SUPREME COURT OF QUEENSLAND

CITATION:	*ABC Glass & Aluminium Pty Ltd v Nik Nominees Pty Ltd & Anor* [2019] QSC 171
PARTIES:	**ABC GLASS & ALUMINIUM PTY LTD (ACN 082 806 755) AS TRUSTEE** (applicant) **v** **NIK NOMINEES PTY LTD (ACN 107 967 519) AS TRUSTEE** (first respondent) **ROBERT DOUGLAS SUNDERCOMBE** (second respondent)
FILE NO:	TS994 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for declaration and injunction
DELIVERED ON:	17 July 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2019
JUDGE:	Mullins J
ORDER:	**1. The application filed on 28 November 2018 is dismissed.** **2. The applicant must pay the first respondent's costs of the application.** **3. The question of any ancillary orders 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 – where the applicant challenges the adjudication decision for jurisdictional errors – whether the adjudicator was in substantial breach of natural justice by relying on a case authority to which neither party had referred the adjudicator and misstating the effect of the authority– whether the parties should have been provided with an opportunity to make additional submissions in respect of the case authority – where the adjudicator's consideration of the case authority did not affect the finding on the evidence that resolved the issue rather than the application of the case authority – whether the adjudicator otherwise failed to discharge his statutory function

Building and Construction Industry Payments Act 2004 (Qld), s 3, s 13, s 14, s 25, s 26

Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd [2012] NSWCA 31, considered
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205, considered
Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd [2010] NSWSC 818, considered
Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd [2018] QSC 310, cited
Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd [2018] QSC 65, considered

COUNSEL: M H Martinez for the applicant
L N Campbell for the first respondent

SOLICITORS: Wilson Ryan Grose for the applicant
Connolly Suthers Lawyers for the first respondent

[1] By decision made 22 November 2018 pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) the second respondent as the adjudicator determined that the first respondent (to which I will refer as the respondent) was entitled to a progress payment in relation to a construction contract within the meaning of the Act in the adjudicated amount of $334,023.23, including GST. The applicant seeks a declaration that the adjudication decision is void and an injunction restraining the respondent from seeking to enforce it. The dispute between the applicant and the respondent arose out of refurbishment works at the Hamilton Island Yacht Club Villas. The respondent fabricates aluminium products and fabricated and supplied the shutters that were installed on the project by the applicant.

[2] Section 3(1) of the Act specifies that, subject to that section, the Act applies to construction contracts, but then s 3(2) of the Act sets out the categories of construction contracts that are excluded from the Act's operation. The basis for seeking the relief is an allegation that the adjudicator made two jurisdictional errors:

(a) breach of natural justice by making a decision on the applicant's submission there was no construction contract within the meaning of s 3(2)(c) of the Act based on a view of the law for which neither party contended and in respect of which the adjudicator provided no opportunity to the parties to make submissions concerning his view of the law;

(b) failing to discharge his function under the Act by considering material which was not permitted by s 26(2) of the Act, providing a determination without foundation, failing to intellectually engage with the issues, and not deciding his jurisdiction properly under s 25(3) of the Act.

Adjudication process

[3] The respondent served a payment claim under the Act on the applicant on 26 September 2018 for $344,432.92, including GST. The contract works were shown in the accompanying document as having a total value of $1,148,529.80, including GST, in respect of which payments had been received or credited in the sum of $804,096.88, leaving the balance of the amount claimed as the final payment due under the contract. The payments comprised $220,000 for invoice 10225, $110,000 for invoice 10261, $110,000 for invoice 10279, $220,000 for invoice 10306 and $40,000 for invoice 10322. A credit of $104,096.88 was applied in respect of a direct payment made by the head contractor to Alspec which had supplied materials to the respondent.

[4] On 11 October 2018 the applicant served a payment schedule in response to the payment claim in which it stated that the amount of the payment that it proposed to make was nil. The applicant asserted there was no construction contract within the definition under the Act, as the agreement between the parties "was a cooperative enterprise … for the specific purpose of the Project whereby the parties shared resources including staff, management responsibility and profit". The applicant relied on the fact that both the applicant and the respondent had a direct relationship with the head contractor and any subcontractors and/or suppliers and the respondent had received direct payment from the head contractor, as evidenced by the payment claim. The second reason advanced was that, even if the arrangement between the parties was a construction contract, s 3(2)(c) of the Act excluded the contract because the arrangement was for profit share. A third reason asserted that the respondent was not entitled to make a final payment claim as the works had not been completed under the contract (that is, no reference date). Additional reasons were then advanced for why the respondent was not entitled to payment for the amount claimed, including a claim that the final scope of works underwent a complete redesign which resulted in a significant reduction in the price of the works.

[5] The respondent served an adjudication application dated 25 October 2018. The applicant issued an adjudication response that was accompanied by a statutory declaration by Mr Connell who is the director of the applicant. The adjudicator's decision was dated 22 November 2018.

The adjudicator's decision

[6] The adjudicator addressed the issue of jurisdiction by reference to the three matters raised by the applicant, namely that there was no construction contract, the contract was excluded under s 3(2)(c) of the Act, and there was no reference date for the payment claim. In [8] of the decision, the adjudicator quoted from the payment schedule in respect of the applicant's reasons for there being no construction contract. In [9] of the decision, the adjudicator set out the respondent's response from the adjudication application to the effect that there was no evidence that such a partnership or "cooperative enterprise" existed between the parties and highlighting that the applicant did not explain what was meant by cooperative enterprise, what terms applied to the enterprise and how the applicant used them when making its payments to the respondent. This included the respondent's assertion that unless the applicant could explain these details "there is no evidence or rationale of any such joint venture and

indeed the [respondent] categorially rejects this idea" and the respondent's referral to the fact that when this proposition of a joint venture was put by the applicant to the respondent in July 2018, it was rejected by the respondent in an email dated 31 July 2018.

[7] The adjudicator set out paragraphs 2.2 to 2.10 from the adjudication response in [10] of the decision. The adjudicator's consideration of the applicant's first reason for asserting there was no relevant construction contract is set out in [11] to [19] of the decision. The adjudicator noted at [13] that, after the applicant received a payment for the deposit (from the head contractor), it paid an amount to the respondent and the applicant agreed that it had made other payments. The adjudicator in [14] of the decision characterised the applicant's submission in terms that there was a joint venture arrangement between the applicant and the respondent for the project as amounting to the formation of an "entity" by them and, even though the details relating to the entity were not explained, that this entity formed a contract with the head contractor. The adjudicator then noted in [15] of the decision that the applicant "has not provided a copy of the 'contract' which was formed between the 'entity' and the head contractor as evidence that the parties had entered into a 'joint venture arrangement for the project'". After noting in [17] of the decision that it was common ground that the respondent had carried out work and the applicant had paid the respondent for this work, the adjudicator set out in [18] of the decision that the only conclusion that could be drawn is that the respondent "undertook to carry out construction work for" the applicant. The adjudicator's decision on this issue is then set out at [19] of the decision that he preferred the respondent's submissions and decided "that there is a construction contract between the parties that meets the requirements of the Act".

[8] The adjudicator then in [20] to [37] of the decision addressed the second reason relied on by the applicant that the contract was excluded under s 3(2)(c) of the Act. The adjudicator set out in [20] of the decision the applicant's reasons for asserting why the exclusion under s 3(2)(c) of the Act applied, including that the amounts paid by the applicant did not reflect the value of the goods supplied, and then quoted in [21] of the decision the respondent's submission in response to the applicant's argument that was set out in the respondent's adjudication application that the amounts paid were on account of the contract price. In [22] of the decision, the applicant's submissions in paragraphs 3.1 and 3.3 to 3.8 of the adjudication response were then set out. The adjudicator noted at [24] of the decision that the parties had not provided any case law that supported their various positions, but then identified four judgments that the adjudicator considered were relevant with respect to s 3(2)(c) of the Act, including *Edelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31 and quoted [39]-[52] from *Edelbrand*.

[9] At [25] of the decision, the adjudicator noted the applicant's submission that the respondent "sporadically issued six (6) invoices for round figures which did not reflect the value of work carried out and payment of four (4) of the invoices as a demonstration that consideration was not payable by reference to the value of works completed". The details of the invoices which were paid were set out at [26] and the details of two invoices which were not paid were set out at [27]. The adjudicator noted at [28] of the decision that the respondent had submitted that the payments were made on "account against the contract price". The adjudicator noted at [32] that the parties' submissions

on how the payments should be characterised and what the payments evidenced in relation to the nature of the contract between the parties were not "particularly compelling". The adjudicator observed at [33] of the decision:

> "If there was a profit share arrangement, the [applicant] has not provided any details regarding the split or distribution of profit."

[10] The adjudicator reverted to the case law on excluded contracts in [34] of the decision and noted, that of the four cases analysed by him, it was only in *Sheppard Homes Pty Ltd v FADL Industrial Pty Ltd* [2010] QSC 228 that the contract fell under s 3(2)(c) of the Act. The adjudicator noted specifically at [35] of the decision that it was decided in *Edelbrand* that the New South Wales equivalent to s 3(2)(c) of the Act did not apply to a profit share arrangement. The adjudicator then noted at [36] of the decision that:

> "Therefore, while the [applicant] has not persuaded me that there is a 'profit share arrangement', I note that even if there was such an arrangement it still may not be captured by s 3(2)(c) of the Act and quite probably could be an arrangement that could lead to the [respondent] providing a payment claim under the Act."

[11] The adjudicator then summed up the outcome of his consideration of whether or not the contract was an excluded contract in [37] of the decision by stating:

> "Therefore, with regard to all the foregoing, I prefer the [respondent's] submissions that there is no exclusion under s 3(2)(c) of the Act."

[12] The adjudicator dealt with the applicant's third reason in [38] to [45] of the decision that there was no reference date.

[13] After having disposed of the reasons advanced by the applicant that went to jurisdiction, the adjudicator concluded at [47] that he had jurisdiction to decide the adjudication application. The adjudicator then in [48] to [90] dealt in great detail with deciding the adjudicated amount by addressing the reasons advanced by the applicant for withholding payment that were set out in the payment schedule and advanced as an alternative arrangement, if the respondent's payment claim was found to be made within time. One of those reasons was there had been a redesign. At [82] the adjudicator referred to the emails included in the adjudication response where various design issues were discussed between the parties and noted at [84] that the applicant submitted there was "some type of agreed price" for the work the respondent was to carry out, but there was a series of design changes which resulted in the scope of work being reduced, and the reduction was valued at $295,418.75 which the adjudicator noted was "unclear" as to GST status. The adjudicator observed at [85] that the emails did not explain how the scope was reduced and concluded at [87] to [90] that the applicant's submission fell "foul" of s 24(4) of the Act, that it was impossible to make sense of the valuation of the reductions, the adjudicator preferred the respondent's submissions, and the applicant was therefore not entitled to the deduction for design changes that it sought.

Limited role of the court in reviewing an adjudicator's decision

[14] The parties acknowledged the limited role the court has in exercising its inherent jurisdiction to grant declaratory and injunctive relief in relation to an adjudicator's decision under the Act on the basis of jurisdictional error.

[15] The main argument pursued by the applicant was that it had been denied procedural fairness, as it had not been given an opportunity by the adjudicator to make submissions on the cases relied on by the adjudicator to determine the issues before him. Ms Martinez of counsel who appeared for the applicant sought to draw an analogy between the adjudicator's reliance on *Edelbrand* as authority that the exclusion did not apply to a profit share arrangement and the conduct of the adjudicator that was successfully challenged in *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302.

[16] It is common ground that the adjudicator must give natural justice to a party when making a decision under the Act, but that it is only a substantial denial of natural justice by the adjudicator that may invalidate an adjudicator's decision, such that it may be declared void for jurisdictional error. Applegarth J in *John Holland* at [29]-[40] summarised the authorities on what constitutes a substantial breach of natural justice in the context of an adjudication decision under the Act.

[17] An issue the adjudicator in *John Holland* had to determine was whether certain contractual conditions relied upon by the builder John Holland were void by reason of s 99 of the Act and whether the subcontractor TAC was entitled to be paid its claim for items in respect of which it had not complied with certain contractual provisions that governed its entitlement to claim payment for variations. Both parties had made substantial submissions to the adjudicator concerning whether the preconditions to contract were void pursuant to s 99 of the Act. John Holland relied on the decision in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707. TAC did not contend that *Goss* was wrongly decided, but submitted that *Goss* did not have the effect contended for by John Holland. The adjudicator rejected John Holland's submission that TAC was not entitled to payment of its claim by finding that *Goss* had effectively been overturned in *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279. Neither party had referred to that authority and the adjudicator had not asked for submissions, before relying on it.

[18] Applegarth J held at [58]-[60] that the adjudicator committed a substantial breach of the requirements of natural justice by determining the major issue on a ground for which neither party contended, namely that *Goss* did not reflect the law and had been overturned by *Plaza West*, without providing an opportunity to the parties to make submissions on the point, and thereby depriving John Holland of an opportunity to put submissions on a matter that was significant to the way in which the matter was actually decided. Applegarth J deal with the requirements of natural justice at [55]-[57]:

> "[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.

[56] The allegation of a denial of natural justice is not answered by characterising the decision as simply a matter in which the adjudicator reached a view of the law after considering the submissions of the parties and the principles derived from the authorities about the operation of contractual preconditions of the kind relied upon by John Holland. The adjudicator's view of the law was not one contended for by either party.

[57] It also does not assist TAC to contend that an error made by the adjudicator in his view of the law 'is a mere error of law and does not result in the decision of the adjudicator being void.' The issue of natural justice relates to the condition upon which the adjudicator exercised his powers, as distinct from the result he reached and the insulation of that result from review for error of law. John Holland was not given an opportunity to make submissions to the adjudicator that the view he proposed to take about the law was wrong, and to thereby avoid legal error. The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after considering the parties' submissions. The statutory scheme does not permit an adjudicator to determine an adjudication on the basis of a view of the law for which neither party has contended. An adjudicator may be free, as it were, to make an unreviewable error of law based on the submissions of one of the parties. He should not be so free where the error is all his own work and might have been avoided by affording natural justice."

The decision in *Edelbrand*

[19] Both parties made submissions on what the decision in *Edelbrand* means.

[20] The appellant Domus Homes had entered into a contract with the respondent HM Australia in respect of a factory development. Domus Homes undertook management of construction projects. Its contract with HM Australia provided for a fixed price project management service fee of $130,000 plus a bonus payment to be shared on a 50/50 basis between HM Australia and Domus Homes for all savings effected below the $3.45m target construction budget for the project. On the basis the actual costs of construction were below the target budget adjusted for variations, Domus Homes claimed a bonus in the sum of $214,913.60. Eventually Domus Homes made an adjudication application that was accepted by the adjudicator and the adjudicated amount was the sum claimed. HM Australia successfully applied to a judge of the Equity Division of the Supreme Court of New South Wales to set aside the adjudicator's decision which was done on the basis the agreement was not a construction contract, as Domus Homes was providing architectural advisory services in relation to construction work and not carrying out construction work or supplying related services: *HM Australia Holdings Pty Ltd v Edelbrand Pty Ltd* [2011] NSWSC 604. The primary judge rejected the alternative basis relied on by HM Australia that the

agreement was not excluded from the operation of the relevant Act by virtue of the equivalent provision to s 3(2)(c) of the Act. The Court of Appeal in *Edelbrand* allowed the appeal, set aside the primary judge's orders and in lieu dismissed the application to set aside the adjudication.

[21] As the Court of Appeal found at [37] that the primary judge erred in holding that the agreement was not a construction contract, it considered whether the contract was an excluded contract on the basis of the contention it involved a profit sharing arrangement. The agreement provided for the fixed fee of $130,000 to be payable by six equal instalments at six of the 12 steps specified in the contract where each step up to step 11 dealt with the services to be provided by Domus Homes at the relevant stage of construction. Step 12 provided then for the bonus payment within seven days of an invoice after direct reconciliation following occupation and/or building completion. It was held by Bathurst CJ (with whom the other members of the court agreed) at [50]-[51] that the bonus amount was calculated in accordance with the terms of the contract which provided how the amount was to be valued at 50 per cent of savings below a targeted budget, so that the equivalent provision to s 3(2)(c) of the Act did not apply. It was therefore not a basis for calculation that took the construction contract outside the description of "consideration … calculated other than by reference to the value of the work carried out or the value of the goods and services supplied".

[22] In the course of [51], Bathurst CJ stated:

> "As I have pointed out, the date of any payment due and its value can be determined in accordance with the contract as required by the Act."

The applicant relied on that statement to contend that it was authority for the proposition that to be a construction contract, any progress payment had to be linked to the value of the goods supplied at the date of the progress payment. That particular passage in the judgment of Bathurst CJ related to the operation of the particular contract that was under consideration in *Edelbrand* and is not authority for the broader proposition advanced by the applicant on this application. To the extent that the applicant relied on the above passage from [51] in *Edelbrand* to submit that the adjudicator failed to consider whether the agreement between the parties was an excluded contract on the basis that the compensation claimed in the submitted invoices was not related to the value of the goods supplied, the submission was misconceived. In applying s 3(2)(c) of the Act, the adjudicator was not required to consider whether each progress payment sought by the respondent was linked to the value of the goods supplied at the date in respect of which the claim for the progress payment was made, but whether the consideration for the contract was calculated by reference to the value of the goods supplied.

[23] To the extent the adjudicator recorded at [35] of the decision that it was decided in *Edelbrand* that the equivalent provision to s 3(2)(c) of the Act did not apply to a profit share arrangement, that does not record accurately the conclusion of the court. First, the court did not decide that the parties had entered into a profit sharing arrangement and, second, what was decided was that the structure of the contract that provided for progress payments and a bonus payment for specified services relating to construction

work did not fall within the class of excluded contracts under the equivalent provision to s 3(2)(c) of the Act.

Was the adjudicator bound to ask for submissions on *Edelbrand?*

[24] The applicant accepts (as is the case) the adjudicator's rejection of its submission that there was a joint venture arrangement between the parties or a cooperative enterprise that included sharing of profit was not a matter reviewable on a jurisdictional challenge. The adjudicator's mistake about what *Edelbrand* decided was irrelevant to his adjudication decision, when the adjudicator had rejected the applicant's assertion that the agreement between the parties was, in effect, a profit share arrangement. The critical aspect of the adjudicator's decision was his rejection of this assertion, as a matter of fact, based on the evidence adduced by both parties of the agreement between them. It was common ground for both parties that the relevant critical issue before the adjudicator was whether the agreement between the parties was a profit share arrangement. The adjudicator's consideration of *Edelbrand* did not make any difference to the conclusion which he reached on the evidence before him. The applicant cannot show that the conduct of the adjudicator in not seeking submissions on *Edelbrand* was a substantial denial of natural justice in the circumstances or even a denial of natural justice. The adjudicator's conduct in this adjudication in relation to the case of *Edelbrand* is distinguishable from the conduct of the adjudicator that was considered, and characterised as resulting in, a substantial denial of natural justice, in *John Holland*.

[25] There was a submission on behalf of the applicant to the effect that I should infer from the adjudicator's emphasis in his decision on *Edelbrand* and his conclusion that it was authority for the proposition that s 3(2)(c) of the Act did not apply to a profit sharing arrangement that the adjudicator did not properly focus on whether, in fact, the agreement between the parties was a profit share arrangement. That submission does not reflect the analysis undertaken by the adjudicator of the evidence relevant to whether there was a profit sharing arrangement and the conclusion at [36] of the decision that the applicant had not persuaded him there was a profit share arrangement. Even though the adjudicator had observed at [32] of the decision that neither party's submissions were particularly compelling, the fact that the adjudicator noted at [33] that the applicant had not provided any details regarding the split or distribution of profit is the critical finding to found the conclusion in [36] of the decision. It would not reflect fairly on the adjudicator's decision to accept the submission made by the applicant that by finding that *Edelbrand* was authority for a profit share arrangement not being an excluded contract, the adjudicator "discounted all of [the applicant's] submissions" on the profit share arrangement.

[26] The applicant also relied on what it described as another "incorrect" statement made by the adjudicator at [34] of the decision. The relevant statement was that it was only in *Sheppard Homes* that the contract fell under s 3(2)(c) of the Act. That statement was prefaced by a reference to "various arrangements outlined in the case law foregoing". The applicant pointed out that in *Edelbrand* one of the cases that was referred to was *Smith v Coastivity Pty Ltd* [2008] NSWSC 313 where profits were agreed to be shared under the contract in question. This submission suggests that the applicant has over-analysed the adjudicator's decision. I took the reference in [34] of the decision to be the

cases that were identified by the adjudicator himself, rather than extending to every authority referred to within those cases. Whether the applicant's interpretation is correct or not, the point is immaterial to the issue of whether the adjudicator's decision was made in substantial denial of natural justice for the reason that any error had no bearing on the finding made by the adjudicator on the evidence that there was not a profit sharing arrangement between the parties.

[27] The applicant also relies on the adjudicator's use of *Edelbrand* (and other authorities on excluded contracts) as a failure to follow the procedure anticipated by s 25(3)(b) of the Act to call for further written submissions from the parties. The adjudicator's reference to *Edelbrand* (and the other authorities on excluded contracts) was for the purpose of determining the jurisdictional issue. The applicant's reliance on s 25(3)(b) as a means by which the adjudicator could have sought further written submissions does not assist the applicant in overcoming the conclusion that the adjudicator's failure to seek submissions on *Edelbrand* (and the other authorities) did not amount to a substantial denial of natural justice.

Whether the adjudicator considered material outside s 26(2) of the Act

[28] Section 26(2) of the Act prescribes the only matters that an adjudicator may consider in deciding an adjudication application. The applicant submits that by referring to case law which the parties had not provided to the adjudicator, the adjudicator was looking outside the matters which he was permitted to consider under paragraphs (c) and (d) of s 26(2) of the Act. That submission does not take account of the fact that in determining jurisdiction an adjudicator is not limited to considering only the matters stated in s 26(2). The respondent submitted correctly that s 26(2) of the Act deals with what the adjudicator can consider in deciding an adjudication application after determining that jurisdiction exists. As was observed by Brown J in *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65 at [76], s 26(2) "applies to the consideration of the subject matter of the adjudication itself and not jurisdiction". Brown J explained at [77]:

> "The question of jurisdiction is different from the decision required to be made pursuant to s 26 of the Act, which is predicated on jurisdiction already having been determined. The demarcation between a decision as to jurisdiction and the adjudication decision itself is apparent in s 35 of the Act. A decision as to jurisdiction is not confined to the matters in s 26(2) of the Act."

[29] There is no substance therefore in this alternative challenge to the adjudication decision (in reliance on s 26(2) of the Act) on the basis the adjudicator referred to case law not provided by the parties.

Did the adjudicator provide a determination without foundation?

[30] The applicant submitted the adjudicator could not consider whether the agreement between the parties was an excluded contract within s 3(2)(c) of the Act, unless the adjudicator first identified the terms of the agreement. This argument was also framed in terms that the adjudicator breached his statutory duty under s 25(3) of the Act by not

making a finding as to what the terms of the agreement were in determining jurisdiction. The applicant relies on the approach undertaken in *Edelbrand* at [47]-[48] and noted the approach of Douglas J in *Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd* [2018] QSC 310 at [49] where the resolution of whether a contract was an excluded contract under s 3(2)(c) of the Act depended on the proper construction of the contract. It should be noted, however, that the respective observations in these two cases were made in the context of written contracts with extensive provisions covering the timing and calculation of progress payments.

[31] The respondent had relied on its original quotation dated 12 October 2017 addressed to the applicant for $1,044,118 (excluding GST) in order to claim in the adjudication application the balance owing for the goods supplied, after deducting the payments made by the applicant and the one payment made by the head contractor direct to the respondent's supplier of materials. The claim therefore was in respect of the balance owed under a lump sum contract. The applicant submitted that there was a "disconnect" between the value of goods supplied and the payments made by the applicant in respect of the respondent's invoices, as $660,000 had been paid by the applicant before the first shutter was delivered on 22 May 2018. The adjudicator did not have to determine at the time the progress payments were claimed the entitlement to, or the timing of, those progress payments before the final payment, as it was only the final payment that was in contention. It is implicit in the findings of the adjudicator that he accepted the basis on which the respondent submitted it was entitled to final payment under the contract, which was by reference to the balance owing under the 12 October 2017 quote, taking into account the actual interim payments that were made. The terms of the agreement that were relevant to the adjudication application were therefore determined by the adjudicator.

[32] The submission made by the applicant that, even if the total contract sum is agreed between the parties for goods supplied, the adjudicator is required to analyse the claims for interim payments to assess whether they are for compensation payable for something other than the value of the goods supplied, when the claim for the interim payments was made, does not reflect what was required of the adjudicator in relation to this adjudication application, having regard to the matters that were in issue before the adjudicator. The submission also was based on an interpretation of s 3(2)(c) of the Act that does not reflect its wording, as noted in [22] above. The submission also relied on s 13 and s 14 of the Act, but s 13 of the Act deals with the amount of a progress payment to which a person is entitled in relation to a construction contract and expressly contemplates in s 13(b) how the amount of the progress payment will be calculated, if the contract does not provide for the matter which then invokes s 14 of the Act. There is nothing in either s 13 or s 14 of the Act that imposes an obligation on the adjudicator in determining a claim for final payment to analyse each of the interim payments against s 13(b) of the Act.

Was there intellectual engagement by the adjudicator?

[33] The applicant submits the adjudicator was required to engage in an "active process of intellectual engagement" in considering the matters referred to in s 26(2) of the Act as explained in *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd* [2010] NSWSC 818 at [38]-[39] in applying statements from

Tickner v Chapman (1995) 57 FCR 451 at 464, 476 and 495 to the process undertaken by an adjudicator.

[34] The particular aspect on which the applicant claims the adjudicator failed in his statutory duty to engage intellectually was in respect of the terms of the agreement, including the timing of progress payments and the relationship between the compensation payable, as sought in the invoices, and the goods supplied by the respondent. The applicant cannot succeed on that argument, as the applicant's assertion of what was required of the adjudicator does not reflect relevant provisions of the Act (as set out in [32] above).

[35] Another aspect of the applicant's argument is that the adjudicator failed to deal with the applicant's alternative submission based on the redesign which it was argued was put forward in the payment schedule as an alternative case to the case based on the agreement being a profit share arrangement.

[36] The adjudicator did deal separately at [84] to [90] of the decision with the redesign submission and the applicant's evidence on that alternative case, but the alternative case suffered from the fact that the applicant in the payment schedule provided only scant detail of the redesign and merely asserted that it "resulted in a significant reduction in the price of the works".

[37] Even though the adjudicator did go off on a "frolic" of his own in relation to the decision in *Edelbrand*, it is not a fair criticism of the adjudicator to allege he failed to engage intellectually with the submissions and evidence of the applicant, in light of the overall reasoning exposed in the decision in the context of the material that was properly before the adjudicator. As the adjudicator rejected the applicant's case based on a profit share arrangement and the alternative case based on a design change, it is clear from the adjudicator's analysis and conclusions at [37] and [90] that he accepted the respondent's claim that the contract price (and the agreement) was based on its quote of 12 October 2017 and the adjudicated amount was calculated accordingly.

Orders

[38] It follows that the application must be dismissed. During the hearing of the application the parties agreed that, whichever party succeeded, costs should follow the event. I will give the parties an opportunity to consider the published reasons, and agree on the ancillary orders that will be required as a result of the order made by North J on 23 January 2019 and the payment into court by the applicant. If the parties are unable to agree on the ancillary orders, I invite submissions on the form of ancillary orders which I will deal with on the papers, if it is appropriate to do so. To facilitate that, I will adjourn the question of any ancillary orders to a date to be fixed.

[39] The formal orders are therefore:

1. The application filed on 28 November 2018 is dismissed.
2. The applicant must pay the first respondent's costs of the application.
3. The question of any ancillary orders is adjourned to a date to be fixed.