SUPREME COURT OF QUEENSLAND

CITATION:	*J.R. & L.M. Trackson Pty Ltd (ACN 088 333 831) v NCP Contracting Pty Ltd (ACN 121 915 017) & Ors* [2019] QSC 201
PARTIES:	**J.R. & L.M. TRACKSON PTY LTD (ACN 088 333 831)** (applicant) **v** **NCP CONTRACTING PTY LTD (ACN 121 915 017)** (first respondent) and **PETER SARLOS** (second respondent) and **ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO:	13799 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	21 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2019; further written submissions received 24 July 2019 and 31 July 2019
JUDGE:	Ryan J
ORDER:	**1. The application is dismissed.** **2. I shall hear the parties as to the form of order and costs.**
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 an adjudicator's decision under the *Building and Construction Industry Payments Act* 2004 (Qld) – whether one payment claim or three was served – whether a "witness" may attend at a "conference of the parties" called by an adjudicator – whether "submissions" may be made at a conference of the parties – whether submissions made at a conference of the parties may be taken into account by an

adjudicator in reaching an adjudication decision

Alan Conolly & Co v Commercial Indemnity Pty Ltd [2005] NSWSC 339, applied
Ardnas (No1) Pty Ltd v J Group (Aust) Pty Ltd [2012] NSWSC 805, applied
Austruc Constructions Ltd v ACA Developments Pty Ltd [2004] NSWSC 131, applied
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2) [2013] QSC 67, cited
Built Environs Pty Ltd v Tali Engineering Pty Ltd and Ors [2013] SASC 84, explained
Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd and Anor [2015] QSC 211, followed
David Hurst Constructions v Helen Durham [2008] NSWSC 318, considered
Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) 74 NSWLR 190, considered
John Holland Pty Limited v Roads & Traffic Authority of New South Wales and Ors [2007] NSWCA 19, applied
McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd and others [2013] QSC 223, cited
Minister for Commerce v Contrax Plumbing (NSW) Pty Limited [2005] NSWCA 142, applied
Multiplex Construction v Lukiens and Anor [2003] NSWSC 1140, considered
Protectavale v K2K Pty Ltd [2008] FCA 1248, considered
Pyneboard v Trade Practices Commission (1982) 39 ALR 565, cited
Rail Corporation of NSW v Nebax Construction [2012] NSWSC 6, considered
Roadtek, Department of Main Roads v Philip Davenport and Ors [2006] QSC 047, cited
State Water Corporation v Civil Team Engineering Ltd [2013] NSWSC 1879, distinguished
Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors [2011] QSC 293, applied
Tailored Projects Pty Ltd v Jedfire Ltd [2009] 2 Qd R 171, applied
Walter Constructions Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266, considered

COUNSEL: A J Greinke for the applicant
B A Reading for the first respondent

SOLICITORS: Doyles Construction Lawyers for the applicant
Miller Harris Lawyers for the first respondent

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[1] NCP, as subcontractor, entered into a contract with Trackson to construct a gravity sewer main for Trackson's project at Mount Peter in Edmonton. NCP submitted progress payment claims to Trackson, not all of which were paid. In respect of a claim for "wet hire", NCP had success in an adjudication under the now repealed *Building and Construction Industry Payments Act* 2004. Trackson applied for an order setting aside, or declaring void, the adjudication decision.

Grounds

[2] Trackson argued that it ought to succeed for one or more of the following reasons –

(a) NCP served more than one payment claim in respect of the same reference date, contrary to section 17(4) *Building and Construction Industry Payments Act* 2004 (BCIPA);

(b) If NCP served only one payment claim, it filed more than one adjudication application for that claim, contrary to section 21 BCIPA;

(c) The "conference of the parties" called by the adjudicator was not held in accordance with section 25(3)(d) BCIPA because the conference involved a person who was not a party but a witness – namely Darren Hargreaves; or

(d) The adjudicator failed in not considering the matters listed in section 26(2) BCIPA *only*: he also considered submissions advanced by NCP during the conference, including the statements of a non-party witness.

Relevant history

[3] NCP's work under the subcontract commenced on 25 October 2017 and ceased on 20 June 2018.

[4] NCP submitted payment claims monthly. Trackson paid the first four claims.

[5] NCP submitted three further payment claims as follows:

25 June 2018, claim 5, for $57,340.25;
31 May 2018, claim 6, for $85,812.98;
25 June 2018, claim 7, for $25,014.14.

[6] Trackson did not pay payment claims 5, 6 or 7.

[7] On 26 July 2018 NCP lodged an adjudication application for progress payment claim 6 (adjudication number 409951). It consisted of a claim for three types of work: sewerage work (by way of concrete benching), wet hire and float hire.

History relevant to the payment claim issue

[8] In its adjudication application 409951, under the heading "Jurisdiction", NCP submitted –

> "3.5 The adjudicator can be satisfied that there is a construction contract in place between NCP and J R and L M Trackson … which is contained in or evidenced by the facts and matters of the statutory declarations of Gavin Ulf Selke, Tracy Lenore Diamond and Shane Jesse Robinson …
>
> 3.6 It is clear from those statutory declarations that:
>
> 3.6.1 in the case of the Sewerage Works (concrete benching of nine manholes), there was specific agreement between NCP and Trackson that NCP would undertake that work and bill Trackson;
>
> 3.6.2 in the case of the Wet Hire Agreement, there was specific agreement between NCP and Trackson about undertaking work and providing hire of equipment charged at specific and agreed hourly rates; and
>
> 3.6.3 in the case of the Float Hire Agreement, a request for provision of float services at the Site which services were subsequently delivered by NCP." [1]

[9] Focusing on NCP's reference to "specific agreement" (in 3.6.1 and 3.6.2) and the "request" (in 3.6.3), Trackson raised a jurisdictional issue in its adjudication response.

[10] It submitted as follows –

> "50. The Respondent submits that the three agreements as submitted by the Claimant are clearly three separate agreements of an entirely different nature that do not, together, form a single construction contract under the Act. The Respondent submits that the three agreements as alleged by the Claimant are three construction contracts under the Act.
>
> 51. The Respondent submits that it is well established that a Payment Claim and Adjudication Application can only relate to a single construction contract …
>
> …
>
> 56. … in this adjudication … the Claimant has submitted that there are three separate agreements, and the Claimant must be bound to the position it has adopted.
>
> …
>
> 61. The Respondent submits that the Claimant has, by its own admission, served a Payment Claim that comprises works under three separate construction contracts under the Act and, as such, its Payment Claim is invalid and the adjudicator has no jurisdiction to consider this adjudication application."

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[1] I note the use of the phrase "specific agreement" rather than "a specific agreement" in NCP's application.

[11] On 23 August 2018, the adjudicator decided that he did not have jurisdiction. He said:

> "In receipt of the adjudication response in which the Respondent asserts that the adjudication application is not a valid approach under the Act, I sought further submissions from the parties. The opportunity to provide further submissions permitted the Claimant to present a counter argument to that proffered by the Respondent. It would have permitted the Claimant to perhaps demonstrate that the three elements of the payment claim were variations to the original contract … The Claimant opted not to provide any further submissions with respect to my jurisdiction to decide this adjudication application.
>
> I am satisfied, on the basis of the evidence provided by the Respondent and the statements contained within the Claimant's adjudication application that the three sections of the payment claim were not considered by the Claimant to be variations to the original contract but constituted separate agreements or contracts to provide works or services. Accordingly, I find that I do not have jurisdiction to decide this adjudication application."

[12] I do not need to decide whether in fact the language used by NCP in its submissions in support of its adjudication application asserted the existence of three separate agreements or not.

[13] On 27 September 2018, NCP served another payment claim by way of delivery to Trackson's Cairns and Innisfail offices, as well as by way of email.

[14] The email, which was sent at 5.28 pm, stated in its subject line: "Mt Peter Gravity Sewer Invoices". It was addressed to Jeff Trackson, the applicant's director. It stated –

> "Good afternoon Jeff
> Please find attached invoices and supporting documents for:
> Wet Hire
> Float hire and
> Sewerage works completed on the Mt Peter Gravity Sewer Project.
> Regards
> TRACY DIAMOND
> (Administration)"

[15] Attached to the email were three invoices, together with related day work sheets and summaries:[2]

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[2] The documents attached to the email were listed in the following order in the covering email, and appeared in this same order in exhibit RA-15 to the affidavit of Rawai Ayache:

- 27 Sept 18 Benching INV00001013.pdf
- 27 Sept 18 Benching Payment Claim Schedule.xlsx
- 27 Sept 18 Float Hire INV00001014.pdf
- 27 Sept 2018 Float Hire Payment Claim Schedule.xlsx
- 21 Mar – 24 Apr 18 Dayworks.pdf
- 26 Apr 2018 – 25 May 2018 Dayworks.pdf
- 26 May – 20 June 2018 Dayworks.pdf
- 27 September 18 Wet Hire Inv 00001012.pdf
- 27 Sept 18 Wet Hire Payment Claim.xlsx

> "Invoice 1012 for $161,251.75 for 'wet hire';
> Invoice 1013 for $2,637.80 for 'benching'; and
> Invoice 1014 for $4,398.68 for 'float hire'."

[16] Each of the invoices was expressly stated to be a claim made under BCIPA.

[17] Each of the invoices bore the same date (27 September 2018) and referred to work done on the Mt Peter Gravity Sewer Project. The recipient's reference was stated to be, in each case, "Mt Peter Sewer".

[18] The wet hire invoice (1012) stated –

> "Wet Hire – labour, plant and equipment for the period 21 Mar 18 – 20 June 18 on Mt Peter Gravity Sewer as per attached schedule, records of day works and tabulated summary of records of dayworks"
>
> and
>
> (at the foot of the invoice) "Your Order #: Mt Peter Sewer".

[19] The benching invoice (1013) stated –

> "Concrete benching of manholes on Mt Peter Gravity Sewer project as per attached schedule"
>
> and
>
> (at the foot of the invoice) "Your Order #: Mt Peter Sewer".

[20] The float hire invoice (1014) stated –

> "Float hire for site establishment/disestablishment and relocating plant and machinery around site on Mt Peter Gravity Sewer project – as per attached schedule"
>
> and
>
> (at the foot of the invoice) "Your Order #: Mt Peter Sewer".

[21] Trackson responded to NCP's "purported payment claim dated 27 September 2018 for Mount Peter Gravity Sewer Main", proposing to pay $0.

[22] It argued that it was an abuse of process for NCP to submit the claims on a "different contractual basis" in an attempt to "overcome the shortcomings of a previous adjudication application".

NCP's adjudication applications

[23] On 26 October 2018 NCP lodged –

- Tabulated Summary of Records of Dayworks.xlsx

- an adjudication application (443788) for Invoice 1012; and
- an adjudication application (443792) for Invoice 1014.

[24] NCP did not pursue invoice 1013 through adjudication.

Trackson's adjudication response

[25] In its adjudication response, Trackson's position was that the claimant had previously failed to obtain an interim payment on the basis that it had "formed a series of new contracts with the site foreman". Having so failed, its attempt to do so again "using a different contractual basis" was an abuse of process. Trackson stated that NCP had "shied away from asserting that it formed a new contract with the site foreman, but still relies upon the same daysheets".[3]

[26] Trackson stated that "there had only ever been one contract formed for the subcontract works" and that there had never been a separate wet hire agreement, float hire agreement or sewerage works agreement.[4]

[27] Its substantive argument was that NCP was not entitled to dayworks' payments for works that were part of the original scope of the Schedule of Rates.

History relevant to the issues taken about the conference of the parties

[28] In support of application 443788, NCP relied upon statutory declarations from –

- Gavin Selke, a civil construction contractor and a director of NCP;
- Tracy Diamond, an administrator employed by NCP;
- Shane Robinson, NCP's foreman for the Mount Peter Gravity Sewer Works;
- Bejae Aller, Trackson's site foreman at the relevant time;
- Darren Hargreaves, Trackson's Project Manager at the relevant time.

[29] It may be noted that Mr Aller and Mr Hargreaves were Trackson's former employees.

[30] Trackson's adjudication response was supported by Jeff Trackson's statutory declaration dated 13 November 2018, which attached Mr Trackson's earlier statutory declaration (dated 10 August 2018) and Gavin Selke's earlier statutory declaration (dated 26 July 2018).

[31] It is plain from Mr Trackson's statutory declaration that he did not have a good relationship with Mr Hargreaves, who resigned from Trackson on 19 January 2018.

[32] NCP supported its adjudication application 443792 with statutory declarations from Mr Selke and Ms Diamond.

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3 See paragraphs 19 and 20, Trackson's adjudication response (443778).
4 Paragraph 49, Adjudication Response (443778).

[33] Trackson's adjudication response to application 443792 was supported by Mr Trackson's statutory declaration dated 13 November 2018 and the statutory declarations it attached.[5]

[34] The adjudication applications were referred to adjudicator Peter Sarlos, the second respondent to this application. He has taken no active role in these proceedings. Nor has the third respondent, the Adjudication Registrar.

[35] Mr Sarlos treated the application concerning the wet hire invoice as a Payment Claim in its own right.[6] He treated the application concerning float hire in the same way. He referred to his approach and the findings of the previous adjudicator in his reasons. He said he did not agree with them – but did not pursue that issue further. In the context of dealing with Trackson's "reason 2" for non-payment of the wet hire claim Mr Sarlos said (my emphasis) –

> "REASON 2 – FLOAT HIRE INCLUDED IN RATES
>
> 51) The float hire claim is a separate claim that does not form part of this adjudication. It is part of a **concurrent claim** QBCC 433792 which was previously included as part of an earlier Adjudication Application in which the adjudicator decided he had no jurisdiction.
>
> a) That Adjudicator's reasoning was that the Float Hire arrangement was outside the scope of the Schedule of Rates (SOR) and was akin to a period contract. It was his view, supported by some precedent, that that Contract could not be tied to the subcontract for the installation of the Mt. Peter Gravity Sewer Main contract.
>
> b) **While I do not agree with the adjudicator's reasoning, I find that I do not need to pursue that matter further as it is the subject of a separate Adjudication than I am to deal with.**"

[36] On 19 November 2018 the adjudicator called a conference of the parties under section 25(3)(d) BCIPA, for 26 November 2018, in relation to both applications.

[37] Section 25 BCIPA states:

> "25 Adjudication procedures
>
> (1) An adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator.

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5 That is, the statutory declaration of Mr Trackson dated 10 August 2018 and the statutory declaration of Mr Selke dated 26 July 2018.

6 He referred to Trackson's submission that the adjudication process had been abused because NCP had "made a claim under the Act when the matter had previously been adjudicated". Mr Sarlos was of the view that while the matters raised in the adjudication before him had formed part of a previous application, the previous adjudicator found that he did not have jurisdiction and did not consider the merits of the contents of the claim nor the valuation of the claim. He did not reach a decision on the matter. Accordingly, Mr Sarlos found that he had jurisdiction to hear the adjudication application.

(2) An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator.

(3) Subject to subsections (1) and (2), an adjudicator must decide an adjudication application as quickly as possible and, in any case –

(a) within 10 business days after the earlier of –

(i) the date on which the adjudicator receives the adjudication response; or

(ii) the date on which the adjudicator should have received the adjudication response; or

(b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days.

(4) For a proceeding conducted to decide an adjudication application, an adjudicator –

(a) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.

(6) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicators' call for a conference of the parties."

[38] The adjudicator's request in relation to adjudication 443788 was in these terms –

"I have reviewed the primary submission (sic) provided by the parties in the Adjudication Application and the Adjudications and submissions in QBCC 443788 and have decided that a conference pursuant to s25(3)(d) is warranted. I intend that the conference is to be held on Monday, 26 November 2018 …

Should it be necessary I may request a site inspection pursuant to s25(3)(e) at any time on the day.

> As a result of the conference I request that the parties agree to an extension of time to 12 December 2012 to allow me to process the outcome of the conference and to ask any further information that might arise from the conference (and if necessary, an inspection).
>
> This conference will be held contemporaneously with that requested for Adjudication Application QBCC 443792.
>
> Please confirm your attendance including not more than 2 persons providing support by not later than 3.30 PM on Monday 19 November 2018."

[39] A virtually identical request was made in relation to adjudication 443792.

[40] NCP indicated its availability for a conference and agreed to the extension of time.

[41] Trackson objected to the conference and the extensions of time, providing reasons in a letter dated 19 November 2018. It argued that the conference would "simply be a forum for the making of additional improperly made submissions and accusations", which could complicate the matter further. In the event that the adjudicator decided to proceed with the conference, it sought "disclos[ure] of the matters in the properly made submissions that the adjudicator [was] seeking to have clarified".

[42] In correspondence in reply, dated 20 November 2018, the adjudicator set out the purpose of the conference –

> "The purpose of the conference is not to mediate, conciliate, expert determine or arbitrate the dispute. It is to assist the adjudicator in addressing the issues that are apparent from the parties submissions as fairly and succinctly as possible. The parties raised concerns that I have as yet not indicated the subject matter of the conference. As a guide, the matters to be discussed relate to clarification of items that will assist me as Adjudicator to decide including:-
>
> (a) what was included in the scope of agreement;
>
> (b) to establish the terms and conditions of contract;
>
> (c) establish the scope of works;
>
> (d) to clarify construction work that it or is not defective."

[43] Trackson maintained its objection to the conference. It informed the adjudicator that "[t]he persons with the best knowledge of the project (speaking on behalf of the Respondent) are not available to attend on the date proposed". Those persons were Trackson's director, Jeff Trackson, and its project manager. It offered to clarify the issues with the adjudicator by way of written submissions or teleconference.

[44] The adjudicator declined Trackson's offer, and reiterated that the conference was for its benefit. He said that it was not "the venue for the development of new reasons or new submissions". It "provides a venue in which both parties have the opportunity to make submissions in reply on the facts drawn from the parties' submissions and through the adjudicator's observations".

[45] On 22 November 2018, NCP confirmed its attendance at the conference and informed the adjudicator that its proposed attendees were Mr Diamond, Mr Selke, Rowan Wilson (its lawyer) and "Darren Hargreaves (as a support person)". All attendees were permitted by the adjudicator to attend.

[46] Trackson objected to the attendance of Darren Hargreaves, arguing that he was a person who had given evidence and should not be taking part in a conference "that's purpose is to clarify submissions already made". Nor, it argued, should he be permitted to give "new evidence". Trackson sought leave for its solicitor to attend, which was granted subject to a caution by the adjudicator (to both parties) that the conference was "not a venue for legal advocacy".

[47] The conference proceeded on 26 November 2018. Mr Hargreaves was in attendance.

[48] On 27 November 2018 the adjudicator made his decision in application 443788. That decision favoured NCP and is the subject of this application.

[49] The adjudicator did not make a decision in application 443792.

Issues

[50] The hearing revealed that the issues for me were –

- whether NCP served on Trackson one payment claim or three?
- if I concluded that only one payment claim was served, whether either or both of NCP's adjudication applications are invalid?
- whether the adjudicator was permitted to receive evidence from a witness at the conference of the parties?
- whether the parties were permitted to make "submissions" at the conference and whether the adjudicator was permitted to take those "submissions" into account in reaching his decision?

One payment claim or three?

[51] Section 12 BCIPA provides for a statutory right to progress payments under a construction contract.

[52] Under section 17(1) BCIPA, a person entitled to a progress payment may serve a payment claim on the person who is liable to make the payment under the construction contract. A claimant may not serve more than one payment claim for each reference date under the construction contract, but may include in any payment claim an amount that has been the subject of a previous payment claim: section 17(4).

[53] In its written submissions, Trackson referred to the "finding" of Mr Sarlos that there was a single construction contract for the Mount Peter project, and relied upon it for its argument that NCP had breached the prohibition in section 17(4) "… by serving three statutory payment claims in respect of the same reference date on 27 September 2018".

[54] Trackson referred to the following part of Mr Sarlos' adjudication decision as containing Mr Sarlos' "finding" –

> "**AGREEMENT**
>
> 14) The Claimant submitted that it undertook to carry out the construction work and supply related goods and services under a contract, agreement or other arrangement entered by both the Claimant and the respondent. The Parties agree that the agreement consists of:-
>
> a) the drawings and the specifications referred to in the drawings;
>
> b) the Schedule of Rates; and
>
> c) the hourly rates, added as a variation by agreement after the contract was formed."

[55] It is not clear to me that this was in fact a "finding" on the "one contract or three" issue. Indeed, as I understand the reasons of Mr Sarlos, he appears to have proceeded on the basis that, while he did not agree with the decision of the first adjudicator, he did not need to decide the "one contract or three" issue (see above at [35]).

[56] Regardless, Trackson's counsel confirmed in oral submissions that neither party wished to re-open Mr Sarlos' "finding" that there was one construction contract (not three) with variations for wet hire, benching and float hire.[7]

[57] On the basis of that "finding", Trackson argued that the claim was invalid because each of the three invoices was a separate payment claim and there could not be multiple payment claims for one reference date for one construction contract.

[58] In response, NCP argued that it had not served three payment claims: it had served one claim, in three parts (for one reference date, for one construction contract).

[59] Trackson referred to *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[8] for Allsop P's statement about the prohibition on serving more than one payment claim per reference date. That proposition is uncontroversial. However, it is worth noting the form or composition of the payment claim in *Dualcorp*.

[60] In *Dualcorp*, a payment claim was made on 29 January 2008 attaching six invoices: four of which were dated 24 January 2008 and two of which were dated 29 January 2008. The relevant reference date was not identified on the claim or invoices.

[61] Remo disputed the bulk of the claim. Dualcorp applied for adjudication of the claim. The adjudication amount was substantially less than Dualcorp's claim.

[62] Dissatisfied with the outcome of the adjudication, on 3 March 2008, Dualcorp purported to serve a second payment claim on Remo annexing the same invoices and claiming the same amount.

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7 Transcript 1 – 15. See also the respondent's written submissions at 13.

8 (2009) 74 NSWLR 190.

[63] The question for the Court of Appeal of New South Wales was whether a claimant who was dissatisfied with the determination of an adjudicator could seek a redetermination of the same issues before the same or another adjudicator.

[64] The Court of Appeal concluded that to seek redetermination of the same issues was contrary to the intention of the Act. In was in that context that Allsop P referred to the prohibition on making more than one payment claim per reference date.

[65] At [12] – [14], Allsop P said (my emphasis):

> "12 … **The claim represented by the six invoices** must have been in respect of only one reference date – either 15 December 2007 or 15 January 2008 …[or, the last day of each month, as provided for by the Act].
>
> 13 I see no warrant under either the contract or the Act … for permitting a party in Dualcorp's position to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims. That is not the intended operation of the last phrase of s 8(2)(b) ("and the last day of each subsequent named month").[9]
>
> 14 Here, the work had been done: Dualcorp, the subcontractor, had left the site; **it claimed payment by six invoices**; six weeks later **it repeated that claim by reference to the same invoices** and, in my view, in respect of the same reference date. Dualcorp was prevented from serving the second payment claim. The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act and does not attract the statutory regime of the Act.
>
> 15 For these reasons, Dualcorp was not entitled to proceed to judgment on a claim founded on the operation of the Act premised on the second payment claim of 3 March 2008 being a payment claim under the Act."

[66] In addition to Allsop P's statement about a claimant being prohibited from serving more than one payment claim per reference date, it may be noted that the payment claim in *Dualcorp* was made up of, or "represented by", several invoices and there was no complaint about the claim in that form.

[67] NCP relied on *Alan Conolly & Co v Commercial Indemnity Pty Ltd*[10] and cases which followed its approach to a "one or more" payment claims issue. The *Alan Conolly* approach took into account the purpose of the relevant legislative provision and considered the way in which the payment claim would have been understood by its recipient.

[68] *Alan Conolly* concerned office fit-out work carried out in pursuance of an oral agreement which made no provision for progress payments.

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[9] The definition of "reference date" in Schedule 2 Dictionary of BCIPA is to the same effect.

[10] [2005] NSWSC 339.

[69] The challenged payment claim was served by facsimile. It consisted of a series of four tax invoices – although the fourth was a copy of the first. The form of the payment claim was described as follows:

> "[3] The matter at issue is an alleged payment claim that was served by the first defendant on the plaintiffs on 14 February 2005. The payment claim or claims were served by facsimile and its form is important. The facsimile was of four pages duration and consisted of three tax invoices dated 14 December 2004. Each tax invoice occupied one page. The fourth page was simply a repeat of the information on the first page. Accordingly it can be put to one side.
>
> [4] The first page was invoice number 041216 and on its face was for "Variations to the scope of works – various". It specified the amounts and concluded with a statement of the "Amount of Claim" with GST totalling $4074.40. At the foot of the page there was a notation as required by section 13(2)(c) of the Act in these terms:
>
> > "Note: This is a payment claim made under to the Building and Construction Industry Security of Payment Act 1999 NSW."
>
> [5] The second page was invoice number 041214 referring to the job and describing the claim as "progress claim #3". The total amount claimed was $57,750 and was otherwise in a similar form with the same notation as the first page. The third page was invoice number 041215 and was on its face for "variations to scope of works – after hours labour". The amount of the claim including GST was $16,632. It carried at the foot of the page the same notation.
>
> [6] The first of the four pages carries a received stamp, which was placed on it on 14 February 2005. Plainly all four pages were received at or about the same time."

[70] The adjudicator in *Alan Conolly* considered whether the documents served on 14 December 2004 constituted a valid payment claim. The adjudicator could see no provision in the Act which would prevent the treatment of individually endorsed invoices, served together, to be regarded in their entirety as one payment claim. That conclusion was challenged by the plaintiffs in the Supreme Court of New South Wales. The plaintiffs argued that the second and third payment claims were invalid because they were in breach of the prohibition on serving more than one payment claim in respect of one reference date under the construction contract. The plaintiffs relied upon the following facts in support of their argument that three payment claims had been served –

- the three documents were received out of the facsimile machine at separate times; and
- "The express words which are found identically in each document, namely, the identification of the amount of the separate claim in each document and the note at the foot of each document".

[71] In concluding that a valid claim had been served, Master Macready considered the mischief the Act intended to avoid in prohibiting the service of more than one payment claim per reference date – that mischief being the overburdening of claims' recipients with claims served too frequently. He said –

> "21. The prohibition which is contained in s 13(5) of the Act is against serving "more than one payment claim in respect of each reference date". Are three documents, each of which complies with the requirements of the Act, served practically at the same time one payment claim, or are they three payment claims? I should consider the mischief that the Act is seeking to avoid in this provision. Plainly, responding to a payment claim imposes burdens of time and effort in its response. The provisions of the Act have clearly specified how often such a claim could be made. Monthly claims in cases of contracts which do not have their own provisions are clearly what is permitted.
>
> 22. In this case the person receiving the payment claim would be immediately aware, on receipt of all documents, that the contractor was claiming the total of the amount shown in the documents. All were received on the same day and plainly refer to the period up to 31 January 2005. All documents were in respect of progress claims which on their face covered three separate items of building work. The first related to three variations, the second to what are traditionally referred to as payment claims and the third to a claim for after-hours labour costs.
>
> 23. Turning to the language, and having regard to the descriptions of the different types of work, it seems to me that the three documents constituted one payment claim as it is clear to the recipient what was being claimed …"

[72] Trackson attempted to distinguish the case of *Alan Conolly* from the present matter on the basis that the claims in the present case were described not as variations but as claims in their own right. While that might be so,[11] counsel for Trackson explained that I was required to proceed in this matter on the basis that there was one construction contract and the claims made were for variations to it.

[73] Regardless, as is apparent from the extract from the Master's reasons above, only one of the separate claims in *Alan Conolly* concerned variations. More significantly though, the Master's conclusion depended primarily on how the recipient of the document understood the documents and having regard to the purpose of the statutory prohibition upon serving more than one payment claim per reference date.

[74] NCP referred to other decisions of Supreme Courts (including this court) which took the same approach as that taken in *Alan Conolly*; namely *Tailored Projects Pty Ltd v Jedfire Ltd,*[12] *Ardnas (No1) Pty Ltd v J Group (Aust) Pty Ltd*,[13] and *Camporeale Holdings Pty Ltd v Mortimer Construction Pty Ltd and Anor*.[14]

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[11] Indeed, the claims were so described to accommodate the decision of the first adjudicator.
[12] [2009] 2 Qd R 171.
[13] [2012] NSWSC 805.

[75] *Tailored Projects* is a decision of Douglas J. In that matter, the applicant made a claim under a contractual regime, similar to the BCIPA regime, for a progress payment. The respondent challenged the claim. The applicant elected to seek payment under the contract and the Act, rather than make an adjudication application under BCIPA.

[76] One of the bases for the respondent's resistance to the claim was that more than one payment claim had been made in respect of the relevant reference date.

[77] Practical completion of the contract in *Tailored Projects* had been achieved on 12 May 2008. There was a claim made on 26 May 2008 for a number of variations, totalling $48,199.80. There was then a later claim, relied upon by the applicant as its statutory claim, for $1,066,106.87. That claim was listed on a document dated 31 July 2008, which referred to a number of invoices (18) and described itself as a payment claim made under the Act. The invoices were also included in the claim separately, each dated 31 July 2008 and each endorsed: "This payment claim is made under [BCIPA]". The respondent argued that 19 separate claims were (invalidly) made dated 31 July 2008.

[78] In rejecting that argument, consistently with the approach taken in *Alan Conolly*, his Honour said (footnotes omitted) –

> "18. … The claims were delivered together in a form where the first document describing itself as a payment claim under the Act contained internal references to the other 18 invoices which made monetary claims by setting out the invoice numbers in a column. Those invoices, with their supporting documents, were then attached behind the covering document. That each invoice also bore the words describing it as a claim made under the Act should not lead to the conclusion that the delivery of those documents at the one time amounted to the service of more than one payment claim. To conclude otherwise would require the triumph of form over substance, even in an area where adherence to form and strict compliance with the Act is important.
>
> 19. That approach is also consistent with the decision in *Alan Conolly and Co v Commercial Indemnity*. To use the language of that decision, "the person receiving the payment plan would be immediately aware, on receipt of all documents, that the contractor was claiming the total of the amount shown in the document". That was doubly clear here because of the form of the first document described as a claim under the Act; it was itself a summary of the following documents."

[79] Trackson attempted to distinguish this case from the present case on the basis that there was no covering document in the present case (in the sense of a covering payment claim) and no cross-referencing of the claims. That may be so, but as in *Alan Conolly*, Douglas J's approach emphasised substance over form and focused on the way in which the documents would have been *understood* by the recipient.

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[14] [2015] QSC 211.

[80] *Ardnas* is a decision of Hammerschlag J of the New South Wales Supreme Court. The applicant in that matter applied to quash an adjudication decision on the ground that the adjudicator had no jurisdiction to make it because its subject matter was more than one payment claim served in respect of one reference date, contrary to the relevant provisions of the New South Wales Act.

[81] The payment claim took the form of two invoices under cover of one facsimile dated 20 December 2011. The invoices claimed separate amounts for separate work. Each bore the same date (19 December 2011) and each called for payment within 14 days.

[82] Hammerschlag J referred to paragraph [18] of *Tailored Projects* (above) and observed that, although sent under cover of a letter which referred to payment claims (plural), the payment schedule served by the plaintiff described the claim as "the claimant's claim" (singular) and responded to the claim of $30,496.16, which was the total of the two invoices. His Honour also observed that the adjudicator described the documents taken into account as including "Claimant's Payment Claim dated 19 December 2011".

[83] In finding that there was only one claim, his Honour emphasised the importance of substance over form –

> "11. Viewing the matter as a matter of substance rather than form, only one payment claim was made comprising two amounts each reflected in an invoice of the same date."

[84] *Camporeale Holdings* is a decision of Henry J in which the applicant, who was the respondent to a progress payment claim, asserted that the claim did not comply with the requirements of BCIPA and it was not therefore obliged to pay it. Henry J also emphasised the importance of substance over form and the way in which the documents said to comprise the claim would have been understood.

[85] The payment claim was served by, and in the form of, an email, consisting of a covering email and attachments. The covering email contained the following statements –

> "Claim #8 Proserpine High School Thu, Sep 25, 2014 at 4.41 pm
> Hi Sandra,
> Attached is Claim #8 for Proserpine High School along with variations 1-3.
> Please advise if you require any further documentation."

[86] Five pdf-documents were attached (although not all were in evidence before his Honour). The four attachments in evidence consisted of four separate tax invoices from the first respondent to the applicant. Three were for variations (for amounts of $4325.20, $6,316.20 and $10,024.96) and the fourth was an invoice for a total amount of $62,722 for "Progress claim #8 Handrails complete to 100%".

[87] The description of work in each invoice identified it as relating to "The Project at the Proserpine State High School". Each invoice was dated 25 September 2014. And each was endorsed: "This invoice is issued under [BCIPA]".

[88] The applicant submitted that, contrary to the requirement that a claimant not serve more than one payment claim, four separate payment claims were served on 25 September 2014. The applicant argued that the claimant's covering email did not assist the

claimant because it did not identify itself or the whole content of the email as one payment claim and did not state that it was made under the Act.

[89] His Honour concluded that the payment claim was valid. His Honour said (footnotes omitted, my emphasis) –

> "12. It is well settled that because of the mandatory consequences of the BCIPA regime the content of a progress payment claim must strictly comply with the requirements of that statutory regime. **However, whether a purported claim does satisfy the description of a payment claim is not to be approached from an unduly critical viewpoint and the only concern is whether the content of the purported claim satisfies the statutory description.**
>
> 13. The real issue here is whether compliance ought to be assessed in a purely literal sense without regard to the combined effect of multiple documents served together.
>
> 14. The importance of considering the totality of the documents served in purported compliance with s 17 was illustrated in *Tailored Projects* ...
>
> 15. The applicant seeks to distinguish that case from the present on the basis that unlike the covering document in *Tailored Projects*, the covering email here did not state it was a payment claim under the Act. The applicant argues that the presence of such a statement on each of the invoices does not assist the first respondent's position and to the contrary, supports the argument that more than one payment claim has been served, contrary to s 17(4).
>
> 16. It will be recalled however that s 17's prohibition is on the service of more than one payment claim "for each reference date". The reference date here was monthly. The only evidence of any service of any payment claims for the month in question was the act of service on 25 September 2014. If that service is properly construed as service of one payment claim there could only have been one service (sic) claim for the relevant reference date.
>
> 17. The four invoices here were received as one set of documents in the one act of service as attachments to a single covering email. To interpret s 17 as requiring that the covering email here had to explicitly state the attachments formed part of one payment claim **would be to ignore the collective state in which they were received and referenced by the covering email**. Similarly, to interpret s 17 as requiring the covering email to state that it was made under the Act would be to ignore that each of the invoices stated they were made under the Act. **Considered collectively, those invoices and the covering email constituted one payment claim which was stated to be made under the Act**.
>
> 18. That conclusion is consistent with New South Wales authority … [His Honour referred to *Alan Conolly* and *Ardnas*.]

> 19. …
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> 20. The applicant submitted the covering email here should have cited a single total amount claimed. However, it is obvious when the documents are considered together that the amount claimed was the total of the four amounts stated in the invoices. The absence of a statement of the mathematical total of those amounts does not make the statements of the four amounts considered in combination any less a statement of the amount of the progress payment claimed. I am fortified in that conclusion by s 32C of the *Acts Interpretation Act* 1954 (Qld) which provides that in an act words in the singular include the plural and vice versa. Thus a payment claim which states the amounts of the progress payment claims to be payable will comply with section 17(2)(b) as long as those amounts are stated as part of one payment claim.
>
> **21. When collective consideration is given to the content of all of the documents served** it is readily discernible that the combined total of the invoices served was one payment claim and that it was said to be made under the Act. **The documents were served together and it would have been obvious to their recipient that they fell for consideration collectively. When they are considered collectively it can be seen that what was served was one payment claim and that it met the requirements of s 17.**"

[90] NCP also relied upon *Walter Constructions Group Ltd v CPL (Surry Hills) Pty Ltd,*[15] in which Nicholas J of the New South Wales Supreme Court dealt with an argument that documents served on a recipient, purporting to be a payment claim, were ambiguous or lacking in clarity to such an extent that it was not reasonably apparent to the recipient that it had been served with a claim under the New South Wales equivalent of BCIPA.

[91] In rejecting that argument, Nicholas J applied an objective test as to how the documents would have been reasonably understood by the recipient. His Honour said –

> "82 Section 31(2)(c) requires the payment claim to state that it is made under the Act. It must be clear on the face of the document that it purports to be a payment claim under the Act. The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning …"

[92] His Honour referred to authority which emphasised the need for a common sense and reasonable approach.[16] His Honour determined the matter from the point of view of a reasonable recipient of the documents.

[93] As to how the documents in this case were likely to be reasonably understood by Trackson, counsel for Trackson submitted that I ought not to view the documents entirely objectively. He said, "given the history between these parties and what appears

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[15] [2003] NSWSC 266.

[16] *Pyneboard v Trade Practices Commission* (1982) 39 ALR 565 at 571.

to have been a reaction by the respondent to what happened at the first adjudication, this would be understood by the parties here as three payment claims, because the obvious intent is to try and avoid the same thing happening that happened at the first adjudication".[17] In oral submission in reply,[18] in further support of its submission that I ought not to view the documents entirely objectively, Trackson relied upon *Multiplex Construction v Lukiens and Anor*[19] and *Protectavale v K2K Pty Ltd*.[20]

[94] *Multiplex v Lukiens* is a decision of Palmer J of the New South Wales Supreme Court. One of the errors said to have been made by the adjudicator in that case was that he failed to take into account Multiplex's reason for non-payment of certain items (namely, that those items had been deleted from the contract). The adjudicator was of the view that the reasons for withholding payment stated in the Payment Schedule had not been sufficiently indicated. The relevant part of the Payment Schedule referred to "scope deletions" in an abbreviated way.

[95] Palmer J held that the adjudicator erred in holding that the reasons had not been sufficiently indicated. His Honour said –[21]

> "A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of the construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute."

[96] In the Federal Court, in *Protectavale,* Finklestein J referred to *Multiplex* in stating that, while the test as to whether an invoice met the requirements of a payment claim under the Act was objective, its terms had to be read in context. His Honour said: "Payment claims are usually given and received by parties experienced in the building industry who are familiar with the construction contract, the history of the project and any issues which may have arisen regarding payment. Those matters are part of the context".[22]

[97] In the present case, an examination of the history reveals that, for the purposes of the adjudication of the claim made on 27 September 2018, NCP spelt out its position. In its adjudication application relating to the wet hire invoice it said:

> "12.2 Progress claim 6 was the subject of adjudication decision number 409951 dated 23 August 2018 which ultimately found that the

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17 Transcript 1 – 19, lines 20 – 25.
18 Transcript 1 – 54 – 1 – 56.
19 [2003] NSWSC 1140.
20 [2008] FCA 1248.
21 [2003] NSWSC 1140 at [76].
22 [2008] FCA 1248 at [10].

adjudicator had no jurisdiction to decide the application because Progress Claim 6 related to three separate construction contracts.

12.3 Having objected to the validity of Progress Claim 6 which included claims for payment pursuant to three contracts or arrangements; the respondent now seeks to circumvent the operation of BCIPA by objecting to the applicant making three separate payment claims pursuant to those three contracts or arrangements.

12.4 The effect of adjudication decision 409951 is that Progress Claim 6 was invalid for the purposes of BCIPA.

12.5 It follows that the applicant must make a new claim, and for it to be a valid claim for the purposes of BCIPA, three separate payment claims must be made. The applicant has made three separate claims under BCIPA.

12.6 The contractual basis of the applicant's claims is abundantly clear (both in the adjudication application and in this Payment Claim) and at no time has the applicant waivered from that position."

[98] The characterisation of the claims as separate claims was reflected in the affidavits of Ms Diamond and Mr Selke submitted in support of NCP's adjudication application.

[99] In its adjudication response to the wet hire claim (invoice 1012) Trackson said:

"PAYMENT CLAIM

26 The Respondent accepts that the Payment Claim is as provided by the Claimant in the Statutory Declaration of Tracey Lee Diamond … as a full copy of the Claim that was served upon the Respondent.

27 The Payment claim was served in a single email comprising three payment claims, and it was not apparent whether this amounted to a single payment claim under one contract or three separate claims under three separate contracts.

28 This Payment Claim is a repetition of Progress Claim 7 submitted under the Schedule of Rates Contract, with that claim being split into three parts and three alleged separate contracts.

PAYMENT SCHEDULE

29 The Respondent, consistent with its view that there has only ever been one contract between the parties, served a single Payment Schedule…[23]"

[23] In its adjudication application relating to the float hire invoice, NCP made the same submissions about the need for it to characterise its invoices as relating to three separate claims as is set out above. Trackson's response to this aspect of the claim was as set out above.

[100] As the extract immediately above shows, Trackson stated (for the purposes of its adjudication response) that it "was not apparent" to it when it received the payment claim for 27 September 2018 whether the email and invoices attached amounted to one claim or three (see [27] in the quote immediately above). That statement is inconsistent with the submission made by its counsel here that the email and its attachments were *understood* by Trackson as three payment claims.[24] In those circumstances, I consider it appropriate to consider the documents objectively.

[101] The authorities emphasise the need to approach this issue in a way which does not give undue emphasis to form over substance, having regard to the purpose for the prohibition upon service of more than one payment claim per reference date, and to consider the way in which the documents were likely to be reasonably understood by their recipient.

[102] I find that NCP served one payment claim, by email (and in hard copy), comprising three invoices.

[103] I have reached that conclusion for these reasons: The invoices were sent as attachments, under one email cover. They were sent collectively and at the same time. They bore the same date. They concerned work under the same construction contract and they each referenced the same project. Reasonably understood, Trackson would have appreciated that NCP was claiming the total of the invoice amounts in its payment claim for September. Viewed reasonably, there was not service of more than one payment claim upon Trackson for one reference date.

[104] I find that the payment claim met the requirements of BCIPA and was valid.

Was the adjudication decision invalid because it was one of two adjudication applications made by NCP arising out of one payment claim?

[105] This argument, that the adjudication decision was invalid because NCP submitted two adjudication applications for one payment claim, was first made in Trackson's written submissions in reply to NCP's response.

[106] Trackson's primary position was that NCP had served more than one payment claim for one reference date, contrary to section 17(4) BCIPA. Its secondary position was that if I were to find that NCP had served only one payment claim, then the adjudication decision was invalid because on the basis of that single payment claim, NCP made two adjudication applications.

[107] This secondary argument seeks to take advantage of the position in which NCP found itself after the first adjudication. To accommodate the first adjudication decision, NCP characterised its payment claim, consisting of three invoices, as three separate payment claims. Consistently with that characterisation, it pursued two of those claims through adjudication separately.

[108] The second adjudicator, who did not agree that separate payment claims were required, nevertheless adjudicated the claims as separate claims – abiding by the decision of the first adjudicator.

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[24] Transcript 1 – 19, lines 20 – 25.

[109] Trackson's secondary position is one that argues, in effect, that NCP ought to have persisted in its characterisation of its three invoices as a single payment claim – notwithstanding what had occurred at the first adjudication. Having said that, I record that I appreciate that the parties cannot confer jurisdiction beyond that which is conferred by BCIPA.

[110] NCP submitted that there was no authority to support an argument that – were I to find that there was only one payment claim – the adjudication application in respect of the wet hire claim was invalidated because NCP *also* filed an adjudication application in respect of its float hire claim.

[111] It argued that, on the assumption that it had in fact served one payment claim on 27 September 2018 –[25]

- it was entitled to submit one adjudication application in respect of its one payment claim;
- it was not required to pursue the whole of its claim through adjudication: I could treat the adjudication application for the wet hire claim as an adjudication application for *part* of its claim;
- any subsequent application for adjudication (of another part of the claim) would not have been valid;
- the invalidity of the float hire adjudication application did not bear upon the validity of the first adjudication application; and
- the service of the float hire adjudication application did not invalidate the adjudication application in relation to wet hire.

[112] Trackson relied for its argument upon *Rail Corporation of NSW v Nebax Construction*,[26] a decision of McDougall J of the New South Wales Supreme Court.

[113] NCP submitted that while that decision was authority for the proposition that a claimant could not lodge more than one adjudication application per payment claim, it was not authority for the proposition that submitting a second adjudication application for a payment claim invalidated the first.

[114] In *Rail Corporation v Nebax*, Nebax made what it called "Progress Claim No 18" by email. The email stated, "Please find attached invoices in relation to progress claim No 18 in the platform resurfacing program 2009-10. The above claims are for the month of September 2011". The email was sent with five invoices and other documents. Railcorp responded with five payment schedules – one in respect of each invoice. It the case of each invoice, Railcorp stated that it would pay either nil or something less than the amount claimed. Nebax made five adjudication applications – one in respect of each invoice. Railcorp took the point at adjudication that there were five separate adjudication applications referable to one contract and one payment claim, contrary to the Act. The adjudicator found that there were in fact 25 separate contracts on the strength of their being 25 severable portions of the contract. On that basis, he dealt with

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[25] Transcript 1-43 – 1-44.
[26] [2012] NSWSC 6.

the five adjudication applications which were made. Railcorp challenged the adjudicator's determinations.

[115] McDougall J concluded that, when one considered the structure of the Act as a whole it was "reasonably clear" that there could be only one application for adjudication of only one payment claim.[27] His Honour said –

> "44 It seems to me that, because s 13(5) prevents … the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can be only one adjudication application for any particular payment claim for any particular contract.
>
> 45 The proposition that there may be multiple adjudication applications in respect of different parts of a payment claim seems to me to be completely inconsistent with the underlying objective of the Act, which is to provide for an enforceable right to progress payments and a relatively cheap and efficient means for enforcement of those rights …
>
> 46 Thus, I seems to me, the better view of s 17(1) is that there can only be one adjudication application for any one payment claim. To put it another way, it seems to me that s 17(1) does not authorise the lodging of multiple adjudication applications in respect of the one payment claim.
>
> 47 On that basis, the adjudicator was required to do as he did, and to consider whether the objection to jurisdiction was good …"

[116] As noted, the adjudicator reasoned that there were in fact 25 separate contracts between the parties, one for each separable part of the works. That was an approach which neither party had taken. Nor had the parties been given notice of the adjudicator's intention to decide the matter on that basis or given an opportunity to be heard on the point. McDougall J concluded that the parties had been denied natural justice and had the parties – Railcorp in particular – been permitted to make submissions on the point, the adjudicator might have been (and should have been) persuaded to change his mind. McDougall J concluded that there had been a material denial of natural justice which rendered his determination void.[28]

[117] NCP is correct in its submissions that this case did not address the question whether the first of the adjudication applications was valid.

[118] In *Alan Conolly*, it was argued that the "second and third purported payment claims" were not valid because the claimant had served more than one payment claim. Master Macready noted that implicit in that argument was the concession that the first page of

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[27] Ibid [42].

[28] As an aside, I note his Honour's statement at [30] that he had no doubt that in an appropriate case "it is open to a claimant to submit one payment claim, for the purposes of the Act that comprises several invoices, even though each invoice is separately stated to be a payment claim for the purposes of the Act". His Honour referred to the decision in *Alan Conolly* and stated that he had no doubt that the finding in that case was "sound in law". His Honour's observations provide further support for my decision on the "one claim or three" issue.

the facsimile constituted a valid payment claim.[29] Trackson made the point that it had not made that concession in this case. Its position was that if there was more than one payment claim, they were *all* invalid. As I understood Trackson's point in referring to *Alan Conolly*, it was that, consistently with its payment claim position, if there was more than one adjudication application made, they were all invalid.

[119] Proceeding on the assumption that NCP was entitled to make only one adjudication application, and on the assumption that the "second" application did not invalidate the "first", raised the issue of which adjudication application was the "first" one.

[120] That issue may be resolved by reference to the file numbers allocated to the adjudication applications. It is reasonable to assume that the adjudication registrar issues file numbers to adjudication applications in ascending numerical order. On that basis, adjudication number 443788 was made to the registrar before adjudication number 443792. On that basis, the application determined by the adjudicator was the "first" adjudication application.

[121] I note however that the two adjudication applications were lodged by NCP on the same day (26 October 2018) and acknowledge the likelihood that they were lodged, in effect, simultaneously. Indeed, one might have expected them to be allocated sequential file numbers but they were not. I acknowledge that there might be thought to be some artificiality in designating adjudication application 443788 as the "first" application and adjudication application 443792 as the "second".

[122] Nevertheless, in the absence of authority to support the argument that NCP's making its second application invalidated its first, I am prepared to treat adjudication application 443788 as the first, and valid, adjudication application which was not invalidated upon NCP's making adjudication application 443792.

[123] On that basis, NCP was not permitted to make adjudication application 443792 but, as it turns out, the adjudicator did not determine that application.

[124] I mention also that in the course of considering this argument, I became concerned about what seemed to be Trackson's shifting position. Trackson encouraged the first adjudicator to find that he had no jurisdiction because NCP had impermissibly submitted one payment claim for three construction contracts. In seeking adjudication of its September payment claim, in accordance with the decision of the first adjudicator, NCP treated each invoice as a separate claim, warranting separate adjudication applications. Trackson now wishes to argue that that was impermissible. I asked the parties for submissions as to whether any estoppel arose having regard to Trackson's change in position.

[125] In written submissions, NCP argued that "Trackson should be estopped from now asserting that the filing of separate Applications in relation to these Works invalidates the Adjudicator's decision". In support of that argument, NCP referred me to no authority or statement of principle. I found that less than satisfactory.

[126] Trackson submitted, and I agree, that no issue estoppel arose out of the first adjudicator's finding that he had no jurisdiction. Trackson also argued that no

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[29] *Alan Conolly* at [14] – [15].

equitable estoppel arose. It submitted that it was entitled to take what it called "a pleading point" about the way in which NCP had "framed its case" at the first adjudication. It argued that NCP chose not to "change its case" (for the purposes of its later adjudication applications) to contend that there was a single contract with variations. It argued that there was no evidence of NCP's reliance on Trackson's position or of any of the other elements necessary to establish equitable estoppel.

[127] Having regard to the limited argument advanced by NCP, I would not be prepared to find that an estoppel applies to prevent Trackson from taking the point now about NCP's making two adjudication applications.

[128] However, the court has a discretion not to exercise its supervisory jurisdiction. The discretion must be exercised judicially, but it may be exercised to withhold relief in appropriate circumstances[30] where it is just to do so.[31] Even if I am wrong, and the correct conclusion is that both of NCP's adjudication applications are invalid, I would exercise my discretion to withhold relief on this basis. I would do so because, as NCP explained, it was attempting to comply with the decision of the first adjudicator in its approach to the following adjudication application, which decision had been encouraged by Trackson.

The conference

[129] As noted above, the adjudicator called a conference of the parties.

Sections 25 and 26 BCIPA

[130] Sections 25 and 26 BCIPA are relevant to Trackson's arguments about the conference. Section 25 is set out above. Section 26 follows –

> "**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 of 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 Services Authority Act 1991*, part 4A;[32]

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[30] *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd and others* [2013] QSC 223.

[31] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67.

[32] *Queensland Building Services Authority Act 1991*, part 4A (Building contracts other than domestic building contracts).

(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."

Was the adjudicator permitted to receive evidence from a "witness" at a conference of the parties?

Was the adjudicator permitted to take into account "submissions" made during the conference in deciding the adjudication application?

[131] This matter proceeded on the understanding that a "conference" called by an adjudicator involved a meeting to discuss matters an adjudicator wished to clarify for the purpose of an adjudication decision.

[132] Trackson argued that there were irregularities in the conference called by the adjudicator and that his adjudication decision should therefore be set aside.

Trackson's arguments that there ought to be no witnesses at a BCIPA conference

[133] Trackson argued that the conference held by Mr Sarlos was irregular because it included "witnesses" who were not parties. I note that Mr Sarlos invited the parties to bring along to the conference not more than two persons "for support".

[134] The "witnesses" in attendance at the conference were persons who had submitted statutory declarations in support of NCP's adjudication application submissions and Trackson's adjudication response – although Mr Trackson's presence was as a director of a party as well as a declarant.[33]

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[33] Trackson also argued, in its original written submissions, that there had been a denial to it of natural justice at the conference. Counsel for Trackson indicated at the hearing that Trackson was not pursuing this complaint.

[135] Trackson's position was that a conference may be used by an adjudicator to resolve questions of fact (in effect acknowledging the weight of the authority relied upon by NCP to make that point)[34] but the only conference permitted by BCIPA was one involving the *parties*, not one involving "an oral hearing of the evidence of witnesses, namely Mr Hargreaves".

Trackson's arguments that there could be no submissions made at a BCIPA conference

[136] Trackson argued that "submissions" could not be made at a conference, and the fact that "submissions" were made there rendered it irregular. It said –

> "The Act does not refer to submissions being made at a conference. The mandate in s 25(4) that the conference must be conducted informally and in the absence of legal representatives. (sic) The drafters of the Act would expect that submissions would be made by the parties' legal representatives."[35]

[137] In other words, Trackson argued that only *written* submissions,[36] *by a party's legal representative* were permitted by BCIPA. Trackson argued that "[i]f the parties were permitted to make submissions at a conference, then an experienced (and perhaps legally trained) party representative would have a significant advantage over a lay party, experienced in adjudication procedures".

Trackson's arguments that submissions made at a conference could not be taken into account by an adjudicator

[138] As a complement to its argument that submissions could not be made at a conference, Trackson argued that the only submissions which could be considered by an adjudicator were those made in support of, or in response to, the adjudication application, or under section 25(3)(b) BCIPA. If submissions were, impermissibly, made at a conference, then the adjudicator was not permitted to consider them "by operation of section 26(2) BCIPA".

[139] Trackson argued that –

- by sections 26(2)(c) and (d), the adjudicator may only consider submissions "properly made" by the parties – that is, submissions made in support or, or in response to, the adjudication application, or written submissions requested by the adjudicator under section 25(3)(b);

- the adjudicator improperly accepted submissions (in the sense of evidence) from Mr Hargreaves at the conference;

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[34] Including *Built Environs Pty Ltd v Tali Engineering Pty Ltd and Ors* [2013] SASC 84 and *Roadtek, Department of Main Roads v Philip Davenport and Ors* [2006] QSC 047

[35] I note that Trackson's written submissions misstate section 25(4) – which does not say that a conference must be conducted in the absence of legal representatives. The section is reproduced above. However, I acknowledge the ambiguity of the phrase "not entitled to any legal representation".

[36] If legal representatives were not permitted at the conference, then they were only able to make written submissions because BCIPA provided for no other forum in which the legal representatives might make un-written (that is, spoken) submissions.

- in his adjudication decision, contrary to section 26(2), the adjudicator relied upon Mr Hargreaves conference submissions to resolve issues about –
    - whether there was an implied term of the contract that the amounts claimed were on account;
    - ostensible authority; and
    - work being outside the schedule of rates;
- the consideration of Mr Hargreaves' submissions was not permitted by section 26(2) and constituted jurisdictional error; and
- the adjudication decision was therefore invalid.

Utility of a conference

[140] In my view, Trackson's view of a BCIPA conference renders it of extremely limited utility. I raised this with counsel for Trackson at the hearing –

> "MR GREINKE: … my contention will be that the conference of the parties does not permit submissions to be made on which the adjudicator can rely and that's really a question of statutory interpretation of the surrounding matrix in relation to the way the Act operates.
>
> HER HONOUR: What would be its other purpose?
>
> MR GREINKE: The purpose, according to the authorities, and several that were cited my learned friend's outline, is for the adjudicator to resolve factual matters in relation to understanding the claims of the parties, and put the parties into the one place and ask them questions.
>
> HER HONOUR: So you draw a – but you don't say the answers to those questions are evidence?
>
> MR GREINKE: I say that the limited way in which the conference can occur don't permits two types of exercises. One exercise is to treat it as a hearing by witnesses. So we say that it was wrong to allow Mr Hargraves, as a witness for one side, to come along and effectively put evidence before the adjudicator.
>
> … And the other one was that because of the mandate that it be informal, and the mandate that you're not entitled to have legal representation, the intention of the Act is that that's not a forum for the parties to make submissions to the adjudicator when there is a formal process for putting those submissions in place through the adjudicator's response.
>
> HER HONOUR: And if, though, you say the conference is an opportunity for the adjudicator to get some clarification about factual matters
>
> …

who would you imagine attending to assist the adjudicator, other than a project manager, for example, with factual matters?

MR GREINKE: Well, one would assume the parties' representatives, their directors or the parties themselves, would be the parties to attend because it does refer to a conference of the parties. It does not refer to conference of the parties, and witnesses and other persons. And the structure of the Act itself, I submit, runs against the argument that you can conduct a hearing in relation to matters.

HER HONOUR: Yes. So I'm not so much thinking of a hearing, but I'm just thinking, in practical terms, an Act with a definite purpose and the conference, in the context of the Act, is designed to assist the adjudicator.

MR GREINKE: Yes.

HER HONOUR: And it's a quick way, one imagines, a quick way for the adjudicator to get answers to questions rather than send out written requests for things.

MR GREINKE: Yes.

HER HONOUR: So if you say "the parties", so you're thinking of the directors of the relevant companies, how helpful are they likely to be?

MR GREINKE: I can see your Honour's point in relation to the practicality of that, and so it's really just

HER HONOUR: …

if there's a distinction between evidence and submissions, that's easily understood, but if we go beyond that and say, "Well, people who might be able to give evidence of relevant facts ought not even be there because the legislation is requiring attendance by the parties"

…

it starts to feel like it's losing utility unless the directors are briefed previously or something like that …

…

MR GREINKE: I think if I can put it this way, your Honour. The process, in my submission, will be that there's not (sic) an opportunity to put evidence in as part of the adjudication application and response, but the conference is not an opportunity to supplement that evidence and expand that evidence with witnesses that are brought along. Otherwise, it might well turn into – if that was permitted, it might well turn into an exercise of both parties arming themselves with a range of different individuals

…

> to bolster their, effectively, quasi evidentiary case before the adjudicator.
>
> HER HONOUR: Yes.
>
> MR GREINKE: And thus if it's a question of clarifying evidence which is already in there, one doesn't need those witnesses to be there in relation to that particular evidence.
>
> HER HONOUR: How would it otherwise be clarified if it was technical evidence, for example?
>
> MR GREINKE: On my client's case, by parties or the party's directors in relation to that, providing that clarification."

[141] In a later exchange with me, counsel for Trackson acknowledged that it was difficult to differentiate between what was involved in "clarifying facts" with a person present at a conference, which he submitted was permitted, and "taking evidence" from such a person, which he submitted was prohibited.

[142] He submitted that were a person other than a party/its director permitted to attend a conference, then the conference would not be "confined and informal and quick and straightforward": it would turn into a "mini-hearing", which was not permitted by BCIPA.[37]

Authorities

[143] Neither party took me to dictionary definitions of "conference" or "submissions".

[144] NCP stated that there were few authorities on BCIPA conferences. Trackson did not suggest otherwise.

[145] Those to which I was taken expressly stated or impliedly conveyed that a BCIPA conference is a mechanism by which an adjudicator may resolve a question of fact or law.

[146] As Blue J recognised in *Built Environs Pty Ltd v Tali Engineering Pty Ltd and Ors,*[38] typically, disputes over payment claims do not involve complex legal issues but rather the valuation of work performed to date. The typical dispute is static and may be resolved on the written application and response. However, as Blue J also recognised, some disputes may involve complex issues of fact or law which may call for a conference to allow the parties to put and meet contentions and/or the opportunity for written submissions for the same purpose.

[147] In *Built Environs*, Blue J held that natural justice in that case required the adjudicator to permit both parties to produce to him "submissions and evidence" (beyond their original application and response) relevant to certain issues which the adjudicator had taken into account "or alternatively" to call a conference of the parties to address this issue. Thus, his Honour treated the addressing of an issue at a conference as equivalent to the written "submissions and evidence" which might be produced about it. In other words, in his

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[37] Transcript 1 – 29 line 34 – 1 – 31, line 14.
[38] [2013] SASC 84 at [154].

Honour's view, the conference provided an occasion for the parties to address an issue orally and informally, as an alternative to written submissions and evidence.

[148] Trackson referred to *David Hurst Constructions v Helen Durham*[39] as authority for the proposition that a witness cannot give evidence at a BCIPA conference. In its written submissions, it referred only to *part* of a paragraph of McDougall J's judgment – that is, the part in which his Honour said (emphasis by Trackson) –

> It is clear from the scheme of the Act that what is called for is some process or balancing or evaluating the competing materials by the parties. It is **not a matter of calling evidence.** Nor is it a matter of conducting a mini-trial.

[149] As NCP submitted, that statement was taken out of context.

[150] In context, McDougall J was dealing with a complaint that an adjudicator had impermissibly imposed an evidential onus upon the claimant. That statement in context (as set out immediately below) does not support Trackson's submission that a witness may not be present at a conference –

> [68] The duty of an adjudicator, as laid down in [the equivalent of section 26(1)], is to determine the amount of the progress payment (if any) to be paid, the date of payment and rate of interest. In undertaking that task, the Adjudicator is to consider only so many of the matters referred to in subs(2) as may be applicable. It is clear from the scheme of the Act that 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. It is not a matter of conducting some mini trial. But at the same time, if the Adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that he or she be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward).
>
> [70] Thus, one might think, it is incumbent on a claimant to put before the adjudicator material that is rationally capable of persuading the adjudicator that the amount claimed is in fact payable.

[151] In *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd & Ors*,[40] Daubney J stated that the word "submissions" in section 26(2)(d) was not to be construed narrowly: "indeed, the words of the section show specifically that submissions may include relevant documents in support". His Honour referenced *Austruc Constructions Ltd v ACA Developments Pty Ltd*[41] for that proposition.

[152] Neither party took me to *Austruc* but in that case McDougall J dealt with an argument similar to the argument made by Trackson here. His Honour was required to consider the meaning of the word "submissions" in the sections of the New South Wales Act which were equivalent to sections 21(3) and 26(2) BCIPA. In that case, it was argued that –

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[39] [2008] NSWSC 318.
[40] [2011] QSC 293 at [32].
[41] [2004] NSWSC 131 at [68].

- "submissions" were something different from evidence;
- they were "the theory or reasoning to support the position for which a party is contending"; and
- "submissions" in support of an adjudication application could not include evidence.

[153] McDougall J rejected the argument. His Honour said –[42]

> "[65] I do not think that the word "submissions" in either [section 21(3) or 26(2)] should be limited as … submitted. Firstly, I do not think that the ordinary English meaning of the word "submission" is limited in the way that ACA contends. It is certainly correct to say that one of the definitions given by the *Shorter Oxford English Dictionary* is "[t]he theory of a case put forward by an advocate". However, the same dictionary also defines the word to mean "the act of submitting a matter *to* a person for decision and consideration"; and it gives other definitions as well. Further, the *Macquarie Dictionary* defines "submissions" as including "the art of submitting … the condition of having submitted … submissive conduct or attitude … that which is submitted …*law* an agreement to abide by a decision or obey an authority in some matter referred to arbitration …"
>
> "[66] It is apparent from the definitions given by both dictionaries that the 'ordinary English meaning' for which ACA contends is a specific application of a more general meaning, to the effect of "that which is submitted for decision or consideration".
>
> [67] Secondly, I think that the better view of [section 21(3)] is that it does not limit the matters that may be put to an adjudicator in an adjudication application. In this context, I think that the mandatory language of paragraphs [(a) to (e)], and the discretionary language of [(f)], is clear.
>
> [68] Thirdly, and in any event, I think that it is [section 26(2)] that governs the situation. It will be recalled that that subsection specifies the only matters that an adjudicator may take into account. Those matters include, through paragraph (c), the relevant payment claim 'together with all submissions (including relevant documentation) …' Not only do the parenthesised words show that the legislature had in mind that the word 'submissions' was not to be construed narrowly …; they show specifically that the submissions may include relevant documentation in support.
>
> [69] It follows, I think, that if a claimant chooses to include, as part of the relevant documentation supporting its payment claim, a statutory declaration whereby relevant matters are, in effect, verified, then that statutory declaration will form part of the material to be considered by the adjudicator. Equally, if a claimant includes such a statutory declaration in its adjudication application, that is part of the 'submissions' to be considered."

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[42] Ibid at [65] – [69].

[154] I respectfully agree with their Honours that the word "submissions" is not to be narrowly construed nor limited to arguments with a legal flavour.

Consideration of Trackson's arguments

Are "witnesses" permitted at a conference of the parties?

[155] The issue is whether persons who are not parties may attend a "conference of the parties" called in pursuance of section 26(3)(d) BCIPA.

[156] In resolving that issue, one must bear in mind the instruction in section 14A of the *Acts Interpretation Act* 1954 that, in interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[157] BCIPA reflects the legislature's recognition that regular progress payments provide the cash flow which keeps subcontractors in business. BCIPA provides a scheme to expedite claims to progress payments, and a dispute resolution process in which adjudicators resolve payment disputes, on an interim basis, within tight time frames. As Mackenzie J explained in *Roadtek, Department of Main Roads v Philip Davenport and Ors,*[43] adjudication is "essentially a summary process based on written information". But additionally: "Further written submissions may be called for by the adjudicator … The adjudicator may call a conference of the parties … and make an inspection". His Honour also observed that the process of adjudication was not conducive to resolving questions of fact that cannot be resolved on written submissions or in a conference or by inspection.

[158] BCIPA aims for the speedy resolution of payment disputes. It recognises that the outcome of most adjudications will turn on questions of fact and that an adjudicator is likely to be able to resolve most payment disputes on the written submissions accompanying the adjudication application and the adjudication response. BCIPA also recognises that in some cases, either further submissions or a conference or an inspection may be required by the adjudicator.

[159] In my view, the way in which a BCIPA conference is to be held – that is informally and with resistance to legal representation – is intended to avoid the delays which might be occasioned by formality or any attempt (by a party's legal representative) to run a conference like a mini-hearing. In my view, in its requiring informality and in its resistance to legal representation, BCIPA intended an adjudicator to "call the shots" at a conference in determining how it is to be run and the issues to be discussed at it. This aligns with BCIPA's aiming for the speedy resolution of payment disputes by adjudicators with relevant expertise.

[160] Trackson argued that none of the decisions to which NCP referred supported the proposition that a witness may give evidence at a conference. While that may be so, in my view, a conference attended only by the parties would have little utility. The resolution of issues relevant to a payment dispute is likely to require the input of those with relevant experience. As Blue J observed in *Built Environs v Tali*, the paradigm type of dispute between the parties involves subject matter which is in the realm of building and construction experts (footnotes omitted) –[44]

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[43] [2006] QSC 047.
[44] Ibid at [57] – [60].

> "[57] The paradigm type of dispute concerning claims is a dispute about the value of the work performed to date by the contractor out of the total work to be performed under the contract. This can involve a dispute about quantum and/or value of goods and services supplied by the contractor. It can involve a dispute about a percentage completed to date in respect of defined components of the works. It can involve a dispute about a variation. These types of disputes are the province of quantity surveyors, architects, building surveyors, project managers, building supervisors and suchlike.
>
> [58] The value of work completed to date may also be affected by defective work. The assessment whether work is defective in the sense that it affects the value of the work completed to date is the province of architects, engineers, building surveyors, project managers, building supervisors and suchlike.
>
> [59] The structure of the Act assumes that disputes concerning payment claims to be adjudicated under the Act will predominantly be of the above nature. This is reflected in the relatively short timing for payment schedules in response to payment claims … adjudication responses in response to adjudication applications … and adjudication determinations … It is reflected in the adjudicator being confined to having regard only to the contract, the payment claim and submissions in support of it, the payment schedule and submissions in support of it and the results of any inspection carried out by the adjudicator … It is reflected in s 18(1)(b) [of the equivalent South Australian Act] requiring regulations to prescribe qualifications, expertise and experience for a person to be an adjudicator. The *Building and Construction Industry Security of Payment Regulations* 2011 (SA) … prescribe eligibility criteria encompassing architects, engineers, building surveyors, project managers, quantity surveyors and building supervisors.[45]
>
> [60] The above is not to say that diverse other issues of law or fact might not be thrown up by a payment claim and its response and may not be determined by the adjudicator. However, the paradigm types of disputes over progress claims contemplated by the Act provide some guidance to construing the requirements of the Act."

[161] I respectfully agree with his Honour that the nature of BCIPA disputes provides guidance in the construction or interpretation of the Act.

[162] In my view, particularly having regard to the typical nature of payment disputes, it would deprive a conference of utility, and run counter to the purposes of BCIPA, were the phrase "a conference of the parties" interpreted as "a conference of the parties *only*".

[163] In my view, the phrase, "a conference of the parties", is a short hand way of conveying that an adjudicator must invite both sides of the dispute to a conference. It is not intended to convey that conference attendees are limited to the actual parties to the construction contract. The parties will often be corporations and, in many cases, their

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[45] BCIPA – as in the Act itself – prescribes a regime for the registration of appropriately qualified persons as adjudicators.

representatives will be unable to assist the adjudicator in resolving disputes which are "in the province of quantity surveyors, architects, building surveyors, project managers, building supervisors and suchlike". No matter how well briefed, a director, as the representative of a party, is unlikely to be able to contribute to a conference as effectively, or reliably, as a relevant witness, with relevant expertise, who is able to give evidence first hand in a dynamic, conference environment.

[164] In my view, for a conference to have utility, having regard to the purposes of the Act and the paradigm types of disputes over payment claims, those in attendance at a conference must be able to quickly provide information in response to an adjudicator's questions. In my view, witnesses other than the parties, with relevant expertise or factual knowledge, may be in attendance at a conference of the parties.

[165] As to Trackson's argument that the reason why witnesses are not permitted at a conference is to avoid the parties arming themselves with additional evidence to bolster the case they made in their written submissions, I make the following observation. BCIPA does not suggest that an adjudicator is to call a conference in every case. A party which did not put its best case forward in written submissions (accompanied by statutory declarations), and withheld witnesses for later use at a conference, would be taking a risk that those witnesses would never be heard.

May "submissions" be made at a conference?

[166] I found it difficult to understand this argument. Trackson argued that while issues might be *clarified* at a conference, *evidence* could not be received. It was however unable to identify the difference between a conference witness "clarifying issues" (permissibly) and giving evidence (impermissibly) at a conference. Trackson's ultimate complaint seemed to be not so much that Mr Hargraves was able to provide information (and in that sense make submissions) to the adjudicator at the conference but rather that the adjudicator took the submissions into account in his adjudication decision. Trackson also asserted that BCIPA permitted only written "submissions" from lawyers – therefore nothing in the nature of a "submission" could be made orally, by a witness, at a conference.

[167] Having concluded that witnesses may attend a conference of the parties, it follows that they may respond to an adjudicator's questions at the conference – whether the adjudicator's questions involve matters of fact of law.

[168] Taking what I consider to be an appropriately broad view of the meaning of the word "submissions", a witness's response during a conference in relation to a question of fact or law is, in my view, to be treated as a "submission" for the purposes of BCIPA. Indeed, to do otherwise would lead to peculiar consequences as is explained below.

[169] Thus, in my view, a witness may make submissions – in the sense of offering an oral response to questions of fact or law posed by the adjudicator – at a conference.

May an adjudicator take into account submissions made at a conference in reaching an adjudication decision?

[170] Trackson argued that, contrary to section 26(2) BCIPA, in reaching his decision, the adjudicator considered submissions made during the conference. Trackson complained

in particular about the submissions made concerning ostensible authority because that was not a matter that had been raised before. Counsel for Trackson referred to *State Water Corporation v Civil Team Engineering Ltd.*[46] He submitted that, "The adjudicator's power to seek further written submissions cannot be used to invite new submissions that weren't already part of the **application** or response, but only to clarify existing submissions" (my emphasis).

[171] In my view, that submission by Trackson over-states the effect of the *State Water* paragraph relied upon (that is, paragraph [44], see below).

[172] Relevantly, in that matter, Civil Team referred a payment claim for adjudication. It complained to the adjudicator that State Water had, in its adjudication response, advanced reasons for non-payment which it had not included in the payment schedule it had provided to Civil Team ("new reasons"). Section 20(2B) of the New South Wales Act (which is the equivalent of section 24(4) BCIPA) stated that a respondent "cannot include in the adjudication response any reasons for withholding payment unless those reasons have been included in the payment schedule provided to the claimant". State Water complained to the adjudicator that Civil Team's complaint about its new reasons was an unsolicited submission, which should be ignored. The adjudicator sought no submissions from State Water in response to the complaint about its adjudication response including new reasons. Instead the adjudicator sought further submissions from the parties under the equivalent of section 25(3)(b) BCIPA about clause 12 of the contract, which was something that had been raised in the new reasons.

[173] The adjudicator awarded an amount to Civil Team which was much less that it had claimed.[47] Civil Team contended that the adjudication was void and should be quashed including because the adjudicator took into account the new reasons which had not been included in the payment schedule. State Water submitted that section 20(2B) was not offended because the submissions which the adjudicator took into account were made in response to specific requests by the adjudicator for submissions

[174] In rejecting State Water's argument, Sackar J said, in the paragraph relied upon by Trackson, –

> "[44] The provision permitting an adjudicator to request further submissions from the parties … cannot simply be exercised by an adjudicator to transform a party's submissions which were not duly made (by reason of s 20(2B)) to submissions duly made an capable of being considered by the adjudicator. That would empower adjudicators to defeat the underlying purpose of s 20(2B)."

[175] Thus, Sackar J's statement was limited to circumstances in which new reasons had been given in an adjudication *response*.

[176] Of more relevance is Sackar J's statement at [70], upon which NCP relied, in which his Honour went on to say that an adjudicator was permitted to consider a submission, even if it were not one duly made, if it was relevant to an issue arising under section 22(2)(a) or (b) of the New South Wales Act (that is, the provisions of the Act and of the

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46 [2013] NSWSC 1879.

47 $4,528.42 on a claim of $5,028,436.65.

construction contract (see section 26(2)(a) and (b) BCIPA). His Honour said (NCP's emphasis) –

> "[70] However, it must be remembered that the claimant's and the respondent's submissions (duly made) are only two of a number of matters that the adjudicator is required to consider. **Accordingly, an adjudicator should not ignore something of real relevance to issues arising under s 22(2)(a) or (b) or both, simply because the matter was not raised in submissions duly made by the parties** … That applies even where the adjudicator only gained an awareness of those particular matters (i.e. of particular provisions of the relevant construction contract or the Act, as opposed to the facts and circumstances of the particular case) from having come into contact with submissions not duly made … But where the situation arises, the adjudicator must bear in mind the need to afford natural justice to the parties. To address that problem, the adjudicator may wish to call for further submissions (s 21(4)(a)) or arrange a conference (s 21(4)(c))."

[177] To the same effect are statements by Hodgson JA, with whom Beazley and Basten JJA agreed, in *John Holland Pty Limited v Roads & Traffic Authority of New South Wales and Ors* –[48]

> "In my opinion, it is clear that the limit in s 22(2)(d) to submissions "duly made" is intended to engage s 20(2B); so that a submission included in an adjudication response contrary to the requirements of s 20(2B) is not "duly made" within s 22(2)(d). Of course, **the same submission could be duly made if made** in response to a request under s 21(4)(a) or **in a conference called by an adjudicator under s 21(4)(c)** ..."

[178] NCP also relied upon *Minister for Commerce v Contrax Plumbing (NSW) Pty Limited* in which Hodgson JA said (NCP's emphasis) – [49]

> "[35] … paras (a) and (b) of s 22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to **take into account any considerations** (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) **that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to the provisions of the Act.**"

[179] In my view, if a matter occurs to an adjudicator in the course of their consideration of an adjudication application, which concerns BCIPA or the construction contract, and the matter has not been dealt with by the parties in their written submissions in support of the application and response the adjudicator may call for further submissions or call a conference of the parties to deal with the matter. Those further (written) submissions, or the submissions made by the parties about the matter at the conference, will be submissions properly made and available for the adjudicator's consideration.

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48 [2007] NSWCA 19 at 31.
49 [2005] NSWCA 142 at 35.

[180] Further, in my view, the language used in BCIPA, in its provisions dealing with the adjudication of payment disputes (Division 2 of Part 3), does not support Trackson's argument about the limited meaning to be given to the word "submissions" or its argument that submissions made at a conference may not be taken into account by the adjudicator.

[181] To start with, the word "submissions" is not the only word used to deal with the written statements of the parties in support of the adjudication or adjudication response.

[182] The word "submissions" is used in section 21(3)(f) which states: "An adjudication application – may contain the submissions relevant to the application the claimant chooses to include".

[183] Thus, the section contemplates *written* submissions because they are to be "contained" in the adjudication application which must itself be in the approved documentary form.[50] It is likely that those submissions would set out the basis upon which payment is claimed. It is unlikely that submissions of that kind would be in the nature of legal arguments.

[184] The word "submissions" is used in section 24(3)(c), which must be read together with sections 24(2), (4) and (5). Those provisions are to the following effect: The adjudication response must be in writing and may contain relevant submissions. Those submissions may include *reasons* for withholding payment.

[185] A submission about the reasons why payment has been withheld does not necessarily include legal arguments.

[186] The word "submissions" is <u>not</u> used in section 24B which deals with a claimant's "reply" to a respondent's "new reasons". Section 24B(2) states: "The claimant may give the adjudicator a reply to the new reasons (the ***claimant's reply***) within 15 business days after receiving a copy of the adjudication response". Although section 24B(2) does not use the expression "submissions in reply", it is implicit that the reply itself must be in writing[51] because "a copy" of it must be "served" on the respondent and "given" to the adjudicator. Thus, BCIPA has used the word "reply" to mean written arguments or contentions made by the claimant in response to "new reasons". There is no sensible reason to suggest that the reply could not include arguments in the nature of legal arguments, even though the expression "submissions in reply" is not used.

[187] While an adjudicator may ask for "further submissions" from a party, the response to those submissions by the other party is called "a comment on the submissions" (and not, for example, "submissions in reply") (see section 25(3)(b)). Again, there is no sensible reason why only the further submissions may contain submissions in the nature of legal arguments but the "comment" upon the submissions may not.

[188] Although there is much to be said for consistency of language, nothing about the relevant provisions of BCIPA, or its purpose, suggests that the content of submissions, comments or replies must be different. In other words, nothing suggests that it is only where BCIPA mentions "submissions" that legal arguments may be made: nor is there

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[50] Or at least submissions in the form of a document – paper or electronic.

[51] Or at least in the form of a document – paper or electronic.

anything which suggests that because BCIPA uses the work "submissions" only legal arguments may be made.

[189] Section 25(3) permits an adjudicator to seek out submissions or information beyond those which are submitted by the claimant and the respondent in accordance with section 21((3)(f) and sections 24(2) and (3). The adjudicator may –

- ask for further written submissions from either party (with an opportunity for comment on those submissions by the other party);
- call a conference of the parties; or
- carry out an inspection.

[190] In setting out the "only" matters which an adjudicator may consider in deciding an adjudication application, section 26(2) does not explicitly refer to "further submissions", "comments" made on further submissions, or the conference. It refers to –

- **submissions**, including relevant documentation, that have been **properly made** by the claimant **in support of the claim**;
- **submissions**, including relevant documentation, that have been **properly made** by the respondent **in support of the schedule**; and
- the results of any inspection carried out by the adjudicator of any matters to which the claim relates.

[191] Submissions will have been "properly made" "in support of" the claim or schedule if the submissions are within the parameters of the payment claim or the parameters of the payment schedule.[52]

[192] In the case of submissions relevant to the response to a standard payment claim, "properly made" submissions will not include reasons for withholding payment which were not included in the payment schedule.[53]

[193] In my view, there is no sensible reason for suggesting that section 26(2) intended to prevent an adjudicator from taking into account in their decision *further* submissions, and *comment* upon them, which the adjudicator asked for, or *submissions* made during a conference.

[194] One may ask, rhetorically, what is the point of permitting the adjudicator to seek out further information in accordance with section 25(3)(b) (by way of further written submissions), (d) (by way of a conference of the parties) and (e) (by way of an inspection) but allowing the adjudicator to have regard only to the information obtained in accordance with *one* of those subsections (that is, 25(3)(e), the inspection)?

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[52] See the discussion of submissions "duly made" in *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879.

[53] Sections 24(2), (3) and (4).

[195] In my view, to refuse to permit an adjudicator to consider the information obtained in accordance with section 25(3)(b) and (d) would deprive those sections of purpose.

[196] In my view, there is no sensible reason to differentiate between any of the means by which additional information might be obtained in the way that additional information might be used by the adjudicator.

[197] In my view, it does not strain the language of section 26 to suggest that the references to "submissions … properly made … in support of the claim (in section 26(2)(c)) or "submissions … properly made … in support of the schedule" (in section 26(2)(d)) *include* references to the further submissions and comment sought under section 25(3)(b) and to the "submissions" made at the conference of the parties called under section 25(3)(d). To read section 26 in that way gives purpose to the whole of section 25(3).

[198] It follows that in my view, the adjudicator did not err in taking into account submissions made at the conference relevant to his construction of the contract and his determination of the amount of the progress payment to be made.

Conclusion

[199] There has been no jurisdictional error. The application is dismissed.

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