surrounding material they may reveal jurisdictional error, or that the adjudicator has not performed the task of determining an adjudicated amount by reference to the specified relevant factors in accordance with s 22 of the Act.
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> ….
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> The way in which inadequacy of reasons may be used to reveal or illuminate jurisdictional error is apparent from the decisions of the Court of Appeal in *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [2007] NSWCA 32, and of McDougall J in *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359. What is important to appreciate is that it is not a question of a plaintiff in this Court pointing to the reasons and saying "well, it is not apparent how the adjudicator reached this particular decision"; rather the plaintiff must be able to show that the reasons, in the context of the surrounding material, demonstrate that there has been a failure on the part of the adjudicator to perform his or her statutory function. That was, for example, apparent in *Halkat v Holmwood* and in *Bauen v Westwood*, because the adjudication determination proceeded not by reference to the matters referred to in s 22 at all, but by the adjudicator, with an acknowledged inadequacy of evidence to determine the matter, proceeding to do so on an essentially capricious basis.
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> In considering whether it can be shown from an adjudicator's reasons that he or she has not performed the statutory obligations required by s 22, it is also important to bear in mind that adjudicators operate under confined timeframes, and that their decisions are given not in a vacuum but in the context of the payment claim, payment schedule, adjudication application and adjudication response that have preceded them. It is worth observing that in this case the adjudication response alone amounted to some 17 pages, accompanied by a statutory declaration which had annexed to it approximately 220 pages. It is not realistic to expect an adjudicator operating under the time constraints imposed by

[68] [2011] NSWSC 1469.

> the legislation to produce reasons that address, in a detailed way, every single point raised in that bulky material."[69]

[99] Section 26(1) of the Act sets out what an adjudicator is to decide; namely, the amount of the progress payment, if any, to be paid as well as the date it is to be paid and the rate of interest. Section 26(2) makes it clear what can be taken into account by the adjudicator when making that determination, which is restricted to the Act, the contract, the payment claim and payment schedule together with all submissions and relevant documentation that has been properly made in support of the payment claim and the payment schedule. The decision must be in writing and include reasons as required by s 26(3). The task required was summarised by Burns J in *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors*[70] in the following terms:

> "The task of an adjudicator is to decide the adjudication application having regard only to the matters specified in s 26(2) of the Act. That involves a consideration of the provisions of the Act to the extent that they are relevant, the provisions of the construction contract from which the application arose, the payment claim (and all supporting submissions and material) and the payment schedule (and all supporting submissions and material). As McDougall J observed in *David Hurst Constructions Pty Ltd v Durham* in connection with the New South Wales scheme of provisions:
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> > '[What] is called for is some process of balancing or evaluating the competing materials supplied by the parties. It is not a matter of calling evidence. Nor is it a matter of conducting some mini trial. But at the same time, if the Adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that he or she be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward). Thus, one might think, it is incumbent on the claimant to put before the adjudicator material that is rationally capable of persuading the adjudicator that the amount claimed was in fact payable.'"[71] (citations omitted)

[100] In my view, that was in fact the process the Adjudicator engaged in. The Adjudicator determined that in accordance with s 13 of the Act the amount of the Progress Claim was $205,218.53 (GST inclusive).

[101] No jurisdictional error has been identified.

[102] I do not therefore consider there is any basis for the relief sought pursuant to s10 of the *Civil Proceedings Act* 2011 (Qld) or the inherent jurisdiction of the Court. I also note that in part 2 of Schedule 1 of the *Judicial Review Act* 1991 (Qld) there is a specific reference to the *BCIP Act* legislation as an enactment to which the Act does not apply. I note the arguments of Counsel for Cragcorp that as a result of obiter dicta in *Northbuild,*

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69 Ibid at [9], [12] and [13].
70 [2016] QSC 240.
71 [2016] QSC 240 at [26].

it could be debated that the exclusion only operates in relation to cases which do not involve jurisdictional error. I do not need to specifically consider that issue, however, given that jurisdictional error has not been established in the circumstances of this case.

[103] I consider therefore that the originating application filed on 20 February 2018 should be dismissed. I note that on 22 February 2018 Orders were made by Atkinson J in relation to an amount to be paid into court. I will therefore hear from the parties as to the form of order and as to costs.