SUPREME COURT OF QUEENSLAND

CITATION:	*Fulton Hogan Construction Pty Ltd v QH & M Birt Pty Ltd & Ors* [2019] QSC 23
PARTIES:	**FULTON HOGAN CONSTRUCTION PTY LTD (ACN 010 240 758)** (applicant) **v** **QH & M BIRT PTY LTD (ACN 009 963 222)** (first respondent) and **KENNETH SPAIN (ADJUDICATOR J55780)** (second respondent) and **THE ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO:	BS 8527 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2018: hearing; 29 October 2018: Parties referred Court to additional decisions; 9 January 2019: Court advised parties that one of those additional decisions had been overturned on appeal (on 21 December 2018); 16 January 2019: further submissions received from applicant; 30 January 2019: further submissions received from first respondent.
JUDGE:	Ryan J
ORDER:	**It is declared that one part of the adjudication decision of the Second Respondent, dated 30 July 2018, in relation to adjudication application number 367263 is void for jurisdictional error – that is the part identified as 1(a) in the Originating Application.**

The parties are to confer, within 14 days of this order, with a view to agreeing upon the orders to be made to give effect to the declaration, including orders for injunctive relief and for costs.

Failing agreement, the parties are to provide written submissions as to the further orders to be made, including orders for injunctive relief and for costs, within 21 days of this order.

The hearing of the application is adjourned to a date to be fixed.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – GENERALLY – Where it was argued that the adjudicator had exceeded his jurisdiction by adjudicating claims which were not included in the payment claim – where it was argued that the adjudicator had not valued work in accordance with the contract; denied natural justice or failed to give sufficient reasons

Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd [2018] NSWSC 1578

Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466

Bauen Constructions v Westwood Interiors [2010] NSWSC 1359

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

Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006]

NSWSC 1

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

NSWSC 1469

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364

Cragcorp Pty Ltd v Qld Civil Engineering Pty Ltd & Ors

[2018] QSC 203

Creative Building Services Pty Ltd v TIO Air-conditioning Pty Ltd [2016] ACTSC 367

Downer Construction (Australia) Pty Ltd v Energy Australia (2007) 69 NSLWR 72

Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd [2017] NSWSC 232

Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd [2007] NSWCA 32

Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd [2018] NSWCA 339

John Holland Pty Limited v Cardno MBK (NSW) Pty Limited [2004] NSWSC 258

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

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

Musico v Davenport [2003] NSWSC 977

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

Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd [2009] NSWSC 61

Probuild Construction (Aust) Pty Ltdv Shade Systems Pty Ltd [2018] HCA 4

Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors [2016] QSC 108

Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd [2012] QSC 306

Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 941

Waterways Authority v Fitzgibbons (2005) 79 ALJR 1816

Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65

COUNSEL:	G D Beacham QC for the Applicant M H Hindman QC with M Walker for the First Respondent
SOLICITORS:	Holding Redlich for the Applicant Minter Ellison for the First Respondent

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Overview

[1] Fulton Hogan and QBirt entered into a subcontract for about $8.8 million, in pursuance of which QBirt was to carry out earthworks for the construction of a dam. Under the contract, QBirt was to make monthly claims for progress payments upon Fulton Hogan.

[2] QBirt referred its progress payment claim for January 2018 for adjudication under the *Building and Construction Industry Payments Act* 2004 (Qld) (the **Payments Act**).[1] The adjudicator decided that Fulton Hogan was to pay QBirt $1.3 million.

[3] Fulton Hogan seeks orders declaring void certain parts of the adjudication decision and injunctive relief. QBirt resists those orders. The second and third respondents filed submitting appearances and did not actively participate in the proceedings.

[4] More particularly, Fulton Hogan applies for a declaration that the parts of the adjudication decision which concern the following matters (the **Affected Parts**) are void for jurisdictional error:

(a) Fulton Hogan's set off claims;

(b) the sum to be deducted from the total valuation of the work under the contract (namely the amount previously paid/certified); and

(c) the work under contract items 1.4.09.1, 1.4.10.0 and 1.4.23.0;

It also applies for orders permanently restraining QBirt from enforcing, or otherwise relying upon, the Affected Parts.

[5] Declaratory or injunctive relief is available for jurisdictional error in this context.[2]

[6] Fulton Hogan argues that the adjudicator adjudicated claims which were not included in the payment claim, and thereby exceeded his jurisdiction ((a) and (b) above).

[7] Also, it contends that the adjudicator did not value certain work in accordance with section 14 of the Payments Act, and that the valuation was therefore attended by jurisdictional error ((c) above). As an alternative to its section 14 argument, Fulton Hogan argues that it was denied natural justice; or that the adjudicator failed to give adequate reasons to justify his valuation.

[8] For the reasons which follow, I find that –

- There was no jurisdictional error involved in the adjudicator's determining the dispute about the set offs in the adjudication. It was for the adjudicator to act on his understanding of the payment claim. He understood it to include a claim in respect of

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[1] The Payments Act was repealed on 17 December 2018, and was replaced by the *Building Industry Fairness (Security of Payment) Act* 2017.

[2] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

the set offs. If his understanding involved an error, then it was an error within jurisdiction;

- There was no jurisdictional error involved in the adjudicator's use of the amount agreed by the parties as the amount previously certified. He did not thereby increase the payment claim. If he made an error in using the agreed amount, then it was one within jurisdiction;

- The adjudicator committed jurisdictional error in his decision about work under contract items 1.4.09.0, 1.4.10.0 and 1.4.23.0. He did not undertake the task required of him. His reasons are inadequate and there has been a denial of natural justice.

[9] I therefore declare that one of the Affected Parts of the adjudication decision, identified as 1(a) in the Originating Application, is void for jurisdictional error.

[10] I direct the parties to confer, within 14 days of this order, with a view to agreeing upon the orders to be made to give effect to my declaration, including orders for injunctive relief and as to costs.

[11] Failing agreement, I direct the parties to provide written submissions as to the further orders to be made including orders for injunctive relief and as to costs, within 21 days of this order.

[12] Otherwise, I adjourn the hearing of the application to a date to be fixed.

Legislation

[13] The scheme of the Payments Act was recently summarised by Brown J in *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* as follows:[3]

> "[10] The Act establishes a statutory-based scheme of rapid adjudication for the interim resolution of "payment on account" disputes involving building and construction work contracts.[4] The rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal.[5] The adjudicator is also limited as to the matters to which he or she can have regard in making a decision and must turn around his or her decision in a short time-frame.[6] The avenue for review of the adjudicator's decision by a court is also limited to judicial review under the Court's inherent power to review a decision for jurisdictional error.[7]

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3 [2018] QSC 65 at [10] – [16].

4 *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [53].

5 *Building and Construction Industry Payments Act* 2004 (Qld) s 100.

6 Ibid s 26 and s 25A.

7 *Northbuild Constructions* at [75].

[11] Pivotal to the statutory right to progress payments is the existence of a "reference date" …

[12] Section 12 of the Act provides that for each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out, *inter alia*, construction work under the contract.

[13] Section 17 of the Act provides that a person mentioned in section 12 who is or who claims to be entitled to a progress payment may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment. It outlines various requirements for the payment claim. Section 18 provides for the provision of a payment schedule by a respondent which, *inter alia*, must state the amount of the payment, if any, that the respondent proposes to make and if the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less. If it is less because the respondent is withholding payment for any reason, the respondent must state its reasons for withholding payment.

[14] If the payment claim is not paid, a claimant may apply for adjudication of the payment claim which may, *inter alia*, contain the submissions relevant to the application the claimant chooses to include.[8] If the adjudication application is accepted under section 23, there is a right for the respondent to provide an adjudication response under section 24. Pursuant to section 24(3), the adjudication response may contain the submissions relevant to the response that the respondent chooses to include. Pursuant to section 24(4), if the adjudication application is about a standard payment claim, the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant. Where the case concerns a standard payment claim there is no right of reply to the adjudication response …[9]

[15] Pursuant to section 25(1)(a) of the Act, an adjudicator must decide an adjudication application as quickly as possible ... [An adjudicator must decide whether he or she has jurisdiction to adjudicate and may ask for further written submissions: section 25(3).]

[16] Section 26 provides for the matters which the adjudicator must decide.[10] Section 26(2) of the Act provides as follows:

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8 *Building and Construction Industry Payments Act* 2004 (Qld) s 21.

9 Ibid s 24B(1).

10 Ibid s 26(1).

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

(a) the provisions of the Act and, to the extent that 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 documents that have been properly made by the respondent in support of the schedule;

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

Approach

[14] The Act provides for the "speedy, interim only determination by adjudicators of disputed claims"[11] and it was not intended that adjudications be scrutinised in the same was as considered final determinations.[12]

[15] QBirt referred me to the decision of *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd,*[13] a decision of Hammerschlag J concerning an application for a declaration that an adjudication decision was void was made. In that case, his Honour distilled principles relevant to such an application from many authorities, including the following (citations omitted):[14]

"a the Act seeks to facilitate the speedy resolution of claims to progress payments without excessive formality or intervention by the Court and the scope for invalidity for non-jurisdictional error is limited …

b an adjudicator's determination is reviewable for jurisdictional error where the determination is not a determination within the meaning of the Act because of non-satisfaction of some pre-condition which the Act makes essential for the existence of such a determination …

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[11] *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [3] per McMurdo P.

[12] Ibid.

[13] [2007] NSWSC 941.

[14] Ibid [30].

…

f sections 13, 17, 18, 19, 21 and 22 of the [NSW] Act contain certain basic requirements as well as more detailed requirements. The legislation did not intend exact compliance with all of the more detailed requirements to be essential to the existence of a determination. What was intended to be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of the measure of natural justice that the Act requires to be given …

…

h the requirement of good faith is not a reference to dishonesty or the opposite but to the necessity for there to have been an effort to understand and deal with the issues in discharge of the statutory function …

…

j section 14(2) provides that the payment schedule must identify the payment claim to which it relates and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the respondent to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues …"

[16] His Honour explained[15] that the application of these principles to the circumstances of a given case involved consideration of matters of fact and degree. His Honour also said (citations omitted):

"32 As Sir Frederick Jordan said in *Ex part Hebburn Ltd; re Kearsley Shire Council* …:

"… the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction … But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test' … or to 'misconceive its duty', or 'not to apply itself to the question which the law prescribes' … or to misunderstand 'the nature of the opinion which it is to form' … in giving a decision in the exercise of its jurisdiction or authority, a decision so given would be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in

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[15] Ibid [31].

law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law …

33 It is accordingly necessary to consider the nature, gravity and effect of the errors, if any, made by the adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the adjudicator breached a basic and essential requirement of the Act by not considering submissions duly made or by failing to make a bona fide attempt to exercise his powers under the Act, or whether the plaintiff was denied natural justice to a degree sufficient to void the jurisdiction.

34 The required exercise is to determine whether what occurred worked "practical injustice" on the plaintiff sufficient to vitiate the adjudication."

Background facts

[17] Fulton Hogan, the applicant contractor, and QBirt, the first respondent sub-contractor, entered into a written sub-contract in pursuance of which QBirt was to carry out earthworks for the construction of a dam in North Western Queensland. The sub-contract price was about $8.8 million, with QBirt to make progress payment claims monthly.

[18] QBirt made its claims accordingly, but Fulton Hogan did not always pay the full amount claimed for various reasons.

[19] By the time of QBirt's eighth progress payment claim (for work done up until 25 November 2017), the difference between the amount claimed by QBirt and the amount paid by Fulton Hogan was about $1.4 million.

[20] QBirt's November payment claim was referred to adjudication and an adjudication decision was made in respect of it on 28 June 2018.

[21] QBirt made its ninth payment claim, for work done up until 25 December 2017, on 18 January 2018. In this claim, QBirt claimed a total amount of $13,674,830.81; an increase of $1,919,255.87 from its November payment claim. Fulton Hogan scheduled a total amount of $10,523,165.80 (an increase of $188,522.69) which was substantially less than the amount claimed.

[22] Fulton Hogan's December 2017 payment schedule included the following summary table. The amount in bold (my emphasis) is significant.

November 2017 Payment Claim	QBirt Claim	FH Certified (Scheduled) Amount	Variance
Claimed/Scheduled to date	$13,674,830.81	**$10,523,165.80**	-$3,151,655.01

Claimed/Certified Previously	$11,755,574.94	$10,334,643.11	-$1,420,931.82
Claimed/Scheduled this claim	$1,919,255,87	$188,522.69	-$1,730,733.18
Less 5% retention		-$9,426.13	
Total scheduled this claim Excl GST		$179,096.56	
Plus GST		$17,909.66	
Total scheduled this claim Incl GST		$197,006.21	

[23] This table was followed by Fulton Hogan's explanation for the amounts it withheld or adjusted, as well as its reasons for four set offs (totalling $426,362.16) against QBirt's December Payment Claim.

[24] The December payment claim was not referred to adjudication.

QBirt's January Payment Claim

[25] On or about 2 March 2018, QBirt delivered to Fulton Hogan its January 2018 payment claim for work done until 25 January 2018. The adjudication of its November payment claim was then underway.

[26] QBirt claimed $13,822,669.95 as the total value of works completed, which was an increase of $147,839.14 from its December 2017 payment claim.

[27] QBirt's letter, making its claim, included the following (my emphasis):[16]

> "Q H and M Birt hereby submits its **progress claim** for construction work performed up to and including 25 January 2018, **as identified in the attached schedule** and in **previous correspondence relating to the variation claims identified in the schedule**.
>
> The total value of construction work performed pursuant to the subcontract to and including 25 January 2018 is $13,822,669.95 as set out in the table below.

	Amount
Previously certified PC01 – PC09	$ 10,949,527.96
Cumulative claim	$ 13,822,669.95
PC10 – January claim	**$2,873,141.98**

> The **total amount certified** by Fulton Hogan to Q H and M Birt to date in relation to the subcontract is **$10,949,527.96**.
>
> The amount of the progress payment claim in this payment claim is $2,873,141.98."

[28] Attached to the covering letter was a document entitled "Schedule identifying construction works performed – Payment Schedule – QBirt Jan 18 and attachments". The payment schedule stated the "Total Value Certified" as $10,949,527.96 – which was the amount repeated in the summary table.

[29] There was (at least on the face of it)[17] an error in the table as the respondent acknowledged in paragraph 15 of its outline of submissions:

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[16] Ambrose affidavit, filed 16 August 2018, exhibits page 308.

[17] I acknowledge QBirt's argument that there was no error – there was, it argued, a difference between the amount certified and the amount scheduled or paid.

> "$10,949,527.96 was not in fact the amount listed as being the "FH Certified (Scheduled) Amount" that had been "Claimed/Scheduled to Date" in the December 2017 payment schedule, which contained the figure of $10,523,165.80."

[30] The difference between the amount said to be the previous certified/scheduled amount up until December 2017 ($10,949,527.96) and the amount stated in Fulton Hogan's December 2017 payment schedule as the amount scheduled to that date ($10,523,165.80)[18] was $426,362.16 – the amount of Fulton Hogan's set-offs as per its December 2017 payment schedule.

[31] There was no mention in the covering letter, or in QBirt's payment schedule, of the set offs. The claim was expressly "as identified in the payment schedule", which did not refer to the set offs, and in correspondence relating to the variation claims in the schedule. Nor did QBirt explain, in its covering letter or schedule, why it had used the $10.9 million amount, rather than the $10.5 million amount, as the amount previously certified.

Fulton Hogan's Payment Schedule

[32] Fulton Hogan responded to QBirt's January payment claim by way of a 10 page letter, to which was attached a schedule.[19]

[33] In its letter, Fulton Hogan noted that the majority of QBirt's claim was the subject of the adjudication of its November payment claim or its Notice of Dispute, dated 15 February 2018, or both.

[34] It explained that its reasons for withholding sums against previously disputed items had already been provided in detail, but were "reiterated" for the purposes of the January Payment Schedule.

Fulton Hogan informed QBirt that the scheduled amount was $264,903.94, less retention (5%) and excluding GST. It provided the following summary "for convenience".[20] The amounts in bold (my emphasis) are significant:

January 2018 Payment Claim	Qbirt Claim	FH Certified (Scheduled) Amount	Variance
Claimed/Scheduled to Date	$13,396,307.79	$10,802,012.05	

[18] See the table above at [21] and the figure in bold.

[19] Ambrose affidavit, filed 16 August 2018, exhibits, pages 314 – 333.

[20] Ibid, at page 315.

Claimed/Scheduled Previously	**$10,523,165.80**	**$10,523,165.80**	
Claimed/Scheduled this claim	$2,873,141,98	$278,846.25	-$2,594,295.73
Less 5% Retention		$	
Total Scheduled this Claim excl GST		$292,788.56[21]	

[35] Fulton Hogan acknowledged that it had assessed a lesser amount to be paid than that claimed by QBirt and, in accordance with section 18(3) of the Payments Act, set out its reasons for withholding payment for, or adjusting, some of the claims made against certain line items, or for rejecting certain variations.

[36] Also in its letter, Fulton Hogan referred to the set offs it had previously made which were maintained in its January Payment Schedule (my emphasis):

> "In addition to the above, Fulton Hogan has exercised its general powers under Clause 23.12[22] of the Conditions of Subcontract to Set-off a number of sums from the monies claimed to be due to the Subcontractor under its Payment Schedule for December 2017. **These Set-offs have been maintained in the January Payment Schedule but have not been included in QBIRT's Payment Claim for January.** Accordingly, they are detailed as follows."

[37] The payment schedule identified, against each line item in respect of which a January claim had been made, Fulton Hogan's response to it under the heading "Certified this Month". Where a lesser amount was certified than that which was claimed, Fulton Hogan set out its explanation for the difference in columns in the schedule headed "LTD Variance, Status of Dispute, Reason for Variance, Comment (FH)".

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[21] As Fulton Hogan later acknowledged in its adjudication response, this amount was calculated in error. It is $278,846.25 plus 5% - an irrelevant amount. The correct certified or scheduled amount (exclusive of GST) was $278,846.25.

[22] 23.12 **Set off:** Without limiting the contractor's other rights and remedies under the Subcontract or otherwise, the Contractor may at any time deduct or set off from any retention monies or Bank Guarantee provided by the subcontractor and/or moneys otherwise due to the Subcontractor (including from an amount certified in a payment certificate) any money due or claimed to be due from the Subcontractor to the Contractor (including liquidated damages under clause 24.4) whether under the Subcontract or otherwise and any losses, costs, expenses and damages suffered or incurred by the Contractor (including damages for breach of contract at law) in respect of which the Subcontractor is or may be liable.

[38] Fulton Hogan's "Certified this Month" total was $278,846.25. It's "Previously Certified" total was $10,523,165.80 (as per its December payment schedule), an amount which took into account the set offs.

[39] In its payment schedule summary, Fulton Hogan deducted the amount of the set offs from the amounts stated by QBirt as its "Previously Certified" and "Cumulative Claim" amounts. QBirt stated in its written submissions that in so doing, "Fulton Hogan pretended as if QBirt had accepted the validity of the set offs".[23]

[40] It was, in my view, appropriate for Fulton Hogan to have reduced QBirt's "Previously Certified" amount in its (Fulton Hogan's) summary table to correct QBirt's error[24] (although it should have explained what it was doing). However, it did not follow that QBirt's cumulative claim was also to be reduced. While that was necessary to make the mathematics "work" in the "QBirt claim" column of the summary table as constructed, the accurate alternative would have been to separate out the amounts claimed from the set offs made in the summary table.

QBirt's adjudication application

[41] QBirt referred its January payment claim for adjudication.

[42] QBirt's adjudication application submissions stated that the amount of its payment claim was $2,873,141.98.[25] In its executive summary, at 1.1.13,[26] QBirt listed the 14 claims it pressed in its adjudication application against certain line items or variations. Its claims totalled $1,851,894.17. The scheduled amount in respect of eight of those claims was $10,544.61, leaving $1,841,349.56 in dispute. Additionally, QBirt pursued the set offs – contending that they ought to be disregarded.[27]

Adjudication

[43] In the course of the adjudication process, the adjudicator noted the different amounts stated by the parties as the amount previously certified (that is, $10,949,527.96 as per the payment claim; and $10,523,165.80 as per the payment schedule).[28] He asked the parties to agree on an amount. They confirmed an amount of $10,015,164.65 as the amount certified/paid in respect of claims 1 – 9. That was the amount used by the adjudicator in his determination of the progress payment to be made.

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[23] QBirt's written submissions at [19].

[24] I acknowledge that QBirt claims it made no error.

[25] Ambrose affidavit, filed 16 August 2018, exhibits page 335.

[26] Ibid page 341.

[27] Ibid.

[28] Ibid page 653.

[44] The adjudicator delivered his decision on 30 July 2018.[29] He decided that Fulton Hogan was required to pay QBirt $1,300,608.14, including GST.[30]

[45] To reach the amount of $1.300,608.14, the adjudicator –[31]

- Awarded amounts for each line item and variation in dispute between the parties, totalling $411,050.98 (the **adjudicated amount**);
- Determined that the previous set off of $426,362.18 should be reversed – and added that amount to the adjudicated amount;
- Relied on the amount agreed between the parties as the amount previously paid – thereby adding $508,001.15 to the adjudicated amount (the difference between Fulton Hogan's $10.523,165.80 million amount and the agreed amount);
- Deducted from the adjudicated amount the retention monies that he determined should be retained pursuant to the subcontract (that is $441,889.50);
- Added to the adjudication amount the amount certified by Fulton Hogan in its January payment schedule; and
- Added GST.

QBirt's pursuit of a claim for the set off amount

[46] One of Fulton Hogan's complaints is that the adjudicator exceeded his jurisdiction by determining the dispute over the set off amounts.

[47] In part 10 of its adjudication application document,[32] QBirt challenged Fulton Hogan's entitlement to any of the set off amounts claimed.

[48] In part 11 of its application document,[33] QBirt submitted that the adjudicator should "describe the value of the January Payment Claim as follows". Thereafter followed a table which (among other things) acknowledged that the amounts of the set offs were not claimed in the application, but described them as "in dispute" in the current adjudication.

[49] The relevant part of the table is reproduced below. The contents of the "Description" column are the short hand descriptions of the set off items:

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[29] The first version of the decision is at page 636 of the Ambrose affidavit, filed 16 August 2018. I understand that a second version was issued to correct an error that is irrelevant to the matter before me.

[30] $1,182,371.04 excluding GST.

[31] Ambrose affidavit, filed 16 August 2018, exhibits, pages 706 – 707: decision at 411.

[32] Ibid, commencing at page 433.

[33] Ibid commencing at page 446.

Item	Description	Amount Claimed in Application	Amount Scheduled in Payment Schedule 10	Amount in Dispute in current adjudication
Construction Works				
…	…	…	…	…
Variations				
…	…	…	…	…
	Survey	Nil	-$211,740	$211,740.00
	CTB	Nil	-$88,542.61	$88,542.61
	4B Rock Stockpiling	Nil	-$91,141.55	$91,141.55
	Construction Water	Nil	-$34,938.00	$34,938.00
Totals		$11,600,515.72	$10,386,194.50	$1,214,321.22

[50] Fulton Hogan submitted an adjudication response.

[51] In response to QBirt's submissions about the set offs, Fulton Hogan stated that, "Notwithstanding the submissions made by the Claimant, **the Respondent has not set off any amount under the Subcontract from the amount claimed by the Claimant in the Payment Claim"**.[34] Fulton Hogan continued:[35]

> "27 No amount has actually been "scheduled" for these set off claims in the Payment Schedule.
>
> 28 While the Respondent acknowledges that it did set off the total sum of $426,362.16 from the amount which was claimed by the Claimant in its December 2017 Payment Claim, this sum was not, for obvious reasons, set off again from the amount claimed in the following Payment Claim.

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[34] Emphasis in original.

[35] Ibid at pages 460 – 461.

> 29 This is clear from the breakdown in the Payment Schedule which shows that no amount has been "certified this month" for the set off claims for which an amount was "previously certified".
>
> …
>
> 32 This means, practically speaking, the Respondent's right to set off $426,362.16 under the Subcontract was not advanced as a "reason" for withholding payment from that which had been claimed by the Claimant in the January 2018 Payment Claim, the subject of this adjudication. Obviously, no amount claimed in the Payment Claim has been withheld because of the set offs.
>
> …
>
> 35 The Respondent submits that it is relatively uncontentious that a claimant under the Act is not permitted to propound a claim in an adjudication application unless it has been raised in the payment claim. This is because any adjudication determination that takes into account matters raised by the claimant not in the payment claim but only in subsequent documentation (such as the adjudication application) is void for breach of a basic and essential requirement of the Act."

[52] Fulton Hogan referred to *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd*[36] in which Brereton J held that a claimant may not rely on, and an adjudicator may not consider, material included in an adjudication application that is "outside the scope or ambit of the claim described in the payment claim".

[53] Fulton Hogan submitted that, by claiming in its adjudication application the amount that had been previously set off, QBirt had increased its claim by $426,362.18 (sic)[37] to $3,299,504.16.

[54] In reply, QBirt submitted that it was entitled to dispute at adjudication any reason given by Fulton Hogan for withholding payment of the cumulative amount claimed.[38]

[55] It argued that it was not for QBirt to apply for a reversal of any set offs previously applied in its claim for payment; and the dispute of the set offs could not be construed as a claim by QBirt.

[56] QBirt referred to *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited*[39] and argued, in effect, that the adjudicator was to adjudicate the matters raised by the claim and the response to the claim. Qbirt said (my emphasis):[40]

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[36] [2009] NSWSC 61.

[37] By my calculations: $426,362.16.

[38] Ambrose Affidavit, filed 16 August 2018, exhibits page 603, paragraph 7.1.3 of its Reply.

[39] [2004] NSWSC 258.

"7.1.10 **It is clear that the Act … is intended to operate by reference to a claim** (supported at adjudication by submissions in support of that claim), **and a response to that claim** (supported at adjudication by submissions in support of that response).

7.1.11 That is precisely what has occurred, QBirt has claimed an entitlement to payment which does not contemplate the set offs (which do not constitute a claim made by QBirt properly the subject of a payment claim as it is not a claim for payment for the provision of construction work or related goods and services). Fulton Hogan has responded with a payment schedule detailing a number of set offs. Both parties have had the opportunity to address those set offs in the ordinary course of adjudication. No prejudice can be said to arise as a result and it is incredible to submit that an express maintenance of those set off for the purposes of the January claim ought to be ignored in that context.

7.1.12 It is, as was the case in the January Payment Schedule, a matter for Fulton Hogan to apply any set off (or alternative reason for withholding payment) in its payment schedule by way of response to QBirt's claim. Fulton Hogan's payment schedule did just that …

7.1.13 … Fulton Hogan submits that an adjudicator may not determine the set off claim because an adjudicator 'cannot adjudicate a claim that was not included in the Payment Claim and only raised in the Adjudication Application'. That submission:

(a) is inconsistent with the foregoing application of the Act by the parties, adjudicators and the Courts; and

(b) leads to the inevitable conclusion that set offs will not be available to respondents under the Act unless the claimant (for some reason) chooses to include them in a payment claim.

7.1.14 The suggestion that 'no amount claimed in the Payment Claim has been withheld because of the set offs' or that 'the Claimant's … submission … appears to be the result of a mistaken reading of the Payment Schedule' is plainly wrong. The cumulative claim amount derived from all claimed and certified sums over the course of the project is met with a cumulative certified amount which:

(a) contemplates set offs in the sum of $426,362.16;

(b) includes the value of those set offs within the calculation of the amount it intends to pay; and

(c) provides reasons for deducting those amounts.

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[40] Ambrose Affidavit, filed 16 August 2018, exhibits page 604.

7.1.15 **QBirt is entitled to dispute those deductions in the Application <u>on the basis</u> that the payment schedule contemplates the withholding of the set off amounts from the cumulative claim amount** and provides reasons for such withholding. The adjudicator is bound, in the ordinary course of deciding the amount of the progress payment, to determine the validity of those claims and decide the amount due, if any, in respect of the claim."

Adjudicator's approach to the set off issue

[57] In determining whether QBirt was entitled to pursue the set off amounts in the adjudication, the adjudicator noted that neither the payment claim covering letter nor the attached schedule made specific reference to the set off amounts.[41] Nevertheless, he decided that QBirt was entitled to pursue a claim for $426,362.18 (sic) and he assumed jurisdiction over the dispute about the set offs.

[58] His reasons included the following (my emphasis):[42]

"<u>Review of Parties Submissions</u>

319 The respondent submits that the claimant's adjudication application submissions in respect of the set off items fall outside the ambit or scope of the payment claim and thus they are submissions that have not been properly made. The claimant submits that its adjudication application submissions have been properly made.

320 By way of the payment claim, the claimant identified the scope of works that it claimed it had completed in respect of each line items. For each line item the claimant identified the amount it claimed to date, the amount previously certified and the amount claimed for the January 2018 payment claim. The payment claim was summarised on the payment claim covering letter as follows:

	Amount
Previously certified PC01 – PC09	$10,949,527.96
Cumulative Claim	$13,822,699.95
PC10 – January Claim	**$2,873,141.98**

[41] The decision commences at page 636 of the exhibits to the Ambrose affidavit, filed 16 August 2018.

[42] Errors as per original.

321 The above approach to presenting the payment claim is consistent with common industry practice.

322 In respect of the payment claim, I am satisfied as follows:

- The 'Cumulative Claim' of $13,822,699.95 includes all the amounts that the current claimant claims have been completed as 25 January 2018 without any deductions for set offs;

- The 'Previously Certified PC01 – PC09' amount includes for all the payments that the claimant submits it had received up and until 25 January 2018; and

- The 'PC10 – January Claim' amount by definition and by extension of the mathematics means that **the amount claimed reflect the fact that the claimant does not agree with the deduction of the set off items included in the December payment schedule**.

323 I am satisfied that the respondent is a competent and experienced contractor and I am satisfied that having reviewed the payment claim and formulated its payment schedule response, the respondent **understood** that the claimant did not agree with the deduction of the set off items deducted in December 2017 claim **and that the amount claimed in the January 2018 payment claim did not align with the respondent's position in respect of the set off.**"

[59] He referred to section 17(2) of the Payments Act and continued:

"334 In respect of section 17(2) of the Act, I am satisfied that the payment claim identifies the construction work to which the progress payment relates on a line by line basis. I am also satisfied that the payment claim states the amount of the progress payment that the claimant claims to be payable in the sum of $2,873,141.98 and that the amount of $2,873,141.98 is the amount the claimant submits is due prior to any set off being applied.

335 In respect of section 17(3) of the Act, I am satisfied that 17(3)(a) is not applicable to the payment claim …

336 I am satisfied that the payment claim complies with section 17 of the Act and that there is no requirement in section 17 of the Act to identify set off items in the payment claim with which the claimant does not agree or accept.

337 I am satisfied that **the claimant's adjudication application submissions in respect of set offs do not go outside [i.e. fall outside the scope of] the materials which were provided in the payment claim** and that the claimant's adjudication application submissions have been properly made pursuant to section 26(2)(c) of the Act."

[60] Thus, he reasoned, in effect, that while the amount claimed did not reflect (or "align with") QBirt's claim for a reversal of the set offs, Fulton Hogan ought to have appreciated that QBirt did not agree with them. He reasoned that he had jurisdiction to deal with the dispute because it fell within the scope of the payment claim.

[61] The adjudicator went on to consider Fulton Hogan's entitlement to the set offs, and concluded that, while the contract provided for it, Fulton Hogan was not entitled to the set offs it claimed.[43] In the case of each of the four set offs claimed, $Nil was carried to collection.

[43] See paragraphs 388 – 388; especially at 353, 361, 380 and 388.

Fulton Hogan's submissions

[62] In its written submissions to the court, Fulton Hogan made arguments similar to those it made to the adjudicator (some footnotes omitted):

> "10 The payment claim is the document which commences the statutory process, and to which Fulton Hogan's payment schedule responds. The payment claim is required to state the amount claimed, which is defined as the 'claimed amount'. There are statutory consequences for a failure to pay all of the 'claimed amount'.[44]
>
> 11 Section 21(1) of the Payments Act provides for a claimant to apply for the adjudication 'of a payment claim'. The adjudication of the payment claim is then what is undertaken by the adjudicator under section 26 of the Payments Act.
>
> 12 As such, the only statutory right conferred by the Payments Act is to apply for and obtain an adjudication of a payment claim; this in turn limits the adjudication to both the claimed amount and the claims set out in the payment claim. If the adjudication went beyond these parameters, it would not be an adjudication "of a payment claim".
>
> 13 QBirt could not, therefore, expand upon its payment claim in its adjudication application by making a claim that was not included in the payment claim, or by increasing the amount claimed beyond the 'claimed amount'. The adjudicator was similarly limited – he could not purport to decide anything beyond what was set out in the payment claim."

Relevant Authorities

Creative Building Services v TIO Air-conditioning

[63] Fulton Hogan relied upon *Creative Building Services Pty Ltd v TIO Air-conditioning Pty Ltd.*[45] In that case, the payment claim could be interpreted in three different ways – as: (i) a claim for $41,710.67; (ii) a claim for $300,822.84 (the total of all of the amount previously claimed by TIO but not paid by Creative Building Services (CBS)); or (iii) a claim for $342,533.51 (the total of the amounts at (i) and (ii)).

[64] CBS did not provide a payment schedule in response to the claim. The claim was adjudicated. The adjudicator decided that CBS was to pay TIO $143,293.27. CBS applied for an order declaring void the adjudication. The issues raised were (a) the amount of the payment claim; and (b) whether the adjudication involved jurisdictional error because it awarded an amount which was substantially more than $41,710.67.

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[44] Sections 18 – 20A of the Payments Act.

[45] [2016] ACTSC 367.

[65] CBS argued that the amount claimed in a payment claim was a jurisdictional fact and it amounted to jurisdictional error for the adjudicator to have determined that the progress claim amount was more than the amount claimed. TIO submitted that the claim was for the whole of the unpaid amounts (that is, $342,533.51) and that the amount awarded was clearly within its scope. Alternatively, if there was an error by the adjudicator, it was within jurisdiction.

[66] The Court (Mossop AsJ) concluded that, objectively analysed, the payment claim was for an amount of $41,710.67.[46]

[67] Mossop AsJ held that the adjudication decision involved jurisdictional error in awarding an amount beyond that which was claimed: the quantum of the claimed amount was a jurisdictional fact that determined the upper limit of the progress payment which the adjudicator might determine:

> "35. The parties described the relevant question as being whether the quantum of the amount claimed is a jurisdictional fact … The significance of the characterisation of a fact as a jurisdictional fact is that it means that the opinion of the decision maker is not determinative of the question whether the fact exists or not and hence if a court concludes that the fact does or does not exist that will enliven or disable the statutory power purported to have been exercised.
>
> 36. In the present case the quantum of a payment claim is not something which exists or does not exist. Instead it is a specified amount … [His Honour identified the underlying statutory questions as]:
>
> (a) whether the quantum of a payment claim defines the upper limit of the quantum of a progress claim that may be determined by an adjudicator under s 24 of [the ACT Payments Act]; and
>
> (b) if so, whether the determination of the adjudicator of the quantum of the payment claim is determinative of the scope of the adjudicator's jurisdiction or whether it is open to a superior court to determine the magnitude of the payment claim when determining whether the adjudicator has acted within jurisdiction.
>
> …
>
> 38. In my view, the statutory scheme indicates a legislative intention that the claimed amount defines the outer limit of the amount that may be determined by an adjudicator under the Act and is not a matter which is conclusively determined by the adjudicator. This means that it is open to this Court, when deciding whether or not the adjudicator has fallen into jurisdictional error, to determine for itself the amount claimed in the payment claim. These conclusions are compelled by the text and structure

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[46] Ibid at [28].

of the Act. I will refer to the most significant provisions that lead to that conclusion."

[68] His Honour went through the provisions which led him to the conclusion that the claimed amount was something objectively determined separately from, and prior to, any adjudication (in paragraphs [39] – [45] of his judgment).

[69] At [47] and [48] his Honour concluded that the amount of a progress payment was confined, at the upper end, by the claimed amount. His Honour said:

> "47. In s 24 [section 26 of the Queensland Payments Act] the obligation of the adjudicator is to decide the amount of the progress payment, the day on which the amount becomes payable and the rate of interest payable on the amount. There is no requirement or statutory power to determine the claimed amount. It is notable that the obligation on the adjudicator is not expressly confined by the claimed amount. Instead the obligation is to determine the 'amount of the progress payment'. The adjudicator is obliged to 'consider', inter alia, the payment claim and payment schedule, but is not expressly confined to the amount in the payment claim. This leaves open the contention that the adjudicator is able to decide that the amount of the progress claim may be an amount greater than the claimed amount.
>
> 48. … in my view … the capacity to determine the amount of a progress payment must be confined, at the upper end, by the claimed amount. That is because the statutory process of a payment claim, payment schedule, adjudication application and adjudication response are all based upon the identification by a claimant of the claimed amount and a response by the respondent to that claim. The statutory process is clearly one which permits the parties by an adversarial process to define the scope of their dispute. That is consistent with the contractual processes which the Act mirrors and partially adopts. It is also consistent with the autonomy that parties have to determine the claims which they wish to make and pursue under the Act. It would be inconsistent with those statutory processes if, notwithstanding that a claimant had only sought a particular amount, the adjudicator awarded a greater amount."

[70] With respect to the second question, his Honour held that the claimed amount could be determined by the Court in deciding whether an adjudicator had exceeded his or her jurisdiction. His Honour concluded that there had been jurisdictional error in the adjudication decision and made an order quashing the adjudicator's decision. [47]

Australia Avenue Developments v Icon – at first instance

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[47] Ibid, see paragraphs 49 and 50.

[71] After the hearing of the present matter, the parties referred me to two, then new, relevant decisions. *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd*[48] was one of those decisions. In that case, Australia Avenue Developments (**AAD**) challenged an adjudication determination in favour of Icon. The determination was challenged on two bases – the second of which concerned previous deductions from the contract works price (the "backcharges"). The adjudicator made allowances for the backcharges in favour of Icon. AAD argued that the allowances fell outside the scope of the payment claim and that the adjudicator had, by making allowances for them in Icon's favour, exceeded her jurisdiction.

[72] The adjudicator determined that the payment claim did dispute or claim the backcharges and that she had jurisdiction to consider them. Her reasons included the following:[49]

> "a. … the variation amounts were included in the payment schedule and are part of the difference between the claimed amount and the scheduled amount, this being $2,281,159.00 (excluding GST), as opposed to the $282,203.15 (excluding GST) which the Respondent submits should be the scope of my determination considerations. The significant difference of itself tests the credibility of the Respondent's submissions …

[73] In reviewing the decision of the adjudicator, Parker J held that only amounts actually claimed in the payment claim could be adjudicated. A jurisdictional error had occurred.

[74] After considering many cases of alleged jurisdictional error, his Honour reasoned as follows:

- the payment claim did not include any claim for the reversal of the backcharge items in question [61];
- the backcharge items had not been raised in the payment schedule as a credit against the payment claim: they appeared in a breakdown document for contractual variations but this was only a reconciliation of the figures in the project progress certificate which showed the breakdown of prior contractual claims and payments. It had nothing to do with the calculation of the scheduled amount [62];
- Mossop AsJ's decision *Creative Building Services Pty Ltd v TIO Air-Conditioning Pty Ltd* was correct and should be extended: "Where, as is usually the case, the payment claim is made up of a number of individual items for which an amount is claimed, the adjudication must be limited to those items and those amounts. An application for an adjudication is an application for an adjudication "of a payment claim" … This can only include amounts actually claimed in the payment claim. That is the only view consistent with what his Honour recognised as the adversarial nature of the process." [66];

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[48] [2018] NSWSC 1578.

[49] Ibid, as set out in paragraph [54].

- the facts in *Creative Building Services* were directly relevant [91] – the facts of other decisions, including the decision in *Downer Construction (Australia) Pty Ltd v Energy Australia,*[50] were not;

- having concluded that the adjudicator in *Creative Building Services* made an error in making an award for more than that which was claimed in the payment claim, Mossop AsJ concluded that the error was jurisdictional for the following reasons [92]*ff* –

    - the adjudicator is given no express authority to determine what is claimed in the payment claim. This is to be contrasted with the determination of the dispute arising from the payment claim. Matters arising at that stage are, in accordance with section 22(2) [section 26(2) of the Queensland Payments Act], to be left to the adjudicator to consider. Determining what is claimed in the payment claim is a different question to the determination of the dispute itself;

    - that which the contractor claims in the payment claim can be determined from the payment claim itself, before any adjudication occurs and the determination of the amount claimed may have consequences outside of any adjudication which may be made;

    - the determination of that which is claimed in the payment claim, as distinct from interpreting the claim and dealing with it, is not a matter which requires the particular expertise of adjudicators or difficult questions of construction – it simply involves determining what is being claimed in the payment claim which is "a simple numerical conclusion";

    - the determination went beyond that which had been claimed by the contractor in the payment claim;

- while *Downer* was similar to *Icon*, the critical aspect of *Downer* was that the adjudicator's error related to the basis or grounds of the payment claim – not of the amounts claimed in the payment claim. "The payment claim was a claim for delay and associated costs resulting from water entering the tunnel. The particular location of the bedding plane shears which led to the water entry had nothing to do with the quantum of the costs being claimed. The parts of the schedule supporting the payment claim which were departed from in the adjudication application were not necessary to its validity. The Act does not require that a progress claim be supported by grounds or submissions at all" [97];

- "… [T]he reference [in *Downer*] to the adjudicator determining the 'parameters' of the payment claim was a reference to the adjudicator determining the grounds, factual or legal, upon which the contractor advanced the claim. The present case is not about the parameters of the claim in that sense, but about the more fundamental question of whether a claim was made at all" [98].

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[50] (2007) 69 NSLWR 72.

[75] Parker J's decision was reversed on appeal while my judgment was reserved. The parties were informed by the court of its reversal and submissions about it were invited and received.

Downer Construction (Australia) Pty Ltd v Energy Australia

[76] As noted, in the course of reaching his decision, Parker J referred to the decision of *Downer Construction (Australia) Pty Ltd v Energy Australia.*[51] An understanding of *Downer* is necessary for an understanding of the reasons why Parker J's decision was reversed.

[77] Downer contracted with Energy Australia to design and construct a tunnel. Under the contract, extra costs were payable to Downer if it encountered "Latent Conditions" (as defined in the contract). Under the contract, Downer was to give notice to Energy Australia if it had encountered Latent Conditions. It was then for the Principal's Representative to determine whether Latent Conditions had been encountered.

[78] Excavation for the tunnel commenced in early 2002. In May 2002, Downer began to experience significant water ingress with water flowing to the excavation face. Downer notified the Principal's Representative that it had encountered Latent Conditions. The Principal's Representative determined that the conditions encountered did not differ materially from those which should have been anticipated: they were not Latent Conditions.

[79] Downer served a payment claim on Energy Australia. The payment claim included a claim for extra costs arising from Latent Conditions. Energy Australia provided a payment schedule which indicated that it would pay nothing. Downer referred the payment claim for adjudication. The adjudicator determined that Energy Australia was to pay a certain amount to Downer.

[80] Energy Australia succeeded in obtaining a declaration that the adjudicator's decision was void.

[81] Energy Australia argued that the adjudication application differed from the payment claim in its identification of the factual basis for the latent conditions. It argued that it was fatal to the adjudication determination that the determination had proceeded on that different factual basis.

[82] The trial judge held that the adjudication application itself was not vitiated by reason of its difference from the payment claim. However, the adjudicator had made a determination in respect of a claim which was substantially different from the payment claim and his determination was void for that reason. The adjudicator had failed to understand the basis for the claim; had not made a determination in the bona fide exercise of his power and had denied Energy Australia natural justice.

[83] Downer appealed from that decision and the questions on appeal were whether the determination was void because (a) the application was not for an adjudication of a payment claim, or because (b) the determination was not of the payment claim.[52]

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[51] (2007) 69 NSLWR 72.

[52] Ibid [3].

[84] On appeal, it was held that the trial judge was correct that the adjudication application itself was not vitiated by reason of its difference from the payment claim, but the adjudicator had validly determined the payment claim (my emphasis):[53]

> … The adjudicator expressly addressed whether the claim in the application was different from the claim in the payment claim, and considered that it was not; **more to the point, he considered the ambit of the payment claim and that his determination was within it**. In my opinion, **in the circumstances of this case**, that was for the adjudicator to decide, even if erroneously, and I do not think the determination was void on any of the grounds which found favour with the trial judge …

[85] By way of elaboration: On 12 July 2005, Downer served a payment claim upon Energy Australia which included three claims for "water ingress delay costs" and "collection and control of seepage extra costs". A schedule to the payment claim was entitled "Basis of Claim/Entitlement". Downer contended that it had encountered Latent Conditions. Water was entering the tunnel through "bedding plane shears" at three identified locations (design chainages 575 to 501; 572 to 467: and 421 to 404). The inflow of water caused Downer to incur additional costs and delayed completion. Downer claimed an entitlement to an adjustment to the contract price to cover the costs arising from the Latent Conditions.

[86] Downer relied upon a report by Dr J C Braybrooke in support of its Latent Conditions claim. Among other things, Dr Braybrooke concluded that the three bedding plane shears (identified above) could not have been anticipated.

[87] On 26 July 2005, Energy Australia served its payment schedule which included a statement that the Latent Conditions alleged by Downer were not Latent Conditions. The conditions complained of should have been anticipated on the basis of the pre-contract information.

[88] Energy Australia relied upon a report by Dr Pells, who observed that there was no record of bedding plane shears between chainages 404 and 421. And while there were near horizontal bedding plane shears between 467 and 575 metres, they were "not linked hydraulically to a rechargeable water source" as Downer had claimed.

[89] In its adjudication application, Downer correctly identified the relevant chainages, relying on a further report by Dr Braybrooke in which he admitted to incorrectly transcribing the chainages for the bedding plane shears in his first report. Downer claimed the same amounts as it had claimed in its payment claim in relation to the costs associated with the Latent Conditions it alleged.

[90] In its adjudication response, Energy Australia submitted that the adjudication application included a "new Latent Conditions claim" which was different from the claim made in the payment claim. It asserted that it the adjudication application was not a "proper" application because it sought adjudication of something other than the payment claim. It argued that it would be denied natural justice if the adjudicator proceeded to determine the application.

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[53] Ibid [11].

[91] The adjudicator noted the errors in the Payment Claim regarding the chainages and Energy Australia's argument that this amounted to the claim in the Payment Claim being a different claim from that in the Adjudication Application. Notwithstanding that argument, the adjudicator noted that "the many volumes of supporting material provided by both parties deal[t] with only two latent conditions … (a) the … claims …which relate to the amount of water ingress; and (b) the claims relating to the composition of the groundwater".[54] He continued:[55]

> [2] The Payment Claim, Payment Schedule, Adjudication Application and Adjudication Response clearly address the same claim for the increase water ingress. The claim in this adjudication is not a new claim. The issues are extensively ventilated by the parties in the large body of supporting documents provided by each party.

[92] The adjudicator concluded that the level of groundwater ingress encountered was a Latent Condition, notwithstanding that the Principal's Representative had determined that it was not, and that there was no reason why the claimant should not be paid the amount it claimed in respect of it.

[93] As noted, the primary judge held that the adjudication application was valid but its particulars [which included the identification of certain bedding plane shears] were substantially different from those described in the payment claim and the adjudicator's decision was therefore void.[56]

[94] The appeal proceeded on the assumption that there was a substantial difference between the payment claim and the adjudication application. Giles JA said that, notwithstanding the difference, the adjudication application was valid (my emphasis):

> [63] **An adjudicator's task is to determine the amount of the progress payment (if any) to be paid**. That means the progress payment in relation to the construction work … identified in the payment claim. The adjudicator addresses the work and the entitlement to payment for the work. In making the determination, the adjudicator will consider any submissions duly made in support of the payment claim and payment schedule. But the submissions do not set the parameters of the application or its determination. It may be that there are no submissions or only partial submissions, and submissions in support of a progress payment in relation to the construction work … other than that identified in the payment claim should be put aside.
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> [64] **Accordingly, if an adjudication application does what s 17(3)(f) requires, that is, identifies the payment claim and the payment schedule (if any) to**

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[54] Set out in ibid [49].

[55] Ibid [49].

[56] Ibid [59] – [60], setting out the judgment at first instance at [63] – [65].

which it relates, it is a sufficient application and the adjudicator can carry out the statutory task. The application is not changed by the submissions accompanying it …

[65] In the present case the adjudication application sufficiently identified the payment claim, and also the payment schedule; it was not submitted to the contrary. The "submissions relevant to the application" (s 17(3)(h) which accompanied the payment claim … may have had the substantial difference …but that did not invalidate the application. On no view was this an adjudication application which, from the submissions contained within it, sought adjudication of a payment claim unrelated to the payment claim served on 12 July 2005.

[95] The primary judge also concluded that the adjudicator had failed to understand Downer's claim and proceeded on the basis that Downer claimed that its entitlement to payment arose because of *excess water ingress* and addressed the question whether the water ingress should have been anticipated. The primary judge found that the discharge of the statutory duty required the adjudicator to direct his mind to the terms of the payment claim itself to ascertain the basis upon which the claim is made and, having done so, to determine it. The adjudicator failed to determine the claim on the basis of the bedding plane shears. There had not been, therefore, the determination of the payment claim and the adjudication determination was void.

[96] Giles JA observed that, in concluding that the payment claim asserted as the Latent Conditions the bedding plane shears, as distinct from water ingress, the primary judge applied his own view of the payment claim. Downer, at first instance, had argued that it was a matter for the adjudicator who had plainly decided that the payment claim asserted water ingress. Giles JA found that there were grounds for the trial judge's conclusion, as well as "respectable grounds" for the view that the payment claim relied upon water ingress, caused by bedding plane shears, as the Latent Conditions.

[97] Giles JA said:

[78] To return to adjudication of a payment claim by determining the amount of the progress payment (if any) to be made, the progress payment being in relation to the construction work …identified in the payment claim, the issue is payment in relation to the work ... Entitlement to payment in relation to the work can be expounded at different levels of particularity, but the claim to payment in relation to the work remains. It is the payment claim and the identified construction work … that has the adjudicator's attention, and the parameters of the payment claim are not found in the level of particularity at which it is supported.

[79] In the present case the payment claim was relevantly to a progress payment in relation to the work occasioned by the water ingress, with the three claims … describing the direct and indirect costs thereby occasioned. The payment claim was made in reliance of cl30.1 of the contract [the Latent Conditions clause]. It was for the adjudicator to address whether, on

> the material properly before him, Downer was entitled to payment in relation to the work. In determining the application, the adjudicator would be expected to give attention to the meaning and scope of "ground conditions" in the definition of latent conditions, and to what ground conditions were encountered and whether they should have been anticipated by a prudent etc contractor. But what he was to determine was the payment claim, and it does not seem to me that this task would fall away if he thought it asserted bedding plane shears as the ground conditions as distinct from water ingress resulting from the bedding plane shears; or because it referred to bedding plane shears at precise chainages stated in the payment claim (which by the time of the adjudication were accepted on both sides to have been stated mistakenly) … [The adjudicator] considered that excessive water ingress was within the contractual conditions. He may or may not have been correct in his construction of the contract, but once he so decided his determination was within the parameters of the payment claim.

[98] Giles JA also stated that even if an adjudicator makes an error which can be seen as taking a determination outside the parameters of the payment claim, an adjudication is not necessarily invalidated. It was essential that the adjudicator made a bona fide attempt to exercise the relevant power: his or her determination may be incorrect, but it can still be valid. The determination is of an "interim" nature, often made in "pressure cooker" circumstances. The purpose of the Act is to enable speedy resolution of claims. The scope for invalidity for non-jurisdictional error is limited. An adjudicator's exercise of power includes addressing the parameters of the payment claim, but his or her determination will not necessarily be set aside if the determination goes beyond those parameters, properly understood.[57]

[99] Giles JA referred to the following from Basten JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (my emphasis):[58]

> Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. **It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to any inferior courts, it has been said that there is a strong presumption against jurisdictional qualification being interpreted as contingent upon the actual existence of a state of fact as opposed to the decision makers opinion in that regard …**

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[57] Ibid [79] – [82].

[58] (2005) 21 BCL 364, at 380 [44].

[100] Giles JA referred to other authority to like effect and said that it was for the adjudicator to determine the "parameters" of the payment claim:[59]

> [87] In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the adjudication. In the present case … it was for the adjudicator to decide whether the water ingress fell within latent conditions for the purpose of the contract, and the parameters of the payment claim in that respect. He did so. As to both, it could not be said that the adjudicator's decision was without foundation, and if the adjudicator addressed the matters and came to his decisions, even if other decisions could have been come to, he did what the Act required – he determined the adjudicated amount …
>
> [88] There is good reason for leaving the determination of the scope and nature of the payment claim to the adjudicator, apart from the purpose of the Act earlier mentioned. The scope and nature of the payment claim will often be, and in the present case was, open to be elucidated and evaluated with the benefit of the adjudicator's specialised knowledge.
>
> [89] Accordingly, I am unable to agree with the trial judge's conclusion that the adjudicator failed to determine Downer's payment claim, but instead determined another a different claim. The adjudicator determined the payment claim and the court should not, by judicial review engage with the questions decided by him in doing so.
>
> [90] Nor do I consider that the determination was void because the adjudicator failed to attempt to understand the basis of the claim or failed bona fide to exercise his power. With respect to the trial judge, to say that 'the outcome of [the adjudicator's] determination indicates failure to consider the matters to which s 22(2) refers does not pay heed to the exposure of the adjudicator's reasons, and incorrectly imposes the Court's opinion of the correct outcome as the determinant of bona fides.

Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd – appeal decision[60]

[101] Turning to the appellate decision in *Icon*, Baston JA, with whom Meagher and Leeming JJA agreed, considered the statutory scheme and concluded that it was for the adjudicator to act upon his or her understanding of the content of the payment claim.

[102] His Honour explained that if the engagement of a statutory power depended on an identified state of affairs, then that state of affairs is a "jurisdictional fact" and the lawful exercise of the power may ultimately depend upon a finding of a court exercising judicial review as to whether or not the state of affairs existed. If engagement of a statutory power depends upon

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[59] (2007) 69 NSWLR 72, [87] – [89].

[60] [2018] NSWCA339.

an opinion formed by a decision maker, then a reviewing court may only be concerned with the existence and formation of the opinion.

[103] At [16], his Honour said:

> Relevantly for the present case, with respect to the function conferred on the adjudicator under s 22(1) of the Act (determining "the amount of the progress payment" which is to be paid), s 22(2) requires that the adjudicator "is to consider the following matters only". Those matters include "the provisions of the construction contract and the payment claim leads to the inference that the adjudicator is to act upon his or her understanding of the contractual obligations and of the content of the payment claim. While the construction of a contract will usually involve questions of law, the Act implicitly confers on the adjudicator the power to form an opinion as to the meaning of the contract, for the purposes of the adjudication. The adjudication cannot be set aside because an error of law in construing the contract appears on the face of the record. The same is true with respect to the scope of the payment claim.

[104] His Honour referred to the primary judge's reference to *Downer*. His Honour observed that the primary judge in *Downer*, who was found to have erred, had undertaken an exercise not dissimilar to that undertaken by the primary judge in *Icon*. In *Downer*, it was held that "determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the adjudication".[61] Also in *Downer* it was said that there was good reason for leaving determination of the scope and nature of the payment claim to the adjudicator: it was often open to elucidation and evaluation with the benefit of the adjudicator's specialised knowledge.[62]

[105] Baston JA referred to Giles JA's reasons (at [89] and [90] – set out above) and said (footnotes omitted):[63]

> It follows that it was no part of the primary judge's function to examine the payment claim to determine whether he considered that the approach by the adjudicator was erroneous. Even if it were erroneous, it would not constitute jurisdictional error to act upon such an erroneous view …

[106] Baston JA observed that at first instance, the primary judge found that the adjudicator had awarded amounts which were not the subject of the payment claim (by entertaining a challenge to the backcharges), thereby committing jurisdictional error.

[107] At [25], Baston JA said:

> It was part of the respondent's case that the adjudicator allowed an amount on account of "back charges" which was not to be found in the payment claim. If a

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[61] *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72, at [87].

[62] Ibid [88].

[63] [2018] NSWCA 339 at [19].

backcharge amount were an amount which reduced the claim, it would not properly be described as an amount for which a claim is made. It would only be part of a payment claim if a claim included amounts which had been previously made and allowed, or perhaps disallowed and were now sought to be reinstated. It is not clear that either party used the language in that sense.

[108] Baston JA observed that *Icon* involved a dispute as to how the payment claim and payment schedule were to be understood and that it was not appropriate for the court to engage in an analysis of the manner in which the adjudicator dealt with the claim in her adjudication.[64] Nevertheless, his Honour considered the adjudicator's reasoning and concluded that she had made no error. His Honour also concluded that it was for the adjudicator to consider and construe the payment claim – not the court (my emphasis):

> [25] **In short, to the extent that there was an issue as to whether or not there was a claim for backcharges, the issue was expressly addressed by the adjudicator and was resolved.** The respondent did not identify error in how the adjudicator addressed the issues; rather it submitted that she should not have addressed the issues otherwise than by accepting the respondent's position. Alternatively, the jurisdictional issue … could only be finally resolved by the Court on judicial review.
>
> [26] This proposition gave rise to a debate as to whether the "progress certificate" was part of the payment schedule … [T]he certificate referred expressly to the backcharges; on any view they were before the adjudicator for consideration.
>
> …
>
> [32] This was not a case in which it could be said that the adjudicator awarded more than the amount claimed; she self-evidently did not. Rather, it was a dispute as to the proper construction of the payment claim having regard to the contractual provisions. The statute requires that the adjudicator "is to consider" the provisions of the construction contract and the payment claim. **However an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form a basis upon which the adjudication can be quashed.**
>
> [33] **In any event, it is tolerably clear that there was no error.** There was a dispute between the parties in relation to what were described as "backcharges". Once it was accepted that there was a dispute to be resolved, the respondent identified no error in the reasoning of the adjudicator, except to say that the backcharges were not part of the payment claim as served. The respondent accepted that the payment claim as served and adjudicated upon identified the construction work, as required by s 13(2)(a). It was not deficient in that respect. The dispute was

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[64] [2018] NSWCA 339 at [26] – [27].

> as to the calculation of the value of that work, which was the very task vested in the adjudicator.

Fulton Hogan's submissions continued

[109] Parker J's reasons at [66] mirrored Fulton Hogan's original arguments in this application.

[110] Fulton Hogan pointed out that the payment claim expressly set out each item that was claimed for work under the contract, or for variations, and claimed an amount against each of those items, which in sum totalled $2,873,141.98 – the amount claimed. There was no claim, in the line items, for a return of the set off amounts. I note also that QBirt's table expressly acknowledged that it made no claim for the set off amounts in its adjudication application.

[111] Having considered the appeal decision in *Icon,* Fulton Hogan noted that the primary judge had distinguished *Downer* on the basis that the critical aspect of it was that the error related to the basis or grounds of the payment claim – not the amounts claimed.[65]

[112] Fulton Hogan submitted that –

- the Court of Appeal overturned the first instance decision on a "factual basis". It decided that the approach of the adjudicator was within the principle stated in *Downer*;
- the reasoning of the Court of Appeal appeared to leave open that the result could have been different had the adjudicator awarded more than the amount claimed;
- there was no criticism of the proposition that, if in fact the adjudicator had awarded an amount for a claim which had not been made at all in the payment claim, it would amount to jurisdictional error;
- there was no criticism of the primary judge's reliance on *Creative Building Services v TIO*;
- the decision did not deal with the situation where an adjudicator allows a claim that was not made in the payment claim at all;
- there is error in the adjudicator's response in the present case;
- the decision in *Icon* turned on the way in which the payment claim was expressed and is not inconsistent with the proposition that an award of an amount which is not claimed at all is a jurisdictional error.

QBirt's submissions

[113] In oral argument, reflecting QBirt's written submissions, QBirt emphasised that the Payments Act provided for adjudication of the *payment claim* – not the *claimed amount*.[66]

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[65] [2018] NSWSC 1578 at [97], [98].

[66] Transcript of hearing, 1 – 71, lines 29 – 31.

[114] Queen's Counsel for QBirt referred to 26(1)(a) of the Payments Act and emphasised that the adjudicator had to decide the amount of the *progress payment*; which was a term arising out of sections 12 and 13. She drew to the court's attention the matters which the adjudicator had to consider under section 26.[67]

[115] Queen's Counsel for QBirt submitted that the summary table contained no error. She distinguished between the "certified amount" and the "scheduled amount" and submitted that the scheduled amount was the certified amount less the set offs and that the table only referred to the certified amount. She argued that the set off clause in the contract did not permit *a reduction in a certification* because of a set off, rather, it permitted a set off against amounts that were otherwise due to QBirt.[68]

[116] She submitted that it was not necessary for QBirt to specifically claim a line item for the set offs – indeed, under the contract "it could not properly do so". All QBirt could claim for was

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[67] **26 Adjudicator's decision**

(1) An adjudicator is to decide –

(a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any amount became or becomes payable; and

(c) the rate of interest payable on any amount.

(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.

(3) The adjudicator's decision must –

(a) be in writing; and

(b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

[68] Transcript of hearing, 1 – 84, lines 4 – 10.

the work it performed.[69] She argued that Fulton Hogan had raised the set offs in its payment schedule – the issue was thus "enlivened" and the adjudicator (within jurisdiction) decided it.[70]

[117] She argued that the payment claim and the payment schedule *put in issue* the set offs: "We say that the payment claim implicitly rejected any set off by Fulton Hogan. It was claiming for all of the works with no set off".[71] The fact that the claim was for $2.8 million was not the extent of the dispute.

[118] QBirt submitted that the approach of the primary judge in *Icon* had been rejected by the Court of Appeal. The primary judge's approach required the adjudicator to limit his or her adjudication to a consideration of the individual items in a payment claim for which an amount is claimed.

[119] QBirt submitted that the Court of Appeal decision –

- in effect confirmed that, by virtue of section 26(2) of the Payments Act "the adjudicator is to act upon his or her understanding of the contractual obligations and the content of the payment claim";
- established that an error in understanding the payment claim did not constitute jurisdictional error and a reviewing court can only be concerned about the existence and lawful formation of the opinion; and
- adopted *Downer*, which was authority for the proposition that a determination of the scope and nature of the payment claim was not open to judicial review, and implicitly rejected the view of the primary judge that there was a limit to the aspects of the payment claim about which the adjudicator could form unreviewable decisions.

[120] QBirt submitted that the appellate decision in *Icon* was inconsistent with *Creative Building Services v TIO,* which was a "central pillar" of the applicant's submissions.

[121] QBirt submitted that this case involved a dispute about the way in which the payment claim was understood. The appellate decision in *Icon* supported the view that the adjudicator's determination about the claims contained in the payment claim cannot be reviewed, even if erroneous and supported the process of the formation of the opinion by the adjudicator in this case. The identification of the scope of the claim was within the adjudicator's jurisdiction. The award did not exceed the amount claimed – if indeed that amounted to jurisdictional error.

Conclusion (set offs)

[122] I will deal first with the issue about whether there was an error in QBirt's summary table for its January claim: that is, whether there is a difference between a scheduled and a certified amount.

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[69] Transcript of hearing, 1 – 93.

[70] Transcript of hearing, 1 – 94.

[71] Transcript of hearing, 1 – 95, lines 6 – 7.

[123] The subcontract in this case contemplates the identification by Fulton Hogan of a certified amount. It also contemplates amounts being set off from the certified amount:

[124] The subcontract provides for a "payment certificate" in clause 23.5(1),[72] which is to be delivered in response to a payment claim and which is to "certify the amount the Contractor's Representative reasonably considers is due … If the amount is more or less than the amount claimed by the Subcontractor, the Contractor's Representative must set out why and the reasons for the difference and if it is less because the Contractor is withholding payment for any reason, the Contractor's reasons for withholding payment".

[125] By clause 23.5(2),[73] the Contractor's Representative "may allow in any payment certificate adjustment for amounts paid … by the Contractor and amounts that otherwise may be retained, deducted or claimed by the Contractor from the Subcontractor … under this Subcontract". By clause 23.12,[74] the Contractor *may deduct or set off from money otherwise due to the subcontractor, including from an amount certified*, any money due or claimed to be due from the subcontractor under the subcontract or otherwise. By clause 23.6(1),[75] the Contractor must pay the Subcontractor the amount certified for payment to the Subcontractor in the payment certificate or the amount of the payment the Contractor has indicated in a payment schedule under the Security of Payment Act that the Contractor proposes to make, as the case may be within certain time frames.

[126] The Payments Act does not require or contemplate the identification of a "certified amount" by a respondent to a payment claim. Rather, by section 18, it requires a respondent to a payment claim, who chooses to reply to it, to identify the amount of the payment it proposes to make, which is called the "scheduled amount".

[127] In my view, the wording of the contract does not suggest that a certified amount reduced by a set off is to be known as a scheduled amount. The certified amount and the scheduled amount both refer to the amount a respondent to a claim has indicated that it will pay – whether it has set off amounts or not.

[128] But whether there was an error in QBirt's summary table or not is not to the point. The issue is whether the adjudicator in the present case went beyond deciding, in the way contemplated by the Act, the "progress payment" by adjudicating upon the set off amounts, which had not been included in the payment claim.

[129] I find that the facts of the present case are not sufficiently distinguishable from the facts in *Icon* and I find no reason not to follow the appellate decision in that case.

[130] In both this case and *Icon* it was contended that the adjudicator had awarded an amount for something which had not been included in the payment claim.

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[72] Ibid page 40.

[73] Ibid.

[74] Ibid 41.

[75] Ibid.

[131] I do not consider the absence of error by the adjudicator in *Icon* as a distinguishable feature of the case.

[132] I acknowledge that the reasoning of the Court of Appeal in *Icon* appeared to leave open the possibility that the outcome might have been different had the adjudicator awarded more than the amount claimed, as submitted by Fulton Hogan.

[133] In that context, I have taken into account that, if QBirt had persuaded the adjudicator to award it everything claimed in the schedule it attached to its payment claim,[76] as well as the amount of the set offs, then the progress payment determined by the adjudicator would have exceeded the amount claimed as stated in the summary table[77] and the schedule containing the detail of the claim.[78]

[134] However, it seems to me that Icon was in that same position. It sought to recover backcharges even though it had not claimed for them in its payment claim. The adjudicator and the Court of Appeal found that the backcharges were referred to in the payment schedule, in the same way as the set offs were maintained in Fulton Hogan's January Payment schedule.

[135] As the adjudicator in *Icon* explained, they had been used to calculate the scheduled amount. She considered her jurisdiction to extend to the backcharges. The present adjudicator took a similar approach to his jurisdiction. He was of the view that the payment claim reflected the fact that QBirt did not agree with the deduction of the set off items included in the December schedule.

[136] I note Fulton Hogan's submissions to the effect that the statements of principle in *Icon*, which reflected those in *Downer*, did not deal with the situation where an adjudicator allows a claim that was not made in the payment claim at all. However *Icon* proceeded on the basis that the payment claim did not include any claim for the reversal of the back charges in question. And it was expressly part of Australian Avenue's case that the adjudicator had allowed an amount on account of backcharges which was not to be found in the payment claim.

[137] I acknowledge that Basten JA observed the uncertainty about the meaning of "backcharge". I note his Honour's statement that if a backcharge were an amount which reduced a claim, it would not properly be described as an amount for which a claim was made: it would only be part of a payment claim if the claim included a claim for amounts which had previously been *inter alia* disallowed and were now sought to be reinstated.

[138] That is how the present adjudicator interpreted the payment claim in this case – that is, as including a claim in respect of the set offs, even if the stated amount claimed did not "align" with that position. In other words, the present adjudicator considered that there had been, at least implicitly, a claim in respect of the set offs made in the payment claim.

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[76] Ibid pages 310 – 313.

[77] Ibid page 308.

[78] Ibid pages 310 – 313.

[139] On my understanding of the authorities, while it may be that the existence of a valid payment claim is a jurisdictional fact, its interpretation is a matter for the adjudicator.

[140] An adjudicator's exercise of power includes his or her addressing the parameters of the payment claim and his or her determination will not be set aside even if goes beyond the parameters properly understood.

[141] Whether the present adjudicator's interpretation of the claim involved an error or not, as explained in *Downer* and *Icon,* it was for the adjudicator – not the court – to determine the parameters of the payment claim, by interpreting the factual basis upon which it was made and the claims to amounts made in it, and to then rely upon his or her understanding of the payment claim in deciding the progress payment to be made.

[142] *Downer* and *Icon* make it plain that a reasonable but erroneous decision about the parameters of the payment claim does not invalidate the adjudication. The adjudicator in the present case exposed his reasoning and it cannot be said that his approach was unreasonable.

[143] It short, I find that it was for the adjudicator to determine the scope of claim and his decision in that regard in this case cannot be reviewed. I find no jurisdictional error in this aspect of the adjudication.

[144] Further, I consider my conclusion to be consistent with the principles outlined in *Trysams* above, including those concerning the limited scope for invalidity for non-jurisdictional error and the adjudicator's *bona fide* exercise of his powers under the Act.

Adjustment of the amount previously certified

[145] As explained above, the adjudicator asked the parties to agree on the amount previously certified and he used the agreed amount to determine the amount of the progress payment due to QBirt. Fulton Hogan argued that the adjudicator's use of the agreed previously certified amount involved jurisdictional error.

Background facts

[146] On 6 July 2018, the adjudicator asked Fulton Hogan for a schedule of the payments made by it to QBirt in respect of payment claims 1 to 10 inclusive.[79]

[147] Fulton Hogan provided the adjudicator with that information under cover of a letter dated 10 July 2018, which concluded with this paragraph:[80]

> For completeness the Repondent has indicated the amount of retention held from each progress claim on the basis that this may **assist the adjudicator in his final determination.**

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[79] Ibid page 622.

[80] Ibid page 625.

[148] I mention at this point that the emboldened part of the paragraph above clearly indicates that Fulton Hogan was aware that the information it provided would be used by the adjudicator in his final determination of the progress amount.

[149] The information provided by Fulton Hogan established that it had paid $10,015,164.65 (excluding GST) to QBirt for payment claims 1 – 9.[81] QBirt agreed with that amount.[82]

[150] The adjudicator noted that he now had before him three different amounts said to be the amount previously certified: the parties (different) original amounts and the agreed amount. The adjudicator asked the parties to agree on the amount.[83]

[151] The parties agreed on the figure of $10,015,164.65 and so informed the adjudicator by letter, dated 23 July 2018, which included the following paragraphs:[84]

> "… the Respondent and the Claimant are in agreement about the amount which has been paid.
>
> To be clear, however, we confirm that the amount paid by the Respondent to the Claimant does not include any withholding for retention which the Respondent is entitled to withhold under the contract with the Claimant."

[152] Having been informed that the third (and lowest) amount was the amount the parties agreed was the amount paid by Fulton Hogan under the contract, the adjudicator observed that the individual line amounts included in the "previously certified" columns of the payment claim and payment schedule were "unreliable" because they did not "total the agreed amount …".[85] He continued:[86]

> "In light of the parties' submissions in respect of the amount previously paid/certified, in order to determine the adjudicated amount of the payment claim, the claimant's cumulative entitlement for the various line items either agreed by the parties or pressed at adjudication has been determined. The line items have been totalled and from that total amount, an amount of retention has been deducted followed by a deduction of the previously agreed previously paid amount of $10,015,164.65."

Fulton Hogan's submissions

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81 Claim 10 was the subject of the dispute.

82 Ambrose affidavit, filed 16 August 2016, exhibits page 633.

83 Ibid page 632.

84 Ibid page 635.

85 Ibid at 654: decision at page 117.

86 Ibid at 654: decision at page 118.

[153] Fulton Hogan complained that while the parties agreed that that was the amount previously paid, they did not agree that it should be used in this way – nor did the adjudicator say that was what he intended to do.[87]

[154] Fulton Hogan argued that not only did the adjudicator erroneously increase the claim by the amount of the set offs, his use of the agreed figure increased the claim again by more than $500,000 ($10,523,165.80 - $10,015,164.65 = $508,001.15). This was, it was submitted, further jurisdictional error.

QBirt's submissions

[155] In reply, QBirt submitted that the adjudicator had not added a further $508,001.15 to the claimed amount. It was, QBirt submitted, "simply a step in deciding what part of the "Cumulative Claim" was payable, which was part of the adjudicator's statutory duty" under section 26 (1)(a) of the Payments Act.[88]

[156] QBirt submitted –[89]

> "The correct figure was live as between the parties and the adjudicator was entitled to make a decision. He did. If it was wrong, then it was an error within jurisdiction."

[157] In oral submissions, QBirt made the point that there was no evident purpose for which the adjudicator called for submissions on the amount paid other than to enable him to determine the amount due as required by sections 12 and 13 of the Payments Act.[90]

Conclusion (amount previously paid)

[158] By asking the parties to agree upon the previously paid amount in the circumstances in which the adjudicator made that request, the adjudicator did not increase the claimed amount or payment claim and thereby exceed his jurisdiction

[159] His 'determination' of that amount, by reference to the parties' agreed amount, was necessary for his determination of the progress payment to which QBirt was entitled. If it involved a mistake, it was a mistake within his jurisdiction and part of his bona fide attempt to exercise his power under the Act: see *Trysams*.

[160] Also, it is plain from Fulton Hogan's letter dated 10 July 2018 that it appreciated that the 'new' agreed amount would be used by the adjudicator in the manner in which it was used.

[161] This part of the adjudication did not involve jurisdictional error. And if he was in error in using the agreed amount, then it was an error within jurisdiction.

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[87] Fulton Hogan's submissions at paragraph 26.

[88] QBirt's written submissions at 81.

[89] QBirt's written submissions at 83.

[90] Transcript of hearing 1 – 98, lines 38 – 40.

The work under contract items 1.4.09.1, 1.4.10.0 and 1.4.23.0

[162] Fulton Hogan argued that the adjudicator committed jurisdictional error in his determination of the value of certain work by QBirt – namely, the removal of unsuitable material and its replacement.

Relevant contract clauses and schedules

[163] The subcontract between the parties was defined as the "the agreement between the Contractor and Subcontractor constituted by the Subcontract Documents". The Subcontract Documents were defined as: "(a) the Formal Instrument of Agreement; (b) these General Conditions of Subcontract; (c) all Schedules to these General Conditions of Subcontract; and (d) all other documents described in **Error! Reference source not found** (sic)".[91]

[164] Schedule 3 to the subcontract was a schedule of rates.[92] Those relevant to this aspect of Fulton Hogan's argument were as follows:[93]

Item	Method of Measurement Item	Description of Works	Unit	Unit Rate
1.4.09.0	2.06	Borrow to Fill 501 – 1000	M3	$5.12
1.4.10.0	2.06	Borrow to Fill 1001 – 1500	M3	$7.04
1.4.23.0	2.06	Borrow to Fill 1501 – 2000	M3	$9.18
1.4.05.0	2.11	Remove and replace – excavate to spoil in existing boreholes, test pits and/or	M3	$12.59

[91] Ambrose affidavit, filed 16 August 2018, exhibits page 10 (Clause 1 of the subcontract: Definitions and Interpretation).

[92] I note that clause 2.2 of the subcontract provided that "Any Schedule of Rates does not form part of the Subcontract (except for the purpose of clause 19.3). Quantities in a Schedule of Rates are estimated quantities only and the Subcontractor is not entitled to make a Claim in relation to any errors in or increases required to those quantities". Clause 19.3 of the subcontract dealt with the valuation of variations. Obviously, clause 2.2 is inconsistent with the definition of the subcontract. As Fulton Hogan suggested in its written submissions, clause 2.2 must be directed at preventing a variation claim if the work exceeds the *quantities* set out in the schedule of rates, rather than preventing the use of the schedule of rates in the valuation of the progress claims. It was, regardless, common ground that the work would be valued in accordance with the schedule of rates (Fulton Hogan's written submissions at 44(1)).

[93] Reproduced from the applicant's written submissions – drawn from Ambrose affidavit, filed 16 August 2018, exhibits – contract at pages 1 – 290, 69 (Schedule of Rates) and 72 – 76 (Unit Rate Schedule) and

		localised soft area and replace with Zone 3 General Fill		

[165] QBirt's scope of work (as outlined in the Scope of Work document in schedule 9 of the subcontract)[94] included that QBirt would be responsible for the "[p]rovision of all plant, labour and equipment to undertake the works as outlined in the amended Scope of Works document and A2 Unit Rate – Method [of] Measurement document as required to complete the works as specified".

[166] The A2 Unit Rate – Method of Measurement document included the following method of measurement items (see the second column of the table above):[95]

> "2.03 MASS EXCAVATION – SPOIL
>
> Mass excavation of material, not meeting the specifications of the required borrow material and within the excavation zone of the Works. Includes excavation, loading, hauling and stockpiling.
>
> Mode of Measurement
>
> Measurement for payment of this item shall be based on the nearest cubic meter (sic) (CM) calculated as the difference between the survey of established lines and levels before excavation of spoil material and levels after excavation of spoil material.
>
> 2.11. REMOVE AND REPLACE
>
> Removal and replacement of unsuitable material identified during Ground Surface Treatment and Subgrade Preparation. Includes excavation of unsuitable material, loading, hauling, stockpiling, and supply of suitable material, loading, hauling, placement, conditioning and compacting.
>
> This item shall be provisional and subject to discovery of unsuitable material during the Works.
>
> Mode of Measurement
>
> Measurement for payment of this item shall be based on nearest cubic meter (sic) (CM) calculated as the difference between the survey of established lines and levels after excavation and prior to the placement of fill, and lines and levels after the placement, compaction, and trimming of material to meet the requirements of Specifications and Drawings."

The dispute about the appropriate rate for certain work

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[94] Ambrose affidavit, filed 16 August 2018, exhibits page 85.

[95] Ambrose affidavit, filed 16 August 2018, exhibits pages 110 – 136.

[167] At paragraph 128 of his decision, the adjudicator provided an overview of this aspect of the dispute between the parties:[96]

> "The claimant submits that it was necessary to remove unsuitable material in Zone 3 and that it is entitled to be paid for the removal of the unsuitable material. In addition the claimant submits it is entitled to be paid for the replacement of the unsuitable material with suitable material taken from the borrow pit to the location where the unsuitable material was removed.
>
> The respondent submits that the rate for removal of the unsuitable material at Line Item 1.4.5.0 includes for the provision of replacement material from the borrow pits and that the claimant has no entitlement to a separate item for excavating in the borrow pit and placing the excavated material where the unsuitable material has been removed."

QBirt's submissions to the adjudicator

[168] QBirt's submissions are outlined at paragraph 130 of the adjudication decision. It submitted that, as a consequence of Fulton Hogan's failure to properly de-water the site, there was a significant increase in the volume of unsuitable material that needed to be removed. It claimed that the parties discussed the issue in late July 2017. It was agreed that QBirt would track the removal of the unsuitable material on day worksheets and divide the overall recorded cost of plant and labour by the volume of material removed to derive a rate per m^3 for the removal of the unsuitable material. QBirt tracked the additional hours of plant and labour over the period from 1 August to 17 September 2017.

[169] The issue was discussed again on or about 20 September 2017. A rate for removal of unsuitable material of $12.41 per m^3, based on the recorded day worksheets and the claimant's assessment that a volume of 43,75.28 m^3 of unsuitable material had been removed, was identified. The parties agreed that the additional work would not be treated as a variation.

[170] Fulton Hogan directed the claimant to adopt the rate of $12.59 per m^3, which was the rate applicable to Item 1.4.05.0 within the existing scope of works. QBirt made it clear to Fulton Hogan that the rate at 1.4.05.0 was to be used only to cover the removal of the excess material on the basis that the rate was comparable to the one that the claimant had developed from its analysis of the removal of unsuitable material works carried out. Fulton Hogan agreed with QBirt's proposition.

[171] QBirt understood Fulton Hogan's direction to mean that it would be reimbursed for the additional scope of works as follows:

(a) The removal of the additional unsuitable material would be reimbursed at the rate stated in Item 1.4.05.0; and

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[96] Ambrose affidavit, filed 16 August 2018, exhibits page 655.

(b) The excavation of suitable replacement material including transportation and backfilling would be reimbursed at the rates at Items 1.4.09.0, 1.4.10.0 and 1.4.23.0.

[172] QBirt considered that approach appropriate because there had been a significant increase in unsuitable material which made the work fundamentally different. QBirt adopted that methodology in its December payment claim which was rejected by the respondent on the basis that the rate at 1.4.05.0 included replacing the material. It adopted the same approach in the January claim.

[173] QBirt submitted that Fulton Hogan's rejection of its claim was not consistent with the method of measurement identified at 2.03 under the contract. The method of measurement included for excavation, loading, hauling and stockpiling. It did not include for replacement. QBirt submitted that Item 1.4.05.0 did not include a replacement component.

Fulton Hogan's submissions to the adjudicator

[174] The adjudicator set out Fulton Hogan's submissions at paragraph 131 of his decision.

[175] It submitted that the issue in dispute was narrow: whether line item 1.4.5.0 included removal *and* replacement.

[176] It submitted that QBirt was not entitled to additionally claim for the replacement of the material removed as the rate at line item 1.4.5.0 included replacement with Zone 3 general fill for which QBirt had already been paid –

- the correct method of measurement was at 2.11 which superseded 2.03;
- item 2.03 included for mass excavation of spoil whereas 2.11 included for the mass excavation of spoil and replacement. QBirt's reference to Method of Measurement 2.03 for line item 1.4.05.0 was in error. QBirt's tender, dated 23 November 2016, referenced item 2.11 at line item 1.4.05.0;
- QBirt's contention that line item 1.4.05.0 did not include both a remove and replace component was contrary to the agreement reached between the parties;
- Fulton Hogan did not agree to pay QBirt on line item 1.4.05.0 as well as line items 1.4.09.0, 1.4.10.0 or 1.4.23.0. There was no discussion at the September 2017 meeting in respect of removal of unsuitable fill and no agreement was reached;
- the line item rate of $12.59 per m^3 for the excavation and replacement of the unsuitable material was a reasonable rate.

[177] Also, Fulton Hogan said it had not failed to dewater the site.

Consideration of the issue by the adjudicator

[178] At paragraph 142 and following, the adjudicator considered the parties' submissions. His conclusions included the following –

"145 Whilst I am satisfied that the rate at line item 1.4.05.0 includes for both excavation and replacement, I am not satisfied that the rate includes for the specific conditions and difficulties encountered in the removal of the unsuitable material or for the haulage of replacement material over varying distances from the borrow pit. I am not satisfied that the rate of 1.4.05 is applicable to the nature of the work undertaken by the claimant.

146 From the information before me, in respect of line item 1.4.05, I am satisfied that the claimant had to remove 45.779 m^3 of unsuitable material … I am therefore satisfied that the claimant had to excavate, haul and place 45.779 m^3 of replacement material.

147 I am satisfied that the claimant should be reimbursed for the removal of the unsuitable material and replacement with suitable material as follows:

- Removal of 45,779 m^3 of unsuitable material at the rate for the removal of the unsuitable material based on the day work sheets which reflect the nature of the work undertaken by the claimant; and

- Excavation in borrow pit, haulage and placement of 45,799 m^3 based on the rates set out at items 1.4.09, 1.4.10, 1.4.22 and 1.4.23.

148 I have reviewed the parties submissions in respect of line items 1.4.09.0, 1.4.10.0 and 1.4.23.0 and I decided that 45,799 m^3 was replaced by fill as follows [thereafter a table followed – dividing the quantity of fill between the items] …

149 I have reviewed the day work sheets … I am not satisfied that the day work sheets and the schedule include for only excavation works … In addition there are discrepancies associated with the transfer of the hours recorded on the day work sheets to the schedule.

150 After giving consideration of the replacement/backfilling component of the day sheets and transfer errors, I am satisfied that a rate per m^3 of $11.51 is appropriate for the work undertaken by the claimant in removing the unsuitable material."

[179] Thereafter, the adjudicator calculated the amount owing for this work – setting out his methodology and noting again, at paragraph 155, Fulton Hogan's position:

"155 With reference to the payment schedule and the adjudication response, the respondent submits that the rate at line item 1.4.05.0 includes for replacement and that the claimant is not entitled to claim an additional 5.140 m^3 of fill at line item 1.04.09.0.

156 As noted above, I am satisfied that the claimant is entitled to claim for the removal of unsuitable material at the rate of $11,51 per m^3 and is entitled to claim for replacement at the rate of $7.04 per m^3 …"

[180] Those paragraphs were contained in the adjudicator's explanation of his calculations involving line item 1.4.09.0. He said something similar during his calculations involving line item 1.4.10.0 (at paragraphs 162 and 163) and line item 1.4.23.0 (at paragraphs 180 and 181).

Fulton Hogan's submissions

[181] Fulton Hogan attacked this aspect of the adjudicator's decision on several bases – namely, that the adjudicator disregarded section 14 of the Payments Act; that he denied Fulton Hogan natural justice because he took an approach that no one contended for in submissions; or that he failed to set out adequately in his reasons the process by which he came to, and justified, the valuation of the construction work.

[182] Fulton Hogan complained that the adjudicator did not say *why* he was not satisfied that the 1.4.05.0 rate applied.[97] He did not explain whether his conclusion that the 1.4.05.0 rate did not apply to the work was the result of his construction of the contract, or his acceptance of QBirt's submission that there had been an agreement between the parties as to the appropriate rate. The adjudicator did not determine the dispute about the cause of the unsuitable material or the agreement alleged by QBirt to have been made. Nor did he make a finding as to how these matters were relevant to the assessment of a claim under the subcontract.

[183] From the absence of reasons, it was argued, I might infer that the adjudicator was not doing the job that he was required to do under the Payments Act.[98] Fulton Hogan's complaint was not that the adjudicator's reasons were not (sufficiently) lengthy, elaborate or detailed. Its complaint was that the adjudicator made a decision without explaining how QBirt's entitlement to the claim arose.

[184] Fulton Hogan identified the sources of an entitlement to be paid under the contract and submitted that the adjudicator's reasons showed that he did not attempt to value the work in accordance with the contract. He developed his own rate for removal of unsuitable material (paragraph 150) and combined that with the rates in 1.4.09.0, 1.4.10.0 and 1.4.23.0 to create a rate for removal and replacement (paragraph 147). That was not a valuation in accordance with the subcontract. Nor was that something contended for by the parties.

[185] The adjudicator's reasons did not explain how the claim could be upheld as a variation claim (if indeed that was the basis upon which the adjudicator proceeded). Nor, if he proceeded under section 14(1)(b), did he explain why he concluded that the subcontract did not provide for the matter, or how his valuation complied with the section.

[186] Fulton Hogan referred me to section 14 of the Payments Act.[99] It submitted that were an adjudicator to "disregard the commandment" in section 14(1), he or she would fall into

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[97] Transcript of hearing 1 – 60, lines 13 – 45.

[98] Transcript of hearing 1 – 61.

[99] **14 Valuation of construction work and related goods and services**

jurisdictional error. Section 14(1)(b) did not apply – the subcontract provided for work under the subcontract and additional work. The adjudicator had not, therefore, valued the work in accordance with section 14 and had thereby committed jurisdictional error. [100]

[187] In the alternative, Fulton Hogan argued that the adjudicator denied Fulton Hogan natural justice by taking an approach that no one contended for in submissions; or failed to set out adequately in his reasons the process by which he came to, and justified, the valuation of the construction work.[101]

Authorities relied upon by Fulton Hogan

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(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued –

(a) under the contract; or

(b) if the contract does not provide for the matter, having regard to –

(i) the contract price for the work; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued –

(a) under the terms of the contract; or

(b) if the contract does not provide for the matter, having regard to –

(i) the contract price for the goods and services; and

(ii) any other rates or prices stated in the contract; and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect.

(3) For subsection (2)(b), for materials and components that are to form part of any building, structure or work arising from construction work, the only materials and components to be included in the valuation are those that have become or, on payment, will become the property of the party or other person for whom construction work is being carried out.

[100] Fulton Hogan's written submissions [44] – [53].

[101] Ibid [54]*ff.*

BM Alliance v BGC Contracting

[188] Fulton Hogan referred me to the decision of Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd.*[102] While there was a successful appeal from that decision, the nature of the appeal did not detract from the principles it applied.

[189] In *BM Alliance* it was argued that the adjudicator had committed jurisdictional error by awarding an amount in respect of which no contractual entitlement arose. In discussing the scheme of the Act and jurisdictional error, his Honour said (citations and footnotes omitted; emphasis by his Honour as well as my emphasis) –[103]

> "An adjudicator who misconstrues or misapplies a relevant contractual provision and, as a result, does not correctly decide the amount of the progress payment, if any, to be paid to the claimant does not, for that reason alone, make a jurisdictional error. As Hodgson JA stated in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*:
>
> > '… The adjudicator's duty is to come to a view as to what is properly payable, <u>on what the adjudicator considers to be the true construction of the contract</u> and the Act and the true merits of the claim.'"

[190] An error alleged to have been committed by the adjudicator concerned claimed termination costs. In rejecting BGC's claim for such costs, BM Alliance stated that the costs were not claimable under the contract because they had not accrued before the reference date. In its submissions to the adjudicator, BGC asserted that its claim arose under clause 17.4 of the contract. Such a claim had to be made in a written claim under clause 17.3(h) and it had not been so made. BM Alliance argued that the claim should therefore be excluded from the adjudicator's consideration.

[191] The adjudicator was satisfied that BGC was entitled to claim for the costs because they had been incurred before the reference date. He said, "I do not accept the respondent's argument that the claimant's entitlement only follows from the claimant's claim pursuant to STC clause 17.4 …".

[192] Applegarth J found that the adjudicator erred because he did not determine the claim on the basis it was put to him. His Honour said (my emphasis) –

> "[47] … The point is that BCG in its submissions to the adjudicator identified the basis of its claim as cl 17.4. It did not point to any other contractual entitlement to be paid these costs. It rested its claim on the fact that these costs had been incurred before the reference date, and this was the basis upon which the adjudicator allowed them ...

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[102] [2012] QSC 346.

[103] Ibid at [8].

…

[49] **BMA's point remains that BGC failed to rest its claim for termination costs on a provision of the contract which entitled it to recover such costs, other than cl 17.** The adjudicator's reasons did not identify any source of contractual entitlement. It is not now open to BGC to submit that it could have advanced all or part of its claim for termination costs upon some other provision of the contract or because it was requested to incur some of these costs. **The adjudicator did not have the claim put to him on that basis, and he did not determine it on that basis.**

…

[52] In carrying out the functions entrusted to him or her, an adjudicator must consider the submissions that have been made. That does not mean that the consideration of the merits of the payment claim is limited to issues actually raised by the submissions. An adjudicator's task is to come to a view as to what is properly payable, but the submissions do not set the parameters of the application or its determination. It may be that there are no submissions or only partial submissions. **However, BGC's submissions identified the source of the claimed entitlement as cl 17, and if the adjudicator was minded to assess that part of the claim on a different basis, natural justice would have required him to accord BMA the opportunity to respond.**

…

[55] … The adjudicator did not construe the contract and find a contractual entitlement to be paid the relevant costs. His reasons do not suggest that he regarded the entitlement as one sourced in cl 17 … Instead, his reasons indicate that he concluded that there was an entitlement simply because the costs had been incurred before the reference date.

[56] [Fulton Hogan drew my attention in particular to this paragraph – emphasising the sentences in bold below.] In *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd*, Brereton J stated in respect of the comparable New South Wales statute:

'The Act does not create a right to remuneration for construction work – that right is created by the construction contract. What the Act does is to create and regulate a right to obtain a progress payment.'

The adjudicator did not identify a contractual entitlement to be reimbursed the relevant costs. Instead, his reasons appear to assume an entitlement to be paid for costs incurred prior to the reference date. **He failed to identify the contractual or other legal basis of the entitlement**, and therefore to find an entitlement that rose prior to the reference date. By including sums which, as at the relevant date, BGC had no entitlement to be paid, and for

> which BGC had not shown an entitlement to be paid, the adjudicator ignored a limit on his jurisdiction and exceeded his jurisdiction. The fact that costs were incurred before the reference date was not sufficient to create an entitlement to be paid for those costs. **In failing to identify and find a legal source for that entitlement, the adjudicator … failed to take into account a matter he was required to take into account and thereby fell into jurisdictional error.** Another way of characterising the jurisdictional error is to say that in finding that an entitlement to be paid existed simply because BGC incurred costs before the reference date, the adjudicator **misconceived the nature of the functions he was performing or misapprehended the limits on his functions or powers.**"

Bauen Constructions v Westwood Interiors

[193] I was referred to Bauen Constructions v Westwood Interiors[104] and the decision of Jackson J in *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors* [2016] QSC 108.

[194] In *Bauen*, one matter the adjudicator had to determine was the existence of defects as at the reference date. In his reasons he said that he "examined" the adjudication response in relation to the allegation of defective work. That was held not to be the task entrusted to him by the statute. Section 22(2) of the New South Wales Act set out the matters he was to "consider" and they included the payment schedule. He was also required to give reasons.

[195] After referring to the High Court case of *Waterways Authority v Fitzgibbons,*[105] which dealt with the sufficiency of reasons in the context of the courts, McDougall J said –[106]

> "Although adjudicators work under significantly greater time pressures than judges, and their reasons should not be scrutinised with the attention to detail which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal, nonetheless the reasons must indicate why it was that the adjudicator arrived at the determination in accordance with s 22(1). Just as there is with judges, so too with adjudicators there is a presumption that the stated reasons are all of the reasons for coming to the conclusion expressed.
>
> Of concern in *Waterways* … was the primary judge's acceptance of the evidence of one medical practitioner over that of others. It appears from what Hayne J said at [131] that the trial judge concluded that the evidence of a particular practitioner should be accepted and preferred "but disclosed no reasoning supporting that conclusion". As his Honour said at the end of the same paragraph, '[t]he absence of explanation for, and reasoning and support of, the conclusion expressed … reveals that the process of fact finding miscarried'.

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[104] [2010] NSWSC 1359.

[105] (2005) 79 ALJR 1816.

[106] Ibid [23] – [25].

[196] A little later, his Honour said, in effect, that the adjudicator (with respect to another aspect of the dispute) had abdicated his obligation to reason where he had given no intellectual justification for his decision; he had not revealed his process of consideration of reasoning. His Honour also said that the parties were entitled to see the process which led to the conclusion –

> "… it is not appropriate to expect the detail of reasoning from adjudicators that litigants rightly expect from judges of this Court, from judges of equivalent courts, and from judges of intermediate and ultimate appellate courts. **But the parties to an adjudication application are still entitled to see some intellectual process that leads to the conclusion, particularly where, in many cases, very substantial sums of money are involved.**
>
> In those circumstances … this is again a case of jurisdictional error because on the face of the reasons, and by application of what was said in *Halkat*, the adjudicator did not perform his statutory function; and of denial of natural justice."

[197] In *Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd,*[107] after referring to the equivalent of section 26 of the Payments Act, Giles JA said –

> … The adjudicator had to make a determination, and he did not make a determination if he arrived at an adjudicated amount by a process wholly unrelated to a consideration of those matters [that is, the matters he was required to consider under section 26].

Sierra Property

[198] *Sierra Property* concerned an adjudicator's failure to comply with the requirement to include reasons for his decision. In that case, there were extensive submissions made by the parties about the extent of the work done by the claimant across nine categories of contract work. The claimant claimed for work ranging between 84 and 100 percent of the work for each category. The respondent submitted that the work had not been undertaken, or not to the value claimed. The adjudicator dealt with the dispute (or the nine separate disputes) as follows:[108]

> "However, after carefully considering the [applicant's] material and also the concerns in relation to the contract works portion of the claim (see, for example, paragraph 119 of the adjudication response), I am satisfied that the [first respondent] is entitled only to 95 per cent of the contract works portion of the claim, that is, $118,030.00 (excluding GST) or $29,833.00 (including GST)."

[199] The applicant submitted that the adjudicator's method of arriving at 95 per cent was completely unexplained. He made no reference to the specific disputes. He made no finding about the value of work for any relevant category.

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[107] [2007] NSWCA 32.

[108] *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108 at [26].

[200] The applicant made four complaints about the adjudication, including that the adjudicator "denied the applicant natural justice by failing to inform the applicant that he proposed to adopt a methodology which did not conform to the treatment of the dispute between the parties"; and that the decision did not include the reasons for it in the manner required.

[201] Section 26(3) of the Payments Act provides that an adjudicator's decision must be in writing, and must include reasons. In the course of considering that requirement, his Honour referred to *Bauen* and emphasised its statement that "the reasons must indicate why it was that the adjudicator arrived at the determination given in accordance with 22(1)". His Honour also referred to the following statements of principle from other authorities:

- "In a fully contested adjudication in which several issues have been raised, the adjudicator's reasons should demonstrate that he or she endeavoured in good faith to consider those issues …"; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd.*[109]

- "Provided it is apparent that the adjudicator has considered pertinent issues in good faith, very considerable latitude in my view should be afforded to an adjudicator as to the manner and form of the determination is to introduce an element of artificiality such as might well defeat the object and purpose of the [Payments Act] and the aim of the process entirely. On the other hand the mere fact an adjudicator says he has read 'all of the submissions and accompanying documents' or simply that he or she is 'satisfied' without more in relation to a particular issue under consideration may not, subject to viewing the determination as a whole survive as adequate reasons": *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd.*[110]

- "The absence of reasons, even in truncated proceedings as occur with adjudicators exercising this statutory jurisdiction, can clearly affect the decision-making process": *Transfield Services (Australia) Pty Ltd v Nortask Pty Ltd*.[111]

[202] His Honour found that the adjudicator's reasons were opaque. Although he said that he carefully considered the applicant's material, the only particular reference made was to paragraph 119 of the adjudication response. No reference was made to the extent of the work completed in any of the nine relevant categories either as claimed by the first respondent or as disputed by the applicant. The adjudicator did not adequately discharge the obligation to "include the reasons for the decision" under section 26(3)(b) of the Payments Act.[112] The failure to include reasons for the decision was a jurisdictional error.[113]

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[109] [2006] NSWSC 1.

[110] [2012] NSWSC 1466.

[111] [2012] QSC 306.

[112] Op cit [44].

[113] Op cit [67].

[203] His Honour noted[114] that the applicant had not relied upon section 27B of the *Acts Interpretation Act* 1954 (Qld), which provides:

> "If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
>
> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based.The application of section 27B may be displaced wholly or partly by an Act's contrary intention: section 4, *Acts Interpretation Act*."

[204] His Honour formed no concluded opinion about the application of section 27B. He said:

> "[48] Irrespective of the possible application of s 27B, it clearly enough emerges that, notwithstanding the specific context of a decision given by an adjudicator under the Payments Act, for the requirement in s 26(3) that the decision must be in writing and include the reasons for the decision to be meaningful, it must require more than what was done by the second respondent in relation to the claim for the original contract work."

Section 27B Acts Interpretation Act 1954

[205] Fulton Hogan did rely upon section 27B of the *Acts Interpretation Act* 1954. It submitted that no contrary intention was displayed in the Payments Act. Section 27B required a standard of decision making which was widely applicable (to a tribunal, authority, body or person) – thus its application was not displaced by the fact that adjudicators were legally unqualified. Nor did the tight timeframes justify the exclusion of the section 27B standard, which was easily achievable.

QBirt's submissions

[206] Qbirt submitted that the finding that the contract rate at 1.4.05 was not applicable to the particular work was at worst a non-jurisdictional error, referring to *Probuild Construction (Aust) Pty Ltd v Shade Systems Pty Ltd*[115] at [2]; *BM Alliance* at first instance at [8]; and *John Holland Pty Ptd v TAC Pacific Pty Ltd*[116] at [56].[117]

[207] The paragraphs referred to from the authorities mentioned made the following points –

- the Payments Act ousted the jurisdiction of the Supreme Court to quash a determination by an adjudicator for error of law on the face of the record;

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[114] Op cit [46].

[115] [2018] HCA 4.

[116] [2010]1 Qd R 302.

[117] QBirt's written submissions at [89] – [91].

- an adjudicator who misconstrues or misapplies a contractual provision does not commit jurisdictional error for that reason alone;

- [from *John Holland*] "The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly determining complex legal issues in adjudications of the present kind after considering the parties' submissions."

[208] QBirt's submitted that the adjudicator's decision showed the intellectual justification, foundation and logical basis for the conclusions he reached – as required by the authorities.

[209] Qbirt submitted that it was implicit in the following statement by the adjudicator that he "accepted QBirt's submission that the parties had agreed that the additional works would not be treated as a variation but would be valued in some other way". The adjudicator said, in the sixth dot point of paragraph 142 of his decision that he was "satisfied" that:[118]

> "The parties agree that the claimant is to be reimbursed for both the removal of unsuitable material and the placement of the suitable material. However the parties do not agree on the value of the removal and replacement works."

[210] QBirt submitted that the adjudicator's process of reasoning was thereby revealed (my emphasis) –[119]

> "QBirt submitted that in respect of these works there was agreement between the parties that the works would not be treated as a variation but would be paid at certain contract rates and the works recorded on day work sheets.
>
> QBirt claimed for the removal works using contract work rates (that it believed have been agreed) (namely item 1.4.05.0 in combination with one of 1.4.09.0, 1.4.10.0 or 1.4.23.0). Fulton Hogan disputed any agreement, including in respect of those rates.
>
> … **it is implicit in the finding … above that the adjudicator accepted QBirt's submission that the parties had agreed (to vary the Subcontract) so that the additional works would not be treated as a variation and would be valued in some other way.** The adjudicator did not accept that the contract work rates had been agreed (as asserted by QBirt) and he proceeded to determine appropriate rates himself based on the permissible factors in s 14(1)(b) of the Payments Act."

[211] In oral submissions, Queen's Counsel for QBirt accepted that there was force in the suggestion that all the adjudicator was doing in paragraph 142 was reciting the context for his decision – rather than expressing a preference for one position over another.[120]

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[118] Ibid [92].

[119] Ibid [99] – [101].

[120] Transcript of hearing 1 – 102, lines 8 – 17.

[212] Queen's Counsel for QBirt also accepted that if – as she submitted – the adjudicator had accepted that there was agreement that the work was to be charged applying "new rates", he did not any point state expressly his findings about the alleged agreement to vary the contract schedule of rates.[121]

[213] QBirt submitted that the better view was that section 27B of the *Acts Interpretation Act* 1954 was displaced by reason of the time limits on adjudication decisions in section 25 of the Payments Act.

Authorities relied upon by QBirt

Watkins Contracting v Hyatt

[214] QBirt relied upon *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd,*[122] in particular at paragraphs [64], [95] and [96], for its argument that there had been no breach of natural justice in the present case.

[215] *Watkins* concerned the adjudication of a payment claim made after a construction contract was said to be terminated. Watkins argued that the decision of the adjudicator, in Hyatt's favour, was void because, the construction contract having been terminated (for Hyatt's breach), there was no available reference date for the payment claim. Hyatt denied that it had breached the contract and that the contract had been terminated.

[216] Watkins argued that the adjudicator committed jurisdictional error by failing to consider, or ignoring, its submissions about the termination of the contract. It also argued that the adjudicator decided the adjudication on the basis that certain documents and implied terms did not form part of the contract, when that was a position for which neither party contended.

[217] After reciting the arguments of the parties, Brown J set out "Relevant Principles". At [64], one of the paragraphs to which my attention was directed, under the sub-heading "Natural Justice" her Honour said –

> "A substantial denial of the natural justice that the Act requires to be given would invalidate an adjudicator's decision such that it would be declared void. The authorities were helpfully analysed and applied by Applegarth J in *John Holland Pty Ltd v TAC Pacific.*[123] His Honour concluded that there was a substantial denial of natural justice where an adjudicator has decided a dispute on a basis for which neither party contended, unless it can be said that no submissions could have been made to the adjudicator which might have produced a different result."

[218] QBirt reproduced this paragraph in its written submissions and emphasised the phrase "for which neither party contended". It submitted that it was "not a requirement that <u>both</u> parties contend for a result".

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[121] Transcript of hearing 1 – 105, line 13 – 1 – 106, line 11.

[122] [2018] QSC 65.

[123] [2010] 1 Qd R 302 – referred to by Applegarth J at [32].

[219] It is necessary to consider *John Holland.* One of the arguments made in *John Holland* was that there had been a substantial denial of natural justice because the adjudicator relied upon a decision (*Plaza West*) "where neither party did so, and the adjudicator did not notify the parties of his intention to rely upon the decision and his interpretation of it, nor seek further submissions from the parties".[124]

[220] In the adjudication, John Holland relied upon the decision of *Goss*. TAC did not submit that *Goss* no longer stated the law, but submitted that it did not have the meaning contended for by John Holland. In his decision, the adjudicator noted that John Holland did not refer to *Plaza West* which the adjudicator found was "relevantly at odds" with *Goss.* He found that *Plaza West* over turned Goss and relied upon it in reaching his adjudication decision about the matter in dispute, which concerned the interplay between section 99 of the Payments Act and contractual preconditions.

[221] TAC submitted that there had not been a substantial denial of natural justice because the parties had an opportunity to make submissions about the matter in dispute (that is, the interplay between the Act and contractual preconditions).

[222] In reaching his decision, Applegarth J referred to *Musico v Davenport,*[125]and emphasised McDougall J's conclusion that "where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have 'a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it".

[223] In finding that there had been a breach of natural justice, his Honour said (footnotes omitted, my emphasis) –

> "[50] **In determining whether there has been a substantial denial of natural justice it is not sufficient to simply identify the issue in dispute between the parties, and to determine whether they had an opportunity to make submissions with respect to that issue** … in the present context the reference to "a critical issue or factor" should not be equated with the general issue joined between the parties in dispute. **The subject of a decision is entitled to have his or her mind directed to "the critical issues or factors *on which the decision is likely to turn* in order to have an opportunity of dealing with it".** In a case such as the present, if the decision is likely to turn on a point of law not contended for by one of the parties, and about which the parties have not been given an opportunity to address, then the requirements of natural justice will not have been observed. It is the issue of law, and not the general issue in dispute, upon which the decision is likely to turn.
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> …

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[124] Ibid [4].

[125] [2003] NSWSC 977 at [107] – [108].

[54] It is not to the point that the *result* was consistent with TAC's submissions to the adjudicator. The result was reached by a view of the law for which TAC did not contend, and for which it would have not contended had it and John Holland been given the opportunity to address *Plaza West* and whether it affected the correctness of *Goss*.

[55] In the circumstances, **it was not sufficient to discharge the requirements of natural justice that John Holland had the opportunity to address the fundamental issue in dispute about the operation of s 99 of the Act and whether John Holland could rely on the contractual preconditions in response to TAC's payment claim. Natural justice required the adjudicator to afford the parties the opportunity to make submissions about a critical issue upon which he was minded to determine the matter, being a view of the law for which neither party contended.**"

[224] Returning to the decision in *Watkins*, her Honour found that the adjudicator had regard to Watkins' submissions and provided sufficient reasons for his conclusion that a reference date was available. Her Honour's finding that the adjudicator considered Watkins' submissions meant that there had been no denial of natural justice in that sense.

[225] In its written submissions at [57], Fulton Hogan argued that the adjudicator "took an approach that no one suggested. There were obvious submissions that Fulton Hogan could have advanced against it: that he was in error in his conclusion as to why rate 1.4.05 did not apply; that if the work was not to be valued under the Schedule of Rates, then it could only be claimed as a variation; and that the approach he was taking was redolent of a *quantum meruit* valuation not a contractual valuation".

[226] In reply to this argument, QBirt said in its written submissions:

"104. Another relevant part of the decision in *Watkins Contracting*, which goes to the allegation made in [57] of Fulton Hogan's Outline of Argument is at [95] – [96] (footnotes omitted, underlining added):

'[95] *A further and alternative argument raised by Watkins is that the decision was invalid because the adjudicator effectively treated certain documents and implied terms as not forming part of the contract by refusing to consider them and that was not a position contended for by either party. In so doing it is contended the adjudicator denied Watkins natural justice.*

[96] *Hyatt in its adjudication application had stated the documents which it contended formed part of the written contract and had specifically stated the contract was, insofar as it was written, limited to those documents. Watkins took a different view of what was constituted by the contract in its adjudication response. It is not correct to say that Hyatt did not dispute that either the MMGSR, SHEWMS [the documents] or implied terms did not form part of the contract, as Hyatt set out in its*

> *adjudication application what it contended constituted the contract. In the circumstances, natural justice did not require the adjudicator to seek further submissions regarding the said documents and the implied terms prior to determining that they did not form part of the contract. It is not correct to say that the adjudicator made his determination on grounds not contended for by either party since clearly it was a matter in issue which had to be resolved by him. Hyatt raised what it said was the relevant part of the contract and Watkins responded with what it contended as the relevant part of the contract. This ground is not made out.'*
>
> 105. Here, QBirt in its adjudication application made contentions about the agreement and the appropriate rates. Fulton Hogan had an opportunity to respond to those allegations. There was no denial of natural justice."

[227] In oral submissions, QBirt argued that Fulton Hogan had an opportunity to dispute the rates that QBirt asserted were the agreed rates for the removal and replacement work.[126]

Futurepower Developments v TJ & RF Fordham

[228] QBirt referred me to *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd*[127] in which Ball J collected the principles relevant to the question of an adjudicator's adequate consideration of a party's submissions and the sufficiency of their reasons were collected as follows (citations omitted):

> "First, reasoning for an administrative decision should not be read "minutely and finely with an eye keenly attuned to the perception of error" … Rather, a broad reading of the reasoning should be adopted in recognition of the fact that administrative decisions are not made by experts accustomed to legal expression …
>
> Second, the reasons should be read in their entirety …
>
> Third, consideration of whether the applicant has been afforded procedural fairness must take into account the scheme prescribed by the Act and the fact that it is "inappropriate" for the court to "sift finely through the reasons of the decision maker in an attempt to find slips warranting the court's intervention" …
>
> Fourth, and related to the third point, a failure to give "lengthy elaborate or detailed" reasons is not a denial of natural justice … In fact, the Act itself deters adjudicators against giving lengthy reasons by prescribing a compressed (10 business days) timeline for the provision of reasons … So long as reasoning

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[126] Transcript of hearing, 1 – 106 line 35 – 1 – 107, line 10.

[127] [2017] NSWSC 232 at [10] – [15].

> demonstrates that the adjudicator has turned his or her mind to the issues raised, natural justice, and the parties interest in expediency, will have been served …
>
> Fifth, an honest error in identifying or addressing issues for determination is not the same as making a determination without good faith. The former will not make an adjudicator determination invalid while the latter will …"

Cragcorp v Qld Civil Engineering (QCE)

[229] QBirt referred me to *Cragcorp Pty Ltd v Qld Civil Engineering Pty Ltd & Ors*[128] (a decision of Lyons SJA) after the hearing had concluded. It involved a challenge to an adjudication decision on the basis (*inter alia*) that the adjudicator denied Cragcorp natural justice and failed to give proper written reasons in non-compliance with section 26(3) of the Payments Act. I was referred in particular to her Honour's conclusions about the adequacy of the adjudicator's reasons.

[230] It had been suggested that, in determining a controversy about a particular variation (VO001), the adjudicator failed to have regard to the scheduled amount – but that was in fact not so – she had.[129] However, her Honour accepted that while the adjudicator discussed the submissions of the parties about this variation, she did not identify –

- conclusions as to the amounts for each element of work claimed;
- the basis of the total amount assessed from the elements of work she concluded;
- from which parties' evidence she deduced the elements of work said to be part of the variation; and
- from which parties' evidence she calculated the value as against the contractual standard.

[231] In finding that there had been no jurisdictional error, her Honour said (footnotes omitted, my emphasis):

> "[96] Furthermore, it is 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**

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[128] [2018] QSC 203.

[129] Ibid [94].

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 … **the Adjudicator considered the submissions before her that had been properly made and concluded that it was a variation.** The Adjudicator was also satisfied that the value of the 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 reasons were inconsistent or illogical, that has not be sufficient to establish jurisdictional error if there was at least some process of reasoning disclosed in the reason. As Brereton J held in *City of Ryde v AMFM Constructions Pty Ltd & Anor:*[130]

' … **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 specific factors in accordance with s 22 of the Act.**'

…

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 a 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 did not 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.

…

It is not realistic to expect an adjudicator operating under the time constraints imposed by the legislation to produce reasons that address, in a detailed way, every single point raised in that bulky material.

[99] … The task required [by section 26] was summarised by Burns J in *Oswald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors* in the following terms:

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[130] [2011] NSWSC 1469. I have not set out the whole of the quote referred to by her Honour.

> '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:
>
> > "[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 conducing 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 paid was in fact payable."'
>
> [100] In my view that was in fact the process that the Adjudicator engaged in …"

Conclusions (value of additional work)

[232] It is helpful to go to the actual submissions of the parties to the adjudicator, rather than to his summary of them, to resolve this issue.

[233] QBirt stated, in its adjudication application, that the method of measurement for line item 1.4.05 was 2.03 – which did not include replacement. Its submissions drew on that proposition: (my emphasis):[131]

> "5.1.16 The adjudicator will note that the method of measurement for this item [1.4.05] pertains only to the removal of spoil, and does not have a replace component as now alleged by Fulton Hogan. The words referable to this method of measurement include only the excavation, loading, hauling and stockpiling of spoil, and not the replacement costs which are properly claimed under the contract works items the subject of this adjudication.
>
> 5.1.17 As outlined above, and confirmed in the statutory declaration of Mr Rados, there was no 'replace component' of item 1.4.05.0 as it applied to

[131] Ambrose affidavit, filed 16 August 2018, exhibits, pages 375*ff.*

that agreement (ie with respect to the claim for removal of the additional work directed for the removal of unsuitable spoil).

5.1.18 Whilst item 1.4.05.0 was included in the original scope of the "*Mass Excavation – Cut to Spoil – Excavate to spoil and existing pits and/or localised soft area and replace with Zone 3 General Fill*" the additional removal of unsuitable spoil brought about by Fulton Hogan's failure to dewater were claimed, **by agreement and in accordance with the method of measurement under the Contract, under Item 14.5.0 (sic)**. The work to replace the unsuitable materials was not captured under the agreement to remove the fill at the rate priced for item 1.4.05.0 but rather the ordinary borrow to fill rate for the relevant scope item.

5.1.19 The additional works, charged at the rate in item 1.4.05.0 **by agreement** between the parties were purely the removal of unsuitable spoil which was significantly increased as a consequence of the saturation of the Site …

5.1.20 While the contract scope for the Borrow to Fill work was increased due to the volume of the spoil removed it was otherwise not affected by the agreement to claim the removal of unsuitable spoil under item 1.4.05.0 …

…

5.1.25 QBirt undertook the works on the basis of that agreement. Several months after completion of the works, Fulton Hogan has inexplicably changed the nature of both the activity 14.05.0 (sic) as well as the basis upon which QBirt were direction to utilise that item in a further attempt to avoid payment due for the contract work.

5.1.26 Should the scheduled amounts stand in respect of those items, QBirt will have received no compensation for the equivalent volumes of replacement fill due to them under line item 1.4.05.0 and remains entitled to payment for the actual Borrow to Fill quantities at the relevant rate for each of the contract works items."

[234] The agreement referred to was the agreement which QBirt alleged was reached at a meeting on or about 20 September 2017, in pursuance of which QBirt was directed to remove unsuitable material (of increased volume) "pursuant to item 14.0.5.0 (sic) of the existing scope. That item was priced at a rate of 12.59 per m^3 and was similar to the price proposed to undertake the additional work by Mr Rados".

[235] The submissions stated that "[t]he item description was not relevant to that discussion, but rather the comparable rate. The agreement to price the removal of unsuitable materials

under that contract works item was based solely upon the comparable rate, and not on the description of the work".[132]

[236] QBirt explained that it then undertook the removal at that 12.59 per m^3 rate (for which it was paid in full) and then "proceeded to undertake its original scope borrow to fill items (including 1.4.09.0, 1.4.10. 1.4.22.0 and 1.4.23.0) and claim those works in accordance with the contract".[133]

[237] So, QBirt submitted that it was agreed that it would *remove* the additional material at the rate stated for line item 1.4.05.0 – not because line item 1.4.05.0 was for removal *and* replacement – but because the *rate* nominated for that work was close to the rate suggested by Mr Rados as appropriate for that work. In support of that argument, it relied upon the fact that the method of measurement for line item 1.4.05.0 (as it appears in the schedule to the subcontract) was 2.03 – which includes only excavation, loading, hauling and stockpiling.

[238] Fulton Hogan submitted that the reference to 2.03 was in error.[134] The method of measurement for line item 1.4.05 had been updated (by the time of the "agreement" referred to by QBirt) – that was "indisputable". Fulton Hogan referred to e-mails from QBirt which indicated that, as at 23 November 2016, the method of measurement for line item 1.4.05 was 2.11.[135] Further, Ben Vance denied any discussion with Mr Rados about the unsuitable material with QBirt in September 2017.

[239] At paragraph 370, Fulton Hogan submitted:

> "The Respondent submits that the agreement alleged by the Claimant cannot be accepted. The allegation is unsupported by any documentary evidence (in contrast with the agreement contended by the Respondent evidenced by the tender) and, with respect, is completely illogical – particularly when item 1.4.5 clearly has "remove" and "replace" components. Why would the Respondent agree to pay the Claimant under two line items when only one was applicable?"

[240] Thus, the factual dispute which the adjudicator was required to resolve was whether there was an agreement between the parties as outlined by QBirt.

[241] The resolution of that dispute was not simple. It was complicated by the issue of the relevance of 1.4.05.0's "description of works" (that is, remove and replace) and the fact that QBirt was supporting its argument by reference to, indisputably, the superseded method of measurement. The adjudicator made no finding about that "agreement".

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[132] Ibid page 371, paragraph 5.1.9.

[133] Ibid page 374.

[134] Ambrose affidavit, filed 16 August 2018, exhibits page 510.

[135] Ibid pages 261*ff* – the revised method of measurement for 1.4.5 is at 267.

[242] I do not agree with QBirt's submission that the adjudicator found, in the sixth dot point of his paragraph 142, that the parties had "agreed" that the additional works would be valued "in some other way".[136]

[243] As a reminder, at the sixth dot point, the adjudicator said: "The parties agree that the claimant is to be reimbursed for both the removal of the unsuitable material and the placement of suitable material. However the parties do not agree on the value of the removal and replacement works".

[244] The language of that dot point does not naturally imply a finding that the parties had agreed that the work would be valued in some other way – nor does that implication arise straining the language to its limits. Rather, the content of that sixth dot point outlines the adjudicator's understanding of the matter in dispute between the parties.

[245] The first phrase in paragraph 145, "Whilst I am satisfied that the rate at line item 1.4.05 includes for both excavation and replacement", is likely to refer to the adjudicator's resolution of the issue between the parties as to whether method of measurement 2.03 or 2.11 applied to 1.4.05. However, the adjudicator provided no reasons for reaching that conclusion, such as his finding that method of measurement 2.03 had been superseded as reflected in QBirt's e-mail of 23 November 2017.

[246] His finding about the applicable method of measurement mattered because QBirt relied, at least to some extent, on method of measurement 2.03 relating to line item 1.4.05.0 to make its point that it was only the *rate* for that line item that mattered, not the works described to be the subject of it, to in turn support its argument that the parties had reached an agreement about the value of the removal and replacement work.

[247] Also, the adjudicator's decision contains no explanation for his following finding that he was "not satisfied that the rate includes for the specific conditions and difficulties encountered in the removal of unsuitable material or for the haulage of replacement material over varying distances from the borrow pit. I am not satisfied that the rate is applicable to the nature of the work undertaken by the claimant".

[248] It is impossible to know whether the adjudicator reached that conclusion on the basis of his construction of the contract; or on the basis of his preference for the evidence of one of the parties about the discussion in September 2017; or for reasons which have to do with his appreciation of appropriate remuneration.

[249] The issue raised by the parties was a narrow one – as Fulton Hogan submitted. It was the way in which the 1.4.05.0 rate was to be applied to the removal and replacement work – either as the rate for removal only (as per the agreement alleged by QBirt), or the rate for removal and replacement, consistent with the subcontract and as alleged by Fulton Hogan.

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[136] As noted above, at the sixth dot point, the adjudicator said:

[250] As noted, the adjudicator did not explain why he was not satisfied that the removal and replacement rate was applicable to the nature of the work undertaken by QBirt. Nor did he explain why he did not apply the rate QBirt claimed had been agreed to the work (that is, the separate rates for removal and replacement).

[251] The adjudicator's reasons do not demonstrate that he endeavoured in good faith to consider the issue in contest (*cf Brookhollow*). They do not reveal his reasoning processes (*cf Bauen*). They are opaque (*cf Sierra*).

[252] In the absence of reasons, I cannot conclude that the adjudicator has undertaken the task required of him under the Act. I cannot be satisfied that he has not misconceived the nature of the functions that he was to perform.

[253] The adjudicator does not explain whether he is relying on section 14(1)(b) of the Payments Act and, if so, how or why.

[254] I have already rejected QBirt's argument that the adjudicator "found" that the parties had agreed to value the work "in some other way", and therefore I do not accept QBirt's argument that it followed that he was relying on section 14(1)(b).

[255] As to whether the adjudicator denied Fulton Hogan natural justice, the concern is not that Fulton Hogan did not have an opportunity to dispute the rate contended for by QBirt (*cf Watkins Contracting*) – it did. The point is that the matter in issue between the parties was not the calculation of an appropriate rate per se but rather whether there had been a certain agreement between them about the method of valuation of the work.

[256] The adjudicator resolved the issue by applying a rate/method for which neither party contended, and in respect of which neither party was given an opportunity to make submissions (*cf John Holland).* As it was in *BM Alliance*, the adjudicator did not determine the claim on the basis on which it was put to him. While he was not limited to the issues actually raised by the submissions, if he decided to assess the claim on another basis, then he was required to provide the parties with an opportunity to respond accordingly.

[257] I find that there has been jurisdictional error in this part of the adjudication: the adjudicator has not undertaken the task required of him; his reasons are inadequate; and there has been a denial of natural justice.

[258] I do not need to consider the application of section 27B because the adjudicator did not provide reasons for his decision as required by section 26(3) of the Payments Act.

Summary

[259] In summary, for the reasons above, I find that –

- There was no jurisdictional error involved in the adjudicator's determining the dispute about the set offs in the adjudication;
- There was no jurisdictional error involved in the adjudicator's use of the amount agreed by the parties as the amount previously certified;

- The adjudicator committed jurisdictional error in his decision about work under contract items 1.4.09.0, 1.4.10.0 and 1.4.23.0.

[260] I therefore declare that one of the Affected Parts of the adjudication decision is void for jurisdictional error – that is the part identified as 1(a) in the Originating Application.

[261] I direct the parties to confer, within 14 days of this order, with a view to agreeing upon the orders to be made to give effect to my declarations, including injunctive relief and any order as to costs.

[262] Failing agreement, I direct the parties to provide written submissions as to the further orders to be made including injunctive relief and any order as to costs, within 21 days of this order.

[263] Otherwise, I adjourn the hearing of the application to a date to be fixed.