SUPREME COURT OF QUEENSLAND

CITATION:	*Livingstone Shire Council v EarthTEC Pty Ltd and Ors* [2018] QSC 271
PARTIES:	**LIVINGSTONE SHIRE COUNCIL ABN 95 399 253 048** (Applicant) **v** **EARTHTEC PTY LTD ACN 093 558 582** (First Respondent) **and** **ALAN STAPLETON** **ADJUDICATOR NO. J1084646** (Second Respondent) **and** **JENNY PHILLIPS as the ADJUDICATION REGISTRAR AND THE ADJUDICATION REGISTRY: QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (Third Respondent)
FILE NO/S:	BS No 7605 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2018
JUDGE:	Lyons SJA
ORDER:	**I will hear from the parties as to the form of the order and as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant submits that the adjudicator's decision is void for jurisdictional error – where the applicant alleges the adjudicator erred in their construction of s 26(2) of the *Building and Construction Industry Payments Act* 2004 (Qld) – where the applicant further alleges that there was a failure by the adjudicator to provide natural justice – where the

respondent submits that the construction of s 26(2) was correct – where there were submissions regarding the intersection of the *Subcontractors' Charges Act* 1974 (Qld) and the *Building and Construction Industry Payments Act* 2004 (Qld) – where the adjudicator determined he did not have the jurisdiction to consider such matters – where the parties were asked four times to provide further submissions – where the parties were not asked to address the adjudicator on the jurisdiction issue – whether the construction of s 26(2) by the adjudicator is correct – whether the construction of s 26(2) is jurisdictional error of the kind that would justify setting aside the decision – whether there was a failure to accord natural justice

Building and Construction Industry Payments Act 2004 (Qld) s 4, s 7, s 8, s 24, s 26

Subcontractors' Charges Act 1974 (Qld) s 11

Queensland Building and Construction Commission Act 1991 (Qld)

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576

Craig v South Australia (1995) 184 CLR 163

Kirk v Industrial Court (NSW) (2010) 239 CLR 531

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Szbel v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

COUNSEL:	M D Ambrose for the Applicant M Steele for the First Respondent
SOLICITORS:	McCullough Robertson for the Applicant Fenwick Elliott Grace for the First Respondent

This Application

[1] This application relates to the intersection of the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIP Act") and the *Subcontractors' Charges Act* 1974 (Qld) ("Charges Act").

[2] The applicant, Livingstone Shire Council ("Livingstone"), claims that a decision made by an adjudicator under the BCIP Act regime on 10 July 2018 is void by reason of jurisdictional error. It is submitted that the adjudicator erred in his construction of s 26(2) of the BCIP Act when he construed that section as prohibiting him from

considering the properly made submission by Livingstone that amounts paid into court in satisfaction of notices of charge under the Charges Act should be taken into account. Furthermore, the basis of the jurisdictional prohibition he considered he was bound by, was not raised by either party in their submissions. As the adjudicator did not give either party an opportunity to make submissions, it is contended that he failed to provide natural justice.

[3] The first respondent, EarthTEC Pty Ltd ("EarthTEC"), contends that the adjudicator did not err in his interpretation of the Act and did not fail to provide natural justice. Alternatively, if the adjudicator had erred in his construction of the Act, or failed to provide natural justice in the way alleged by the applicant, those matters would not amount to jurisdictional error sufficient to set aside the decision.

Background

[4] Livingstone and EarthTEC entered into a contract, dated 18 October 2016, for the construction by EarthTEC of a revetment wall, road remediation works and stabilisation of a section of the Scenic Highway at Statue Bay between Yeppoon and Roslyn Bay in Queensland. The Contract was a construction contract for the purposes of the BCIP Act.

[5] On 21 February 2018, EarthTEC served a Payment Claim under the BCIP Act on Livingstone seeking $2,714,649.11 in relation to progress claim No. 23, with a reference date of 15 February 2018. Of the amount claimed in the Payment Claim:

1. $722,349.11 was claimed for revetment wall and road remediation works; and

2. $1,992,300.00 was claimed for provisional quantities and variations.

[6] Livingstone terminated EarthTEC's contracts for the project on 14 March 2018.

[7] Notices of claims of charge pursuant to the Charges Act were served on Livingstone by some of EarthTEC's subcontractors on 16, 20, and 27 March 2018. As a result of those notices of claims of charge from EarthTEC's subcontractors, Livingstone paid $1,153,224.62 into Court.

[8] On 14 March 2018, Livingstone served a Payment Schedule which scheduled a NIL amount as payable and provided that EarthTEC had failed to comply with clause 43.1 of the Contract. This required a statutory declaration from EarthTEC attesting it had paid all its subcontractors as follows:

> "Until such time as EarthTEC provides a compliant statutory declaration in accordance with clause 43.1, Council will continue to exercise its right to withhold payment pursuant to clause 43.2."[1]

[9] Accordingly, Livingstone contended it was entitled to withhold payment but otherwise valued the work at $801,805.62.

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[1] Court File Document 7, Exhibit CAJ-9 at pg 334.

[10] On 28 March 2018, EarthTEC filed an Adjudication Application which resulted in extensions of time in relation to the filing of an Adjudication Response, Written Submissions and Comments in Reply. Ultimately, Livingstone argued in its Adjudication Response dated 4 May 2018 that those payments into Court must be accounted for in determining the payments to be made in the adjudication, otherwise it would be required to pay for the same work twice.

[11] On 10 July 2018, after 4 requests for further written submissions, the adjudicator rejected those arguments and determined that the adjudicated amount Livingstone was required to pay EarthTEC was $1,364,696.80 exclusive of GST, as follows:

> 7.16 However, my jurisdiction as an adjudicator is set by section 26(2) of the BCIPA. Section 26(2)(a) obviously gives me jurisdiction to consider section 4 of the BCIPA (Section 4 – 'Effect of giving notice of claim of charge under *Subcontractors' Charges Act 1974*').
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> 7.17 As the respondent correctly points out, section 4 of the BCIPA concerns the 'same person' giving a notice of claim under the Charges Act *and* invoking '*Procedure for recovering progress payments*' under Part 3 of the BCIPA.
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> 7.18 In this adjudication application, the claimant invoked the '*Procedure for recovering progress payments under Part 3 of the BCIPA*.
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> 7.18 In this adjudication application, the claimant invoked the 'Procedure for recovering progress payments' under Part 3 of the BCIPA; whereas the claimant's suppliers and subcontractors gave their notices of claim under the Charges Act. Hence, section 4 of the BCIPA does not specifically apply to this claimant.
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> 7.19 The respondent makes submissions on its potential duplicate liability under the Charges Act, notwithstanding section 4 of the BCIPA does not specifically apply to this claimant. However, without express inclusion of the Charges Act in section 26(2) of the BCIPA, I do not have the jurisdiction to consider the possibility of a general duplicate liability under the Charges Act. Section 26(2) of the BCIPA certainly makes it clear that I have no jurisdiction to consider section 11(6) of the Charges Act. Another point (in passing) is that I have no jurisdiction to put myself in the position of the Court, to consider and decide claims currently before the Court, when the court has not made any decision on those claims. The enforcement of orders under the Charges Act and/or the BCIPA is not a matter that have the jurisdiction to consider.
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> 7.20 In summary, I find against the respondent. I find that I have no jurisdiction to consider the respondent's general submission on its potential duplicate liability under the Charges Act, when section 4 of the BCIPA does not apply to the specific facts of this dispute.

7.21 In accordance with section 25(3)(a) of the Act and for the reasons set out above, I am satisfied that I have jurisdiction to decide the matter pursuant to the Act."[2]

[12] The unchallenged portion of the Adjudicated Amount of $666,499.35, as determined by the adjudicator has been paid to EarthTEC and the remaining amount of $918,050.44 has been paid into court. In accordance with the usual practice, the second and third respondent took no part in the proceedings and will abide the order of the court.

Relevant Legislation

[13] Section 26(2) of the BCIP Act states:

"(2) In deciding an adjudication application, the adjudicator is to consider the following matters only—

(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;

(d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

[14] Section 4 of the BCIP Act states:

"(1) This section applies if a person gives a notice of claim of charge under the *Subcontractors' Charges Act 1974* in relation to construction work or related goods and services the subject of a construction contract.

(2) Proceedings or other action may not be started or continued by the person under part 3 in relation to all or part of the construction work or related goods and services.

(3) Without limiting subsection (2), subsection (4) applies if the person has served a payment claim relating to all or part of the construction work or related goods and services on a respondent before the notice of claim of charge is given.

(4) For subsection (3) —

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[2] Court File Document 7, Ex CAJ-39, pg 711 – 712.

(a) the respondent is not required to pay an amount to the person under section 19(2) in relation to the claim; and

(b) amounts may not be recovered by the person under section 19(3)(a)(i) or 20(2)(a)(i) in relation to the claim; and

(c) if the person made an adjudication application in relation to the claim and the application has not been decided by an adjudicator before the notice of the claim of charge is given, the person is taken to have withdrawn the application; and

(d) if the person made an adjudication application in relation to the claim and the application has been decided by an adjudicator before the notice of the claim of charge was given—

(i) the respondent to the application is not required to pay the adjudicated amount under section 29 ; and

(ii) the registrar must not give the person an adjudication certificate under section 30 relating to the adjudication; and

(iii) any adjudication certificate provided in relation to the adjudication can not be enforced by the person under section 31 as a judgment of a court; and

(e) the person may not suspend, or continue to suspend, carrying out all or part of the construction work or the supply of the related goods and services under section 33.

(5) This section does not affect the operation of section 35 and an adjudication application taken to have been withdrawn by the person under subsection (4)(c) is taken to have been withdrawn for the purpose of section 35(4).

(6) This section does not stop the person serving under this Act a payment claim in relation to all or part of the construction work or related goods and services and taking other action under this Act in relation to that claim, if the notice of claim of charge in so far as it relates to the construction work or related goods and services, or part, is withdrawn."

Livingstone Shire Council's contentions

[15] Livingstone argues that in reaching his decision pursuant to s 26 of the BCIP Act, the adjudicator fell into jurisdictional error by misconstruing s 26(2) of the Act as prohibiting him from considering the submission made by Livingstone that amounts paid into court in satisfaction of the notices of charge issued pursuant to the Charges Act should be taken into account when calculating the adjudicated amount. Furthermore, as the basis upon which he concluded that he was that prohibited from considering the applicant's submissions in relation to the payment into court was not raised by either party in their submissions and as the adjudicator did not give the parties an opportunity to make submissions in relation to that intended finding, the adjudicator fell into jurisdictional error in this regard as well.

[16] Livingstone argues that the obligations on an adjudicator in s 26(2)(d) are explicit and mandatory and the adjudicator was obliged to consider "all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule".[3] Accordingly, he was required to take into account Livingstone's properly made submissions in relation to the payments made under the Charges Act. Accordingly, it is argued that the adjudicator led himself into error by misapprehending the statutory obligations and impermissibly excluding a mandatory consideration as required by s 26(2)(d).

[17] Livingstone argues that this was not a case where the adjudicator considered Livingstone's submissions and rejected them, which would amount to errors within jurisdiction, but rather that he considered he was prohibited from considering them as he expressly stated "I do not have jurisdiction to consider the possibility of a general duplicate liability under the Charges Act. Section 26(2) of the BCIPA certainly makes it clear that I have no jurisdiction to consider section 11(6) of the Charges Act."[4]

[18] Livingstone argues that whilst there is a prohibition in s 4 of the BCIP Act from proceeding under both the BCIP Act and the Charges Act in circumstances where there is a notice of a charge by a claimant, that is not relevant in this case as the notices of charge were not issued by EarthTEC as claimant but rather by its subcontractors and the prohibition in s 4 did not apply. The adjudicator considered that he could only take into account the legislation referred to in s 26(2)(a) of the BCIP Act and no other legislation, even if that legislation was referred to in the submissions of a party. Essentially, the adjudicator considered he could not consider any legislation unless specifically authorised to do so by the provisions of the BCIP Act.

EarthTEC's contentions

[19] EarthTEC argues that s 26(2) places limits on the matters which can be taken into account by an adjudicator as the section provides that in deciding an adjudication application the adjudicator is to "consider the following matters *only"* (emphasis added). One of those limits is that s 26(2)(a) states that the legislation to be considered is the BCIP Act and, to the extent that they are relevant, the provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld). EarthTEC argues that there is no reference at all in s 26(2) to the Charges Act. Section 4 of the BCIP Act itself then deals with the effect of giving a notice of claim under the Charges Act. It is argued therefore that this section, and its consequences, must be considered by virtue of s 26(2)(a); but because s 26 identifies the only things which are to be considered, and does not otherwise include the provisions of the Charges Act, then the provisions of that Act, and its consequences, could not be considered by the adjudicator.

[20] EarthTEC argues that the utility of s 4 is apparent because it prevents a subcontractor or contractor from securing money from a contractor or principal through both a notice of claim of charge and through a payment claim under the BCIP Act. That is, it prevents double recovery by the person claiming it.

[21] EarthTEC argues that the construction contended for by Livingstone during the adjudication process was that even where the contractor, namely EarthTEC, has not

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3 BCIP Act, s 26(2)(c).

4 Court File Document 7, Ex CAJ-39, pg 711 at 7.19.

received any money from the principal, namely Livingstone, the contractor should be restrained from its normal recovery mechanisms under the Act because a third party, the subcontractor, has issued a notice of claim for charges under the Charges Act. EarthTEC argues therefore, that in those circumstances, it is not surprising that s 26(2) and the scheme of the Act place limits on the matters to which an adjudicator is to have regard. Were it otherwise, it is argued that an adjudicator who has to act within strict time frames and with an obligation to achieve cost-effective summary determination of the parties' claims, would be obliged to take into account the effect of any notice of claim affecting either of the parties, irrespective of whether the other party was directly involved.

[22] EarthTEC argues that the difficulties in such an approach are obvious, including that it would require the adjudicator to make assessments and determinations about the rights and obligations of persons not a party to the adjudication and how that would affect the rights and obligations of each of the parties. It is argued, therefore, that the enquiry under the Act is limited to those notices specifically referred to in s 4. It is argued that Parliament has provided in s 4 a mechanism by which notice of a claim of charge under the Charges Act can be considered by an adjudicator in certain circumstances, notwithstanding that s 26(2) would otherwise require the adjudicator not to have regard to other legislation. It is argued, therefore, the fact that that particular mechanism is provided for in s 4 means that the adjudicator is not entitled otherwise to have regard to notices of claim that fall outside the operation of s 4. Otherwise, it would not have been necessary to insert s 4 because a party could make any submission about the operation of the Charges Act.

[23] EarthTEC argues that the scheme of the Act is that s 26(2) of the Act requires the adjudicator to have regard only to certain matters and only to certain legislation. In particular, specific provision has been made in s 4 of the Act for regard to be had to notices of claim of charge in certain circumstances, but not in others. It is argued therefore that the adjudicator's construction of s 26(2) of the Act is correct.

The proper construction of s 26(2)

[24] As Counsel for Livingstone contends, the starting point for a consideration of the Act is the High Court decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[5] where it was held that the essential task of statutory interpretation is to "construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute."[6] Such a task involves an examination not only of the language of the Act as a whole, but the context of the provision being examined.

[25] In this regard Livingstone argues that this requires an examination of the purpose and effect of s 4 of the BCIP Act which is to ensure that that the two separate regimes for payments for construction work under the Charges Act and the BCIP Act do not require that payment be made twice for the same work. It is argued that such a regime is commercially sensible and the legislative intent is to avoid double payment. It is also argued that s 4 can only apply in limiting the ability of a claimant to engage both regimes and Livingstone is not such a claimant. Livingstone argues that to expand the prohibition in s 4 further would mean that lower ranked subcontractors would be

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5 (1998) 194 CLR 355.

6 Ibid at [69].

exposed to the decisions of a claimant as to whether or not to make a payment claim. It is argued that the two regimes can work together as a respondent upon receiving a notice of charge can pay the money secured by the charge into Court and by so doing obtain a discharge of its obligations pursuant to s11(6) of the Charges Act.

[26] EarthTEC argues that the utility of s 4 is to prevent a contractor or subcontractor from securing money from a principal through a notice a claim of charge under the Charges Act and then seeking to obtain a payment through a payment claim under the BCIP Act.

[27] I will commence with some observations about s 4 of the BCIP Act. It is directed primarily to a person who has given a notice of claim of charge under the Charges Act. In essence, it denies such a person the benefit of the procedures and remedies otherwise available to that person under the BCIP Act. It has corresponding consequences for a potential or actual respondent to a claim under that Act. It effectively limits the rights of the person claiming the charge to those available under the Charges Act or those otherwise available under the general law.

[28] The effect of s 26(2)(a) is that, in an appropriate case, an adjudicator would have to consider s 4 of the Charges Act. The question raised by the present case is whether the only statutory provisions which an adjudicator may consider are the provisions of the BCIP Act, and the relevant provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld). The question arises because s 26(2) states that "the adjudicator is to consider [certain identified matters] only".

[29] As a matter of language, a restriction of the matters to be considered to a specified group does not affect what might be raised in respect of any matter in the group. The use of the word "only" in s 26(2) prevents an adjudicator from considering a matter not identified in the subsection; but does not exclude from consideration something which comes within one of those matters. The language of the subsection does not preclude from consideration a statutory provision raised in a payment schedule or a properly made submission.

[30] Livingstone's submissions to the adjudicator relied on s 11(6) of the Charges Act as providing for the discharge of its obligation to pay EarthTEC to the extent of the amount it paid into court in response to the notice of claim of charge under that Act. It was not submitted that this was not a properly made submission. The only limitations which the BCIP Act imposes on what may be the subject of a submission by a respondent to a payment claim are found in s 24 of the BCIP Act. They are that the submissions must be "relevant to the response that the respondent chooses to include"[7] in the adjudication response; though in the case of a standard payment claim, the adjudication response, and accordingly the submissions, can not contain any reasons for withholding payment which were not included in the payment schedule.

[31] It is therefore apparent from the wording of s 24 that a respondent is given broad scope to raise matters in its submissions contained in its response. It may be the case that they must in some way relate to a response to the applicant's claim; but otherwise it is sufficient that they are submissions that the respondent "chooses to include".[8] A submission that the liability which the applicant seeks to enforce is discharged by

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7 BCIP Act, s 24(3)(c).
8 BCIP Act, s 24(3)(c).

s 11(6) of the Charges Act is plainly a submission authorised by s 24. There is nothing in the language of that section, or s 26(2)(d) which would preclude an adjudicator from considering such a submission.

[32] While the object of the BCIP Act, set out in s 7, is to ensure that a person is entitled to receive, and is able to recover, progress payments, that object is clarified and qualified by further provisions of the Act. It is not intended that the object is to be achieved without regards to the respective rights of the claimant and respondent, and defences available to a respondent against a claim. Thus s 8 states that the object of the Act is to be achieved by the establishment of a procedure which includes the provision of a payment schedule by the respondent to the claim, no doubt for the purpose of disputing the claim, and by the determination of a disputed claim by an adjudicator. As mentioned, the provisions dealing with adjudication responses appear to be designed to give broad scope to the matters that a respondent may raise in opposition to a claim. The Act's purpose does not suggest any limitation on the scope of submissions to be considered by an adjudicator under s 26(2).

[33] EarthTEC's submissions would have the consequence that s 26 should be construed in a way which deprives a respondent from relying on a statutory discharge of its obligations to a claimant. A respondent would therefore be required to pay moneys to a claimant in circumstances where the underlying obligation to pay those moneys no longer exists. In my view, that would be a serious interference with the rights of a respondent. Such a construction of s 26 should be avoided in the absence of clear language that that is what the legislature intended.[9]

[34] Moreover, if EarthTEC is correct, a respondent could, in adjudication proceedings, rely on defences available under the general law, but not those available under statute. That would be an odd result; and there is no apparent reason why the legislature would have intended it.

[35] EarthTEC submitted that the approach to s 26 for which Livingstone contends would make s 26(2)(a) meaningless, because a respondent could circumvent the prohibition found in it by referring to some other statutory provision in its submissions. EarthTEC's submission clearly assumes that s 26(2)(a) prohibits an adjudicator from considering any statutory provision other than those identified in s 26(2)(a). It will be apparent that I do not accept that view.

[36] For these reasons, it is concluded that an adjudicator is not precluded by s 26(2) from considering a properly made submission by a respondent to an adjudication application that its liability to an applicant is discharged by s 11(6) of the Charges Act.

Mere error of law?

[37] The respondent argues that even if the adjudicator's construction of s 26(2) is not correct, it is not a jurisdictional error of the kind which would justify setting aside the decision. In this regard reference is made to the decision of the majority of the High Court in *Kirk v Industrial Court (NSW)*[10] which examined the jurisdictional error by an

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9 See Finn J in *Buck v Comcare* (1996) 137 ALR 335 at 340.

10 (2010) 239 CLR 531.

inferior court by reference to the principles established by the earlier decision in *Craig v South Australia.*[11] That examination is as follows:

> "It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error. Professor Aronson has collected authorities recognising some eight categories of jurisdictional error. It is necessary, however, to make good the proposition stated earlier in these reasons that the two errors that have been identified as made by the Industrial Court at first instance (and not corrected on appeal to the Full Bench) were jurisdictional errors. The Court in *Craig* explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows.
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> First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist" (emphasis added). Secondly, the Court pointed out that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*". (The reference to "*theoretical* limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case. The Court said of this last example that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes*, *R v Gray; Ex parte Marsh* and *Public Service Association (SA) v Federated Clerks' Union*.[12]"

[38] The respondent is correct to submit that the error of the adjudicator was one of law. That does not have the consequence that the adjudicator did not also commit jurisdictional error.

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11 (1995) 184 CLR 163 at 177.
12 (2010) 239 CLR 531 at [71] – [72].

[39] One example of jurisdictional error identified by the High Court in *Craig v South Australia*[13] is the disregard by an inferior court of some matter which the statute which establishes it and confers jurisdiction requires that that matter be taken into account as a pre-condition of the existence of any authority to make a decision in the circumstances of a particular case. There is no reason to think that the same is not true of an adjudicator making a decision under the BCIP Act. That Act is the statute establishing the adjudicator as the tribunal or body to decide an adjudication application. Section 26 specifies what an adjudicator must consider in performing this task, undoubtedly as a pre-condition to the adjudicator's authority to make a decision. Here, that includes properly made submissions of Livingstone, relevant to its payment schedule. The adjudicator has misdirected himself as to his obligations under s 26(2) and has thereby failed to take into account a mandatory obligation. The adjudicator's error led him to disregard such a submission. Accordingly, the error is a jurisdictional error, and not a mere error of law.[14]

Failure to accord natural justice?

[40] Strictly speaking, it is unnecessary to answer this question in order to decide the present application.

[41] There is no dispute that the adjudicator was bound to accord natural justice, to the extent consistent with the BCIP Act. EarthTEC, by reference to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*[15] and *Szbel v Minister for Immigration and Multicultural and Indigenous Affairs*[16] submitted that the rules of natural justice require a decision maker to identify an issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The relevant principle was described as follows:

> "Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. "[17]

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13 (1995) 184 CLR 163.
14 Compare *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors* [2011] QSC 293, especially at [30]-[33].
15 (1994) 49 FCR 576.
16 [2006] 228 CLR 152.
17 Ibid at [29].

[42] That may be accepted as an appropriate statement of principle relevant to the present case.

[43] Plainly, the issue of whether the adjudicator could consider the submissions of Livingstone based on s 11(6) of the Charges Act was critical to the determination of the adjudication application.

[44] EarthTEC argued, however, that the adjudicator has complied with the requirements of natural justice and was not required to go further and expose his reasoning process behind coming to a decision. EarthTEC submitted that the question of whether the adjudicator was able to consider Livingstone's submission relying on s 11(6) of the Charges Act was an issue apparent from the terms of s 26; and accordingly, not one which the adjudicator was required to identify to Livingstone.

[45] There can be no doubt that s 26(2)(d), in terms which were relevantly unrestricted, required the adjudicator to consider the submissions made on behalf of Livingstone. In my view it was not apparent (without the point being raised) that there was an issue about whether the adjudicator could consider the submission based on s 11(6). As Counsel for Livingstone noted, the adjudicator called for further submissions on four occasions but at no time did he indicate to the parties that he considered that there was a jurisdictional impediment to him considering Livingstone's submission in relation to the Charges Act. Furthermore, the adjudicator did not reject the submissions on a substantive basis or as a matter of construction of the Act but rather, he rejected them on the basis that he did not have jurisdiction to consider them.

[46] I consider therefore that the adjudicator failed to accord Livingstone natural justice in this regard.

Conclusion

[47] It follows that Livingstone's application should succeed.

[48] I shall hear from the parties as to the form of the order and as to costs.