SUPREME COURT OF QUEENSLAND

CITATION:	*Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* [2020] QSC 133
PARTIES:	**ACCIONA AGUA AUSTRALIA PTY LTD** ACN 128 531 742 (applicant) **v** **MONADELPHOUS ENGINEERING PTY LTD** ABN 43 010 305 923 (first respondent) **RICHARD INMAN, ADJUDICATOR J1246501** (second respondent)
FILE NO/S:	BS 11667 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	27 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2020
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. It is declared that:** **(a) part 16.2 of the adjudicator's decision of the second respondent dated 14 October 2019 and numbered 554651 is affected by jurisdictional error and void; and** **(b) part 17 of the adjudicator's decision insofar as it concerns Contributions payable by the applicant is affected by jurisdictional error and void.** **2. It is declared that the balance of the adjudicator's decision remains binding on the parties to the proceeding.** **3. The "adjudicated amount" (as that term is defined by s 88(1)(a) of the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld)) for the adjudicator's decision is $462,853.15 and €308,675.19.** **4. I will hear the parties as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where

adjudicator determined respondent to payment claim was entitled to contribution for shared costs under contract – where adjudicator set off respondent's entitlement against claimant's payment claim to reach adjudicated amount of nil – whether respondent's reasons were "new reasons" not raised in payment schedule – whether adjudicator, in improperly considering new reasons, fell into jurisdictional error – whether adjudicator's reasons for determination were sufficient – how relief can be formulated to allow that part of the adjudicator's decision not affected by jurisdictional error to remain binding on the parties

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 88, s 101(4)

Annie Street JV Pty Ltd v MCC Pty Ltd [2016] QSC 268, considered
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157; [2018] HCA 3, cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, applied
Grassby v The Queen (1989) 168 CLR 1; [1989] HCA 45, cited
John Holland Pty Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19, distinguished
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1, applied
Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd [2018] QSC 310, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, considered
Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd [2015] 1 Qd R 463; [2014] QSC 80, considered
Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd [2016] QSC 108, considered

COUNSEL: M H Hindman QC, with H Clift, for the applicant
G D Beacham QC, with M Long, for the first respondent
No appearance for the second respondent

SOLICITORS: Corrs Chambers Westgarth for the applicant
Pinsent Masons for the first respondent
No appearance for the second respondent

Introduction

[1] On 11 November 2016, the first respondent (**Monadelphous**) and its client entered into a contract (**the head contract**) pursuant to which Monadelphous agreed to carry out a project involving the upgrade of the existing Kawana Sewage Treatment Plant in Warana, Queensland.

[2] Monadelphous and the applicant (**Acciona**) had worked together since June 2016 on the preparation and submission of Monadelphous's tender for the head contract.

[3] On about 17 March 2017, Monadelphous and Acciona entered into a contract (**the subcontract**), pursuant to which Acciona agreed to carry out process engineering design and engineering support, supply of mechanical equipment and materials for incorporation in the head contract works, and commissioning and training support.

[4] The subcontract terms provided for the making of progress claims and Acciona made 34 such claims. Once Monadelphous began including amounts by way of set off in its responses to Acciona's claims, Acciona sought to take advantage of the statutory adjudication process under the *Building and Construction Industry Payments Act* 2004 (Qld) (**the BCIPA**). Acciona lodged an adjudication application in respect of its July 2018 payment claim. Monadelphous sought to restrain the adjudication process in this Court, but was not successful: see *Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd* [2018] QSC 310.

[5] Acciona was subsequently successful in the adjudication. Since then, there have been five further adjudication applications filed by Acciona under the BCIPA and its successor, the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) (**the Payment Act**). Four of those applications have been determined in Acciona's favour.

[6] The present application concerns the adjudicator's decision made consequent upon the fifth adjudication application. The adjudicator decided that the amount of the progress payment to be paid to Acciona was $nil. He reached that conclusion by determining that the claimed amount payable to Acciona in respect of the payment claim was $462,853.17 and €308,675.19, but because he determined that Monadelphous was entitled to be paid $4,424,904.14 and could set off that entitlement, he reduced Acciona's entitlement to $nil.

[7] Acciona sought relief on the grounds that the part of the adjudicator's decision which dealt with the claimed set off was attended by jurisdictional error. Monadelphous opposed the grant of the relief. The second respondent, who was the adjudicator, indicated by letter dated 29 October 2019 that he would not take an active role in the proceedings and would abide by the order of the Court.[1]

[8] Acciona contended, first, that the adjudicator had, in breach of s 88(5) of the Payment Act, failed to give proper reasons for his decision that Monadelphous was entitled to set off a claim in the amount of $4,424,904.14. Acciona said this failure amounted to jurisdictional error.

[9] Second, Acciona contended that the adjudicator acted in excess of his jurisdiction by finding that Monadelphous had the right to recover the claim which it set off. The latter argument was based on (1) Acciona's contention that the adjudicator failed to apply the construction contract properly, in breach of s 88(2), and (2) Acciona's contention that, in breach of s 88(3)(b), the adjudicator had considered reasons advanced by Monadelphous in its adjudication response, which were prohibited from being included in the response under s 88(2).

[10] If I accepted any of those contentions, Acciona sought orders which would identify the parts of the adjudicator's decision which were affected by jurisdictional error, declare them to be void, declare that the balance of the decision remained binding on the parties to it, and declare that the adjudicated amount was the amount which would be arrived at by excising the effect of the set-off.

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[1] Exhibit 1.

[11] Before considering the particular bases of alleged jurisdictional error advanced in this case, it is necessary to identify some relevant general principles.

Jurisdictional error under the Payment Act

The adjudicator's decision under the Payment Act

[12] In the ordinary course, the following steps will have occurred under the Payment Act by the time that an adjudicator comes to make an adjudicator's decision:

(a) A claimant claiming to be entitled to a progress payment under a construction contract will have given a payment claim to the respondent within a specified time frame: s 75.

(b) The respondent will have responded to the payment claim by giving the claimant a payment schedule within a specified time frame: s 76.

(c) The claimant will have lodged with the registrar an adjudication application within a specified time frame: s 79. A copy must be given to the respondent: s 79(3). The claimant is permitted to include the submissions relevant to the application which it chooses to include: s 79(2)(e).

(d) The registrar will have referred the application to an adjudicator: s 79(4). If the adjudicator accepts the referral, written notice of the acceptance will have been served on the claimant, the respondent and the registrar, and the adjudicator will be taken to have been appointed to decide the application: ss 81(2) and (7).

(e) The respondent will have given the adjudicator an adjudication response to the adjudication application: s 82(1). The respondent is permitted to include the submissions relevant to the response which it chooses to include: s 82(3)(c).

[13] The function demanded of an adjudicator by the Payment Act is set out in s 88(1), namely to decide the amount of the progress payment, if any, to be paid by the respondent to the claimant and the date upon which it becomes due and payable together with the rate of interest.

[14] Section 88(2) provides that in deciding an adjudication application the adjudicator is to consider certain matters only, namely:

(a) the provisions of the Payment Act and, to the extent relevant, the provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld) Pt 4A;

(b) the provisions of the relevant construction contract;

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

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

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

[15] There are some matters which s 88 states that the adjudicator must not consider and some matters which the section says that the adjudicator may disregard. Thus:

(a) The adjudicator "must not" consider an adjudication response, to which the adjudication application relates, that was not given to the adjudicator within the time required under s 83: s 88(3)(a). Section 83 sets out certain mandatory time periods

within which the adjudication response must be given, the periods varying depending on whether the payment claim is standard or complex. Section 83 also empowers the adjudicator to extend time where the payment claim is complex.

(b) The adjudicator "must not" consider a reason included in an adjudication response to the adjudication application, if the reason is "prohibited from being included in the response under section 82": s 88(3)(b). Section 82(2) provides the respondent "must not" give an adjudication response if a payment schedule was not given within the time required by s 76. Section 82(4) provides that the adjudication response "must not" include any reasons for withholding payment which were not included in the payment schedule.

(c) The adjudicator may disregard an adjudication application or adjudication response to the extent that the submissions or accompanying documents contravene any limitations relating to submissions or accompanying documents prescribed by regulation: s 88(4). Section 17 of the *Building Industry Fairness (Security of Payment) Regulation* 2018 (Qld) specifies certain content restrictions (page number, formatting, and type of attachments) in respect of adjudications relating to payment claims for progress payments of not more than $25,000.

[16] The adjudicator's decision must be in writing, and must 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: s 88(5).

[17] Some observations should be made about the changes which the Payment Act introduced to the pattern of claim and response (and consideration thereof) which had been contemplated by its immediate statutory predecessor.

[18] **First**, s 24(4) of the BCIPA had provided that for standard payment claims the adjudication response "can not include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant". However, the BCIPA did not contain any statement that the adjudicator was obliged not to consider any reason included in breach of that section. That was altered in the manner already discussed.

[19] **Second**, for complex payment claims, s 24(5) of the BCIPA permitted a respondent to include in its adjudication response any reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant. If, under s 24(5), the respondent included new reasons which were not included in the payment schedule, provision was made for the claimant to give a reply to the new reasons: s 24B. The Payment Act no longer allows a respondent to include new reasons for withholding payment in an adjudication response regardless of whether the claim is standard or complex, and consequently that Act deleted the mechanism permitting the claimant to serve a reply.

[20] **Third**, although the BCIPA did state that an adjudicator must not consider an adjudication response or a claimant's reply unless it was given to the adjudicator within the time that the respondent or claimant may give it to the adjudicator, that was stated in s 25 which governed procedural matters. There was no equivalent statement in s 26 which governed the adjudicator's decision. The obligation is now expressed in s 88.

[21] **Fourth**, it follows that the introduction of the provisions referred to in [15] above into s 88 represented an important change from s 26 of the BCIPA. In particular, the language of ss 82(2), 82(4) and 88(3)(b) (namely "must not" and "prohibited") represents a clear legislative intention to emphasise the criticality of respondents including in their payment schedules any reasons for withholding payment on which they might wish to rely in any

subsequent adjudication. The significance of that statutory intention is only emphasised further when one appreciates that the Payment Act no longer includes any provision for a claimant's reply.

An adjudicator's decision may be set aside for jurisdictional error

[22] The Payment Act does not contain any provision for appeal from an adjudicator's decision, or any other mechanism by which the adjudicator's decision may be reviewed for error. Notably, an adjudicator's decision is not reviewable under the *Judicial Review Act* 1991 (Qld).[2]

[23] However, the supervisory jurisdiction of the State Supreme Courts is regarded as a defining characteristic of those courts which is beyond the power of a State legislature to exclude.[3] Accordingly, it has been established that an adjudicator's decision may be reviewed for jurisdictional error by the adjudicator in the performance of the adjudication function and that a State Supreme Court persuaded of the existence of such error might grant declaratory or injunctive relief based on the invalidity of the decision.[4]

[24] What is jurisdictional error in the context of the Payment Act?

[25] It is appropriate to identify relevant first principles concerning jurisdictional error and then to examine what can be said specifically about jurisdictional error in the context of the Payment Act.

Jurisdictional error generally

[26] The two leading cases concerning the nature of jurisdictional error in Australian jurisprudence are *Craig v South Australia* (1995) 184 CLR 163 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 53.

[27] In *Craig* the High Court explained that the scope of jurisdictional error differs depending on whether the decision-maker under consideration is –

(a) an administrative tribunal; or

(b) an inferior court (or possibly an anomalous tribunal given the right to authoritatively decide questions of law, but not properly characterised as a court).

[28] The ambit of jurisdictional error in the case of an administrative tribunal is quite broad. In a passage which was also referred to with approval in *Kirk*, the High Court in *Craig* said (at 179):

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

[29] On the other hand, the ambit of jurisdictional error in the case of an inferior court (or other tribunal which is to be regarded in the same way) is much narrower. In *Kirk*, the Court summarised the *Craig* explanation in the following terms (bold print emphasis added, italic emphasis in original):

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2 See *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108 at [49], where Jackson J referred to the provisions of the *Judicial Review Act* which excluded the statutory predecessor of the current Payment Act. The same provisions now apply to exclude the current Payment Act.

3 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [98]-[100].

4 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [2]-[19] (esp [7]-[8]) per Spigelman CJ, [63]-[84] per Basten JA, [251]-[261] per McDougall J; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [7], [37], [71]-[72] and [78]; *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd* [2016] QSC 108 at [50] per Jackson J.

> **First**, the Court stated, as a general description of what is jurisdictional error by an inferior court, that **an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist"** (emphasis added). **Secondly**, the Court pointed out that jurisdictional error "is at its most obvious **where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*"** (emphasis added). (The reference to "*theoretical* limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) **Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case**. The Court said of this last example that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" …

[30] The Court in *Kirk* emphasised that the reasoning in *Craig* was not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court were to be seen as examples only. They were not to be taken as marking the boundaries of the relevant field.

[31] Adjudicators under the Payment Act are not to be regarded as administrative tribunals. Rather, they may be characterised as one of the "anomalous" tribunals referred to in *Craig*. So much has been explicitly held in relation to the equivalent statute in Western Australia in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19[5] and *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80.[6] And in Queensland, Muir JA (with whom Gotterson and Morrison JJA agreed) explicitly applied the test which *Craig* applied in relation to inferior courts to the question of jurisdictional error by arbitrators: see *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2013] QCA 386 and see also *Annie Street JV Pty Ltd v MCC Pty Ltd* [2016] QSC 268 at [22] per Flanagan J.

Jurisdictional error under the Payment Act

[32] The cases which have considered the nature of jurisdictional error in the Payment Act context have emphasised the need to discern, as a matter of statutory construction, whether the legislature intended that the valid exercise of power was conditioned in a particular way, such that failure to comply with the condition would invalidate the purported exercise of power. The approach taken is that set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[33] The following propositions may be advanced.

[34] **First**, the valid exercise of an adjudicator's jurisdiction is conditioned on the decision having complied with at least the following "basic and essential" statutory requirements (with the result that a decision which has not complied with the requirements would be void):[7]

(a) The existence of a construction contract between the claimant and the respondent, to which the Payment Act applies (ss 64, 70).

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5 At [101]-[102] per Beech J.

6 At [56]-[59] per Corboy J.

7 This appears from the reasoning in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [53] and [55], as approved in Queensland by *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [32], [37] and [80].

(b) The service by the claimant on the respondent of a payment claim (ss 68, 75).

(c) The making of an adjudication application by the claimant to the Adjudication Registrar (ss 79 and 150).

(d) The reference of the application to an eligible adjudicator, who accepts the application (ss 79(4), 80 and 81).

(e) The determination by the adjudicator of the application, by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable and the issue of a determination in writing (ss 81(7), 88(1) and 88(5)(a)).

[35] **Second**, the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having arrived at his or her conclusion by a process which considers the matters set out in s 88(2) of the Payment Act. But as to this, the following important matters must be noted:

(a) The valid exercise of an adjudicator's jurisdiction is not conditioned on the adjudicator reaching what is objectively the correct conclusion on all of the questions of fact or law required by the consideration of the matters set out in s 88(2). Or, to put it another way, there are many errors of fact and law which might be made by an adjudicator which would not be regarded as going to jurisdiction.

(b) On an application to set aside an adjudicator's decision for jurisdictional error, the question is not whether the Court would have come to the same conclusion as the adjudicator. Rather, the question is whether the adjudicator arrived at his or her conclusion by a process which failed to consider the matters set out in s 88(2).[8]

(c) This point was succinctly made in *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2015] 1 Qd R 463 at [29], where McMurdo J pointed out (footnotes in original):

> To determine an application, an adjudicator must identify the relevant terms of the contract upon which the claim is made and then apply the facts, as he or she finds them to be, to those terms upon their proper interpretation. The identification of the terms and the interpretation of those terms are thereby questions which the adjudicator must answer in the exercise of his jurisdiction. It follows that an error in the identification of the terms or in their interpretation will not be a jurisdictional error: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*;[9] *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd*;[10] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*.[11]

(d) His Honour distinguished between that sort of error – which was not jurisdictional error – and that which was, in the following passage:

> However, where it appears that an adjudicator is not meaning to apply the contract, as he or she interprets it, but is instead allowing the claim upon some other basis, the position is different, because the adjudicator is thereby misunderstanding the scope of the adjudicator's jurisdiction.

(e) Adjudicators under the Payment Act do not have to get the answer right, but if it is demonstrated that they have not gone about their task by carrying out the active process of intellectual engagement with the issues and the submissions before them that the Payment Act requires, then they will have fallen into jurisdictional error

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8 Cf *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq)* [2010] 2 Qd R 322 at [61] per Holmes JA (with whom Fraser JA agreed); *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [96] per White JA.

9 (2005) 63 NSWLR 385 at [52] per Hodgson JA.

10 [2011] NSWSC 1039 at [44] per McDougall J.

11 [2012] QSC 346 at [8] per Applegarth J, whose reasons on this point were not criticised on appeal: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2015] 1 Qd R 228; see also *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd* [2013] QSC 236 at [21]–[24].

because they will not have done the very thing s 88(2) of the Payment Act required them to do.[12]

[36] **Third**, the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having arrived at his or her conclusion by a process which does not involve consideration of the matters set out in s 88(3)(b).[13] If an adjudicator considers a matter which the adjudicator was required by that section not to consider, the adjudicator will have made a jurisdictional error. To use the language of *Kirk*, quoted at [29] above, such an adjudicator will have taken account of a matter required to be ignored. As to this:

(a) Monadelphous submitted that any errors by an adjudicator under the Payment Act in the identification of the submissions which were duly or properly made (and which should, therefore, be considered or not considered) must be regarded as errors within jurisdiction.

(b) Monadelphous relied on *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19.

(c) In that case, in a passage subsequently described by Morrison JA as settled law,[14] Hodgson JA (with whom Beazley JA agreed) made the following observations (emphasis added, references to the BCIPA inserted):

> 54 **In my opinion, there may be a sense in which [s 26(2)] is breached if there is any relevant provision of the Act or provision of the contract which is not considered by the adjudicator, or indeed if there is any one of what may be numerous submissions duly made to the adjudicator which is not considered. However, in my opinion a mere failure through error to consider such a provision of the Act or of the contract, or such a submission, is not a matter which the legislature intended would invalidate the decision**.
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> 55 **The relevant requirement of [s 26(2)] is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission**. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with [s 26(2)], so long as the specified classes of considerations are addressed; or alternatively, if one takes the view that [s 26(2)] does require consideration of each and every relevant provision of the Act and the contract and each and every submission duly made, the intention of the legislature cannot have been that this kind of mistake should invalidate the determination. …

(d) Basten JA also addressed the scope of the obligation under the then equivalent of s 26(2) of the BCIPA, which is now s 88(2) of the Payment Act, rejecting as a false premise the proposition that the scope of the payment schedule and the identification of submissions "duly made" were matters to be objectively determined by the Court, because he thought they were matters to be determined by the adjudicator: see [71] *et seq*.

(e) Insofar as the analysis in *John Holland* tends to support the points which I have advanced at [35] it must still be regarded as expressing settled law. But Monadelphous's submission sought to advance it as an answer to the operation of s 88(3)(b). That submission cannot be accepted. *John Holland* was decided in

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12 *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering and Construction Pty Ltd* [2010] NSWSC 818 at [34]-[39] per McDougall J, followed by P Lyons J in *QCLNG Pipeline Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 292 at [110]-[123].

13 It may well be that the logic here presented also justifies the same conclusion in relation to s 88(3)(a), but that issue does not arise in relation to the present case, and I express no concluded view on it.

14 *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2015] 1 Qd R 350 at [90].

relation to the NSW legislation to which the BCIPA was the Queensland equivalent. The Court's observations were made in relation to the section to which s 26 of the BCIPA was equivalent. There was then no statutory equivalent to s 88(3)(b). As I have demonstrated at [12] to [21] above, the BCIPA has now been replaced by differently structured provisions of the Payment Act.

(f) There is no provision in the Payment Act enabling a claimant to engage with a reason for withholding payment which it sees for the first time in an adjudication response. In such a case a claimant so surprised would be reliant on the adjudicator exercising the discretion conferred by s 84(2)(b) to invite further submissions.

(g) The evident policy behind the Payment Act as it now exists is to alter what had been the s*tatus quo* under the BCIPA so as to ensure that a respondent includes in its payment schedule any reasons for withholding payment on which it might wish to rely in any subsequent adjudication, thereby permitting a claimant to engage with those submissions in its adjudication application and avoiding the possibility of encountering a surprising new reason in the adjudication response.[15]

(h) The legislation in its current form (and, in particular, the language of s 88(3)(b)) reveals the intention that there are certain matters which must not be considered by an adjudicator, because the respondent was prohibited from raising them. In my view the text of ss 82 and 88 of the Payment Act now clearly reveals a legislative intent to condition the valid exercise of the adjudicator's jurisdiction on the adjudicator's compliance with s 88(3)(b) by not considering the matters there specified. Whether the adjudicator has complied with that requirement is a matter to be determined objectively by the Court.

[37] **Fourth**, the valid exercise of an adjudicator's jurisdiction is conditioned on the inclusion in the decision of written reasons for the decision in compliance with s 88(5)(b). Failure to meet this condition would amount to jurisdictional error by the adjudicator and would result in invalidity: *Sierra Property* at [56] to [67] per Jackson J; *Annie Street* at [23] per Flanagan J.

[38] Difficulty in the application of this proposition usually arises where written reasons have been provided, but they are said to be so deficient as not to comply with the legislative requirement. Circumstances in which courts have suggested that an identified deficiency of reasons may justify a conclusion of jurisdictional error include:

(a) where the reasons do not reflect a genuine consideration of the matters identified in s 88(2);[16]

(b) where the adjudicator has not made the critical findings in the way contemplated by the Payment Act;[17]

(c) where findings or conclusions have no basis, are bare conclusions and do not reveal due consideration such that "… being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or there was no evidence or other material sufficient to justify the making of the decision or the

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15 That this is the evident legislative intent finds support in the explanatory notes to the Building Industry Fairness (Security of Payment) Bill 2017, which identified that the purpose of amending s 82 was "to ensure there are no new reasons in an adjudication response" and "to generate communication between the parties at an earlier stage, rather than having the reasons in an adjudication application". (I think the reference to "adjudication application" must, in context, have been intended to be "adjudication response".)

16 See *Annie Street* at [24], citing with approval Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [66].

17 See *Annie Street* at [25], citing with approval Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 at [101].

decision was so unreasonable that no reasonable person would have so exercised the power";[18]

(d) where one party's evidence is rejected for no reason or on no other ground than a bare conclusion that one party's evidence is preferred over another;[19]

(e) where the reasons reveal no intellectual justification for the decision that was made;[20]

(f) where the reasons do not reveal any foundation or logical basis for the decision, so it is appropriate to conclude there has been a failure to exercise jurisdiction.[21]

[39] In *Annie Street*, Flanagan J observed at [29]:

> … there is an important distinction to keep in mind between an error committed within jurisdiction and jurisdictional error. As observed by Brereton J in *City of Ryde v AMFM Constructions Pty Ltd & Anor*:
>
> > "… the inadequacy, insufficiency, inconsistency or illogicality of reasons for a decision, even when the governing statute requires a decision-maker to give reasons in conjunction with and contemporaneously with the decision, does not of itself amount to jurisdictional error. The significance of the reasons, or their inadequacy, is that in the context of the surrounding material they may reveal jurisdictional error, or that the adjudicator has not performed the task of determining an adjudicated amount by reference to the specified relevant factors in accordance with [s 88] of the Act."

[40] The true position is that the various ways in which courts have suggested that a deficiency in reasons might justify a conclusion of jurisdictional error should be regarded as illustrating but not codifying the manner by which such error may be discerned in any particular case. As Flanagan J recognised, the dividing line here is between a deficiency of reasons which demonstrates that the adjudicator has not discharged his or her task as contemplated by s 88, and that which does not go so far. Assistance in resolving where that dividing line should be drawn can also be found in the point made at [35](e) above.

[41] **Fifth**, the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having accorded to the parties what White JA described in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 as "the necessary level of procedural fairness".[22] The juridical basis for this proposition is the same as the preceding propositions. The legislature must be taken to have contemplated that an adjudicator would have accorded the parties the necessary level of procedural fairness, such that failure to do so would be regarded as breach of a condition of the valid exercise of the jurisdiction. No argument was advanced in the present case which requires any examination of the extent of failure to comply with the rules of procedural fairness which will warrant intervention.

[42] **Sixth**, the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having made a good faith attempt to perform the function specified in s 88. No reliance was placed on this ground in the present case. It suffices to observe:

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18 See *Annie Street* at [26], quoting with approval Davies J in *Re Rich Rivers Pty Ltd and Independent FM Radio Pty Ltd v Australian Broadcasting Tribunal & Goulburn Valley Broadcasters Pty Ltd* [1989] FCA 132 at [49]-[50].

19 See *Annie Street* at [27], citing with approval Keane JA in *Camden v McKenzie* [2008] 1 Qd R 39 at [30]-[31].

20 See *Annie Street* at [28], citing with approval McDougall J in *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359 at [23].

21 See *Annie Street* at [30], citing with approval Sackar J in *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 at [126].

22 At [80]. See also *John Holland Pty Limited v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at [57] per Applegarth J; *Caltex Refineries (Qld) v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 at [38] per McMurdo J; *Annie Street JV Pty Ltd v MCC Pty Ltd* [2016] QSC 268 at [31] per Flanagan J.

(a) The case law is replete with examples of courts attempting to grapple with the ambit of this proposition, including by developing so-called "broad" and "narrow" articulations of the relevant test: see the discussion by White JA in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* at [81] to [96].

(b) Ultimately her Honour concluded (Chesterman JA agreeing at [15]) that (emphasis added):

> The discussion in *Minister for Immigration and Citizenship v SZMDS* concerning the relationship between jurisdictional error in respect of reasoning which is "clearly unjust", "arbitrary", "capricious" and "*Wednesbury* unreasonable" demonstrates that attaching these descriptors to the good faith debate possibly adds little more than did the original understanding of good faith in the review of statutory decision making that the power must be exercised honestly for the purpose for which it was given**. As the New South Wales Court of Appeal did in *Holmwood*** [Her Honour had noted at [85] that in that case the Court enquired whether the adjudicator had made a determination by a process related to a consideration of the matters he was statutorily required to consider]**, the enquiry should focus more on whether the adjudicator has performed the function demanded by the *Payments Act* and less on pursuing elusive synonyms, keeping always in mind that the legislative intent dictates a person with recognised expertise in the area be selected for the task by an informed body and this, necessarily, facilitates the rapid decision making required**.

(c) The result is that when an allegation of failure to make a good faith attempt to exercise power has been made, the appropriate course is for the Court to ask itself whether the adjudicator has actually made the determination by a process which involved the consideration of the matters which s 88 required the adjudicator to consider. And when the Court evaluates whatever indications are said to dictate a negative conclusion to that question, the Court is required to bear in mind the legislative intent to which White JA referred.

[43] Against that discussion of relevant legal principles, it is appropriate to turn now to consider the bases on which Acciona sought to establish the existence of relevant jurisdictional error. It is convenient to deal with the arguments in a slightly different order than they were put.

Was there jurisdictional error because the adjudicator breached s 88(3)(b), by considering something which he was required to ignore?

[44] On 27 June 2019, Acciona made payment claim 31, seeking the following payments:

(a) $1,767,592.92 (excluding GST);

(b) €752,932.53 (excluding GST); and

(c) US$15,609.00 (excluding GST).

[45] It will be recalled that the reasons expressed in a payment schedule as the reasons for withholding payment operate as a constraint which is relevant to the proper exercise of the adjudication jurisdiction because:

(a) s 82(4) of the Payment Act provides "… the adjudication response must not include any reasons (***new reasons***) for withholding payment that were not included in the payment schedule when given to the claimant"; and

(b) s 88(3) of the Payment Act provides "… the adjudicator must not consider … a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under section 82."

[46] Accordingly, it is important to identify what reasons for withholding payment were included in the payment schedule and its attachments.

[47] Monadelphous's payment schedule 31 was dated 11 July 2019. It approved for payment $40,165.64 (excluding GST) in respect of the Australian dollar part of payment claim 31 and $nil amounts for the Euro and US$ parts of that claim. Importantly payment schedule 31 identified a deduction from the $40,165.64 approved amount in the sum of $5,326,565 (excluding GST) which the payment schedule described as "[Monadelphous] assessed amount for Acciona's contribution". It then identified the "amount that [Monadelphous] proposes to pay" (which it referred to as the "scheduled amount") as $nil, obviously because the deduction was a figure well in excess of the approved amount. Payment schedule 31 went on to state that "[i]f the scheduled amount is less than the claimed amount, the reasons why it is less and the reasons for withholding payment are set out in the Attachments".

[48] There were two attachments to the payment schedule.

[49] The first attachment contained three separate spreadsheets dealing with the three different currencies of which the payment claim had been comprised and setting out columns identifying Monadelphous's "scheduled amount" and its "comments relating to difference between claimed amount and schedule amount", as well as a spreadsheet invoice reconciliation. It is not necessary to consider that attachment further.

[50] The second attachment was the more significant attachment because it was the document which set out Monadelphous's reasons for the $5,326,565 deduction which had been described as "[Monadelphous] assessed amount for Acciona's contribution".

[51] The attachment was an eight-page narrative containing five sections.

[52] Section 1, entitled "Background", recited the existence of the subcontract, identified the documents of which it was comprised, identified the payment claim and the payment schedule, and stated that it set out the reasons for Monadelphous's assessment therein.

[53] Sections 2 and 3, entitled "Reasons for non payment – jurisdiction and validity of payment claim" and "Reasons for non payment – substantive issues" respectively, set out reasons which essentially were to be read as part of the reasons why Monadelphous approved only the $40,165.64 for payment (before the deduction).

[54] Sections 4 and 5, entitled "Contribution required to be made by Acciona" and "Calculation of contribution" respectively, set out the explanation for the $nil scheduled amount to which I have earlier referred. They were in these terms:

> **4. CONTRIBUTION REQUIRED TO BE MADE BY ACCIONA**
>
> 4.1 Acciona has improperly attempted to terminate the Collaboration Deed. The termination is ineffective and the Contract remains on foot in the form set out in the Instrument of Agreement (including the Collaboration Deed). In any event, clauses of the Collaboration Deed which address contribution (amongst other things) survive termination.
>
> 4.2 Section 72 of the BIF Act provides that construction work, and related goods and services supplied under a construction contract is to be valued in accordance with the contract, or if the contract does not provide for the matter, having regard to the contract price, other rates or prices stated in the contract, variation and estimate cost of rectifying defect (if any of the work is defective).
>
> 4.3 Section 72(4) of the BIF Act provides that contract price, for a construction contract means:
>
> > "... the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract".
>
> 4.4 Valuation in accordance with the BIF Act, requires Contribution (under the Collaboration Deed, and as part of the Contract requirements) to be accounted for.
>
> 4.5 [Monadelphous] has incurred CP Costs, as defined in or described in the Collaboration Deed, including but not limited to clauses 1.1, 10, 13.2, 14.1, 14.3, 16.1 and 16.2, in the sum of **$65,692,067**.

5. CALCULATION OF CONTRIBUTION

5.1 The total amount of progress payment that Acciona is entitled is calculated as follows:

5.1.1 [Monadelphous] Scheduled Amount in respect of amounts claimed by Acciona: **$40,165.64**.

5.1.2 [Monadelphous] assessed amount for Acciona's Contribution: **$5,326,565.00**.

5.1.3 Total amount [Monadelphous] assessed as amount that Acciona is entitled to is **$0.00**.

[55] I observe, parenthetically, that the contractual arrangements between Acciona and Monadelphous set out obligations requiring each party to make "Contributions" in respect of "CP Costs" in certain circumstances. Most of the relevant terms were set out by Douglas J in *Monadelphous Engineering Pty Ltd v Acciona Agua Australia Pty Ltd* [2018] QSC 310 at [7] to [17] and I will not reproduce them here. Essentially they provided for a mechanism by which a "Steering Committee" could, in certain circumstances (namely "[i]n the event that [all CP Costs, a term defined in cll 1 and 16 of the Collaboration Deed] exceed the amount calculated by subtracting the Corporate Fee from the Contract Sum (as that term is defined in the Head Contract)"), make a determination of the amount and timing of the "Contributions" required to be made by the parties, and then issue a "Contribution Notice" to each party requiring it to make the requisite Contribution by a particular due date. The giving of such a notice created an obligation to pay. The Steering Committee comprised two Steering Committee Members, one from Acciona and one from Monadelphous.

[56] Against that background, the following observations may be made about the reasons expressed in the payment schedule and its attachments:

(a) Monadelphous asserted a contractual entitlement against Acciona under the subcontract to recover a $5,326,565 "Contribution" from Acciona in respect of the CP Costs which Monadelphous had incurred.

(b) The only circumstances said to found that contractual entitlement were:

(i) The subcontract (including the clauses of the Collaboration Deed which addressed Contribution) remained on foot.

(ii) Monadelphous had incurred CP costs within the meaning of the Collaboration Deed in the sum of $65,692,067.

(iii) Monadelphous "assessed" the amount of Acciona's Contribution to be $5,326,565.

(c) In reaching a value of Acciona's claim, Monadelphous asserted that account must be taken of Monadelphous's contractual entitlement to recover Contribution in the amount of $5,326,565.

(d) Because that amount exceeded the amount of Acciona's claim, Monadelphous asserted that Acciona was not entitled to any payment.

[57] In section 7 of its adjudication application, Acciona had developed a detailed rebuttal of the correctness of the reasons advanced in the payment schedule justifying the alleged set-off. Amongst other things, Acciona contended:

(a) The claim that Monadelphous had a contractual entitlement for Contribution had been determined against Monadelphous in previous adjudicators' decisions.

(b) In particular, previous adjudicators had determined that, in order to establish such a claim, Monadelphous had to establish that –

(i) the Steering Committee had issued a Contribution Notice stating the amount of Acciona's Contribution; and

(ii) Acciona had failed to pay the Contribution by the due date.

(c) Those things had not happened. Accordingly, Monadelphous could not assert the contractual entitlement it had asserted. In any event, the adjudicator would be bound by the previous adjudication outcomes.

(d) But further, there were other specific contractual reasons which sounded against the existence of the alleged contractual entitlement, including that the amounts alleged to be CP Costs did not fall within the contractual definition, and the mechanism for establishing entitlement could not work within the time frames asserted by Monadelphous. For example, in the adjudication application at [212] to [214], Acciona submitted:

> [212] Therefore, the Claimant submits that the CP Costs allegedly incurred by the Respondent are not in fact CP Costs as defined in the Contract as they have been incurred by the Respondent:
>
> (a) without the approval of the Steering Committee;
>
> (b) without following the agreed Authority to Let Procedure;
>
> (c) in excess of the Project Budget;
>
> (d) in excess of the prices or rates approved by the Steering Committee or otherwise in accordance with the Collaboration Deed; and
>
> (e) other than directly or solely in connection with the Works (e.g. the Respondent has included in its calculations the costs associated with training its staff members who have then almost immediately gone off to work on other projects).
>
> [213] Further and/or in the alternative to the above, clause 16.1(a)(vi) of the Collaboration Deed does not provide a mechanism by which the Respondent can make a claim to recover the "CP Costs" on an item-by-item basis or at a random point-in-time.
>
> [214] Properly understood, the Contract contemplates that the parties will carry out a reconciliation at specific milestones to determine how the CP Costs and revenue to be derived under the Project are to be shared.

[58] In its adjudication response, Monadelphous acknowledged that it was fundamental to Acciona's argument that the Steering Committee had not convened and could not now convene, and had not issued and could not now issue the requisite Contribution Notice. Monadelphous then contended, in paragraph 35 of its adjudication response, as follows:

(a) Acciona's purported termination took place on 28 May 2019 but was ineffective, with the result that the parties remained bound by relevant clauses of the Collaboration Deed, including the obligation to attend Steering Committee meetings.

(b) Since 28 May 2019, Acciona had consistently and repeatedly refused to attend Steering Committee meetings in breach of implied obligations of co-operation in the Collaboration Deed.

(c) That breach had the result that Monadelphous had a right to recover Contribution in respect of CP Costs on two alternative bases.

(d) First, Monadelphous sought to rely on a line of authority said to establish the proposition that if one contracting party prevents the fulfilment by another party of a condition precedent, that party cannot rely on the non-completion of the condition precedent. Such a party should not be permitted to take advantage of its own breach. Prevention of fulfilment of a condition precedent is equal to the performance thereof. Acciona's conduct in refusing to attend Steering Committee meetings after its

purported termination should be so regarded, with the result that Monadelphous's contractual right continued to exist.[23]

(e) Second, because Acciona's conduct was in breach of implied contractual terms, Monadelphous was entitled to claim damages in respect of either of those breaches, the measure of which was the amount of the CP Costs that would have been approved and for which a Contribution Notice would have been issued if Acciona had performed its contractual obligations and had attended a Steering Committee meeting and had engaged in the process of determining the amount of CP Costs.

[59] In paragraph 36 of the adjudication response, Monadelphous went on to explain that it was entitled to set off that damages claim either pursuant to cl 37.2A of the general conditions of the subcontract or in equity.

[60] It is notable that Monadelphous had not asserted in the payment schedule as an explanation for withholding payment that Monadelphous had a contractual right to recover Contributions because Acciona had breached the contract by refusing to attend Steering Committee meetings, with the consequence that Monadelphous had a contractual right to recover Contributions under the subcontract notwithstanding its inability to demonstrate compliance with conditions precedent. Indeed, no mention at all was made of the alleged breaches constituted by conduct post-termination (namely the alleged refusals to attend Steering Committee meetings) which were said to found the prevention argument advanced by Monadelphous. Further, it is notable that Monadelphous had not asserted in the payment schedule as an explanation for withholding payment that it had any claim against Acciona for damages for breach of contract arising from such breaches, let alone that such a claim might be set off against Acciona's claim, whether at law, in equity, or pursuant to cl 37.2A.

[61] Monadelphous contended that the adjudication response should not be regarded as including new reasons for withholding payment, because it merely set out a justification of the contention which was made. Whilst the determination whether reasons are "new" so as to engage the prohibition in s 82 of the Payment Act (and accordingly the operation of s 88(3)(b)) might in some circumstances be difficult to make, in my view this is not such an occasion. As I have explained at [36] above, the evident policy behind the statute as it now exists is to ensure that a respondent includes in its payment schedule any reasons for withholding payment on which it might wish to rely in any subsequent adjudication, thereby permitting a claimant to engage with those submissions in its adjudication application. To accept Monadelphous's submissions would be to treat the distinction between a reason set out in a payment schedule and a new reason in such a way as would undermine the policy underlying the introduction of the new provisions in ss 82 and 88.

[62] In my view, the two "alternative bases" for seeking to establish the alleged claim to recover Contributions in respect of CP Costs must be regarded as reasons for withholding payment which were not included in the payment schedule. They were "new reasons" within the conception of s 82(4) of the Payment Act and, accordingly, they were reasons which Monadelphous was prohibited from including in its adjudication response within the meaning of s 88(3)(b) and, by operation of s 88(3), they were reasons the adjudicator was obliged not to consider.

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[23] By recording Monadelphous's argument in this way, I do not intend to suggest that it has any validity. In fact, reference to *Multiplex Constructions Pty Ltd v Abigroup Contractors Pty Ltd* [2005] 1 Qd R 610 suggests that Monadelphous was pressing the prevention argument too far, because the prevention could not provide a basis for concluding that the Steering Committee would have decided in the way necessary to support the contractual entitlement.

[63] After receipt of the adjudication response, solicitors for Acciona emailed the adjudicator indicating that they had not had sufficient time to review the document and requesting that he allow them time to do so with a view to identifying any matters in respect of which they might request him to exercise his power under s 84(2)(b) to call for further submissions. The adjudicator's response was to deny that request and to ask both parties to refrain from making any further submissions unless expressly requested to do so. My attention was not directed to any evidence that he requested further submissions about the impact of s 88(3)(b).

[64] The relevant aspects of the adjudicator's written reasons were as follows:

(a) Section 16 of the reasons addressed the adjudicator's "determination of the issues in dispute".

(b) Section 16.1 addressed the adjudicator's "determination of the claimed amount payable to [Acciona] by [Monadelphous]". That section culminated in the adjudicator's finding that the claimed amount payable to Acciona by Monadelphous in respect of the payment claim was –

(i) $462,853.17; and

(ii) €308,675.19.

(c) Section 16.2 addressed the adjudicator's "determination of CP Costs and Contribution payable to [Monadelphous] by [Acciona]".

(d) In section 16.2 the adjudicator found that it was for Acciona to prove that it had validly terminated the Collaboration Deed, that it had not done so, and that therefore the parties were required to continue to perform their obligations under the Collaboration Deed. He rejected Acciona's submission that he was bound by previous adjudicators' decisions regarding the issue of set off, amongst other reasons, because the issue of Acciona's failure to attend Steering Committee meetings had not previously been an issue requiring determination. Critically, on the issue of Contribution, he found:

> [228] I have extracted and inserted specific sections of each party's submissions within this decision, including paragraph 35 of [Monadelphous's] Adjudication Response. It is paragraph 35 of [Monadelphous's] Adjudication Response that has persuaded me that (i) as a consequence of my decision in respect of the purported termination of the Collaboration Deed; (ii) the requirement for the parties to continue to perform their obligations under the Collaboration Deed and Project Documents; and (iii) in the event the CP Costs exceed the agreed threshold, [Monadelphous] has a right to recover Contribution in respect of CP Costs from [Acciona], even in the absence of the Steering Committee determining the amount and timing of the Contribution required to be made by the parties.

(e) I observe that paragraph 35 of Monadelphous's adjudication response was the paragraph which set out the contentions I have recorded at [58] above, and which sought to establish the proposition that Acciona's breaches of contract had the result that Monadelphous had a right to recover Contribution in respect of CP Costs on the two alternative bases. It is not clear which of the two alternative bases the adjudicator was accepting. It is possible, but not clear, that in light of his earlier statement (at [194]) that he thought that paragraph 36 introduced "new reasons" which he was obliged to ignore, that he was accepting the first of the alternatives, namely that Monadelphous had a contractual claim against Acciona by virtue of the prevention argument.

(f) Having reached the conclusion identified in the quote above, the adjudicator concluded section 16 by carrying out his own assessment of the CP Costs which had been incurred by Monadelphous, arriving at a figure of $63,888,745.27 (which was

slightly less than the $65,692,067 for which Monadelphous had contended in the payment schedule). He then performed the calculation which would have been performed by the Steering Committee and arrived at his assessment of Contributions payable by Acciona to Monadelphous in the amount of $4,424,904.14.

(g) In section 17 the adjudicator expressed his ultimate conclusion under the heading "Adjudicated Amount" in this way:

> [239] Pursuant to Section 88(1)(a) of the Act, I decide that the amount of the progress payment to be paid by [Monadelphous] to [Acciona] (the Adjudicated Amount) is **$Nil**.
>
> [240] The reason for my decision is that whilst I have decided the claimed amount in respect of the 27 June 2019 Payment Claim is **AU$462,853.15**[24] and **€308,675.19**, I have also decided the portion of the Contributions payable by [Acciona] to [Monadelphous] is **AU$4,424,904.14**, which exceeds the claimed amount payable by [Monadelphous] to [Acciona].

(h) Consistently with section 17 of the reasons, the coversheet to the adjudicator's decision recorded under the heading "Adjudicator's Decision":

Jurisdiction	:	Yes
Adjudicated Amount	:	$Nil
Due Date for Payment	:	Not Applicable
Rate of Interest	:	Not Applicable

[65] Examination of his reasons demonstrates that not only did the adjudicator consider Monadelphous's new reasons in section 16.2 of his reasons, but he used them to justify his ultimate conclusion that Monadelphous had a claim to recover Contributions from Acciona in an amount which exceeded his assessment of Acciona's claim, with the result that the adjudicated amount was $nil. It follows that Acciona has demonstrated that the adjudicator breached s 88(3)(b), by considering reasons for withholding payment that he was obliged to ignore.

[66] Monadelphous submitted that even if the new reasons could be regarded as not duly made, they could be regarded as properly before the adjudicator by reason of s 88(2)(b), which is the provision which requires the adjudicator to consider, amongst other things, "the provisions of the relevant construction contract". On this basis, Monadelphous contended, the submissions as to the two alternative bases were to be considered because they asserted the significance of implied terms to the contract. I reject this submission. The specific prohibition to which I have referred must be taken to apply in preference to the general enabling terms to which Monadelphous refers.

[67] For reasons I have addressed above, the valid exercise of the adjudication jurisdiction should be taken to be conditioned on compliance with s 88(3)(b), such that failure to comply with the condition would invalidate the purported exercise of power. The adjudicator failed to comply with the condition. The adjudicator's decision was, accordingly, attended by jurisdictional error.

Was there jurisdictional error on the remaining bases identified by Acciona?

[68] My conclusion in relation to s 88(3)(b) allows me to address Acciona's remaining arguments in a summary way.

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[24] There is a $0.02 discrepancy between his earlier finding and how he records it here, but I will treat the discrepancy as irrelevant.

Alleged jurisdictional error because of the inadequacy of the adjudicator's reasons

[69] Acciona's contention was that there was no demonstrable process of reasoning that led to the adjudicator's conclusion at [228] of his reasons, quoted at [64](d) above, that Monadelphous was entitled to recover Contributions.

[70] Acciona contended that the decision essentially amounted to the adjudicator recording that he was persuaded by Monadelphous's submissions without offering any reasons as to why that was so.

[71] The way in which issues were joined before the adjudicator in relation to that entitlement was:

(a) Acciona set out its detailed argument concerning the proper construction of the Collaboration Deed in section 7 of its adjudication application.

(b) Monadelphous sought to evade the obstacle of the specific operation of the absence of a Steering Committee notice and failure to pay such a notice by developing the two alternative arguments to which I have referred.

[72] I agree that the adjudicator's reasons were deficient. He did not say which of the two alternative arguments he accepted, nor why he accepted whichever one he did accept. Nor did he attempt to engage with the detail which Acciona had put in its submissions. While I accept that it does not necessarily follow from deficient reasons that jurisdictional error has been established, the reality is that in this decision, on the critical matter going to whether Acciona's entitlement already established could be decreased to $nil (namely whether Monadelphous had a valid claim for Contributions which could operate in that way), the reasons reveal nothing more than a vote one way. In this respect, the reasons reveal that the adjudicator has not gone about the task by carrying out the active process of intellectual engagement with the issues and the submissions before him that the Payment Act requires.

[73] I find this ground of jurisdictional error to be established.

Alleged jurisdictional error by failing to apply the construction contract properly

[74] Acciona's argument was that by making the finding at [228], the adjudicator acted in excess of jurisdiction by failing, contrary to s 88(2)(b) of the Payment Act, to apply the terms of the construction contract. Acciona submitted that the adjudicator must have been on the wrong side of the distinction made by McMurdo J in *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* in the passage I quoted at [35] above.

[75] The proposition here is that there is a logical incongruity between –

(a) the adjudicator having recorded at [194] that he was obliged to ignore the argument that set off was permitted in contract or in equity; and

(b) the adjudicator having found at [228] and following that Monadelphous had a contractual claim which could then be set off against Acciona's claim.

[76] Acciona submitted that the fact of the incongruity demonstrates that the adjudicator must have used Monadelphous's claim in a way which did not involve the application of the subcontract.

[77] I agree that the logical incongruity between the complete acceptance of paragraph 35 and ignoring paragraph 36 undoubtedly exists. Unless the adjudicator was applying a contractually authorised set off, how was the set off achieved? But it is difficult to conclude that the logical incongruity justifies the conclusion that he was not seeking to apply the contract. Rather, it is more likely that he simply failed to appreciate the logical incongruity and did think that set-off for a valid contractual claim was contractually

authorised. The better way to frame the jurisdictional error made is in the ways I have found it to exist under previous headings.

What order should be made?

[78] The relief sought in Acciona's originating application was as follows:

1. Pursuant to s 10 of the *Civil Proceedings Act 2011* (Qld) and s 101(4)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) a declaration that:
   (a) part 16.2 of the adjudicator's decision of the second respondent dated 14 October 2019 and numbered 554651 (**Adjudicator's decision**) is affected by jurisdictional error and void; and
   (b) part 17 of the Adjudicator's decision insofar as it concerns Contributions payable by the applicant is affected by jurisdictional error and void.
2. Alternatively, pursuant to the inherent jurisdiction of the court, an order that:
   (a) part 16.2 of the Adjudicator's decision is set aside or quashed; and
   (b) part 17 of the Adjudicator's decision insofar as it concerns Contributions payable by the applicant is set aside or quashed.
3. Pursuant to s 10 of the *Civil Proceedings Act 2011* (Qld) and s 101(4)(b) of the *Building Industry Fairness (Security of Payment Act 2017* (Qld) a declaration that the balance of the Adjudicator's decision remains binding on the parties to the proceeding.
4. Pursuant to s 10 of the *Civil Proceedings Act 2011* (Qld) a declaration that the Adjudicated Amount in the Adjudicator's decision is AU$462,853.15 and €308,675.19.
5. Such further or other orders as the court deems fit.
6. The first respondent pay the applicant's costs of the application.

[79] Monadelphous opposed the grant of relief sought by paragraph 4 of the application, even if Acciona established the jurisdictional error it sought to establish. Monadelphous submitted that such relief was not authorised by the text of the Payment Act.

[80] Section 10 of the *Civil Proceedings Act* is the section which confers jurisdiction on the Supreme Court to hear an application for a declaratory order. Whilst the declaratory jurisdiction of the Supreme Court is undoubtedly broad, the answer to Monadelphous's argument is not to be found in its terms.

[81] Section 101(4) of the Payment Act is in these terms:

> If, in any proceedings before a court in relation to any matter arising under a construction contract, the court finds that only a part of an adjudicator's decision under this chapter is affected by jurisdictional error, the court may—
>
> (a) identify the part affected by the error; and
>
> (b) allow the part of the decision not affected by the error to remain binding on the parties to the proceeding.

[82] The Court is thereby given power to "allow the part of the decision not affected by the error to remain binding on the parties to the proceeding". The means by which it may achieve that outcome are not specified. But the High Court[25] has recognised the long-standing principle that a grant of power impliedly carries with it everything necessary for its exercise.[26] Moreover, the term "necessary" in connection with the implied power is to

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25 *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J (Mason CJ, Brennan J and Toohey J agreeing at 4, 21; Deane J relevantly agreeing at 5); *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [50]-[51] per Gaudron, Gummow and Callinan JJ; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [40] per Kiefel CJ, [118] per Keane, Nettle and Gordon JJ.

26 The rule recognised by the High Court was the maxim "*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*", namely, "When anything is granted, that also is granted without which the thing

be understood as identifying a power to make orders which are reasonably required or legally necessary to the accomplishment of what is specifically provided to be done by the statute.[27] In this context, "necessary" does not have the meaning of "essential"; rather it is to be "subjected to the touchstone of reasonableness".[28]

[83] When assessing the touchstone of reasonableness in relation to the power conferred on the Court by s 101(4), some further understanding of the statutory background is necessary. Section 101(4) is not materially different in form to its statutory predecessor, s 100(4) of the BCIPA. The power there expressed was first introduced to the BCIPA in 2014. Prior to such a power being conferred on the Court, the identification of jurisdictional error resulted in the invalidity of the entire decision. The conferral of power on the Court was a response by the legislature to the perceived injustice of that outcome. In my view, s 101(4) should be construed beneficially to ensure that the mischief to which it was directed is remedied.

[84] The result of the foregoing is that s 101(4) should be construed as impliedly conferring on the Court the power to make such orders as are reasonably required or legally necessary to achieve the outcome of allowing the part of an adjudicator's decision not affected by jurisdictional error to remain binding on the parties to the proceeding. The remedial nature of the power suggests that a beneficial approach should be taken to the determination of what is reasonably required or legally necessary in order to allow a relevant part of an adjudicator's decision to remain binding.

[85] In this context, the decision referred to in s 101(4) is the adjudicator's decision referred to in s 88. It is the decision of the amount of the progress payment, if any, to be paid by a respondent to a claimant, the date upon which it becomes due and payable, and the rate of interest: s 88(1). Section 101(4) evidently contemplates that the decision as to the amount of a progress payment under a construction contract may have been comprised of decisions as to the merit of a number of component parts. It is obvious why that may be so: the determination of the amount of a progress claim under a construction contract often involves making decisions about a multiplicity of claims, both positive and negative. And in working out what are the component parts in any particular case, it is notable that the adjudicator's decision includes the reasons for the decision: s 88(5).

[86] Against that background, what is the appropriate application of s 101(4) to the circumstances of this case?

[87] It is apparent that the adjudicator decided:

(a) that the claimed amount which was payable by Monadelphous to Acciona in respect of the payment claim was $462,853.15 and €308,675.19;

(b) that the portion of the Contributions payable by Acciona to Monadelphous was $4,424,904.14; and

(c) because the latter exceeded the former, the amount of the progress payment to be paid by Monadelphous to Acciona was $nil.

[88] To put it another way, it is apparent that the adjudicator's decision that the adjudicated amount was $nil was made of up of two parts: (1) a decision about the merits of the multiplicity of claims advanced by Acciona, that decision giving rise to the positive amount, and (2) a decision about the merits of Monadelphous's claimed set-off, that

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granted cannot exist". For a general examination of the operation of this maxim in the law, see Herbert Broom, *A selection of legal maxims* (10th ed, Sweet & Maxwell, Sixth Pakistan reprint) at p 309 *et seq*.

27 As per fn 25.

28 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at [51] per Gaudron, Gummow and Callinan JJ.

decision giving rise to the negative amount. The only part of his decision which was affected by jurisdictional error was the part which gave rise to the negative amount. The part of his decision which was not affected by the jurisdictional error was the part which gave rise to the positive amount. The question then becomes how the Court can exercise power so as to allow that part of the decision to remain binding on the parties.

[89] Monadelphous suggested that the problem for Acciona here was that the Court could not in effect substitute its own decision as to the "adjudicated amount" under s 88(1)(a) for that of the adjudicator, where the adjudicator determined the amount payable under s 88(1)(a) was $nil. I reject that reasoning. If the adjudicated amount was, say, $1 million, which was reached by the adjudicator having approved multiple component claims, but his approval of, say, one $200,000 claim was affected by jurisdictional error, the evident intention of s 104(4) was surely to permit the Court to consider the component parts to the decision and to notionally sever the part which was invalid, leaving the part which was not (namely $800,000 out of the $1 million) to remain binding on the parties. And if that was so, the only purpose for allowing it to remain binding would be that the remaining parts of the Payment Act (including the obligation on the respondent to pay the "adjudicated amount" (s 90); the ability to obtain an adjudication certificate in respect of the "adjudicated amount" (s 91) and the ability to convert the certificate into a judgment debt (s 93)), would be able to operate in relation to the part of the adjudicator's decision which was allowed to remain binding. The only way in which that could work would be if the power to allow the relevant part to remain binding impliedly carried with it the power to alter the "adjudicated amount" to accord with the part of the decision which the Court decided to allow to remain binding.

[90] Monadelphous conceded that in a case like that which I have posited, the Court could allow the part of the adjudicated amount to remain binding, although they did not take the concession to its logical end concerning the power to alter the adjudicated amount in the way I have in the preceding paragraph. However Monadelphous argued that there was a real distinction between allowing part of an adjudicator's decision which was positive in amount to remain binding and the current situation, there being, Monadelphous contended, no "part" of a $nil decision which could be regarded as remaining binding. In my view that operates from too narrow a view of decision. It fails to appreciate the points I have made at [85] above. When one had regard to the decision in this case and the way in which the adjudicator came to the $nil decision, one is driven to the conclusion that there is no valid distinction between a case in which the adjudicated amount was positive and the present case.

[91] Once that conclusion has been reached, it seems to me that it is obvious that the power conferred on the Court by s 101(4)(b) is at least[29] wide enough to enable the Court to grant the relief sought, including that sought by paragraph 4 of the application. However, rather than merely declare a position, I think that the fact that I am regarding the power conferred by s 101(4)(b) as enabling the court to order a change to the adjudicated amount (i.e. from $1 million to $800,000 in my example, and from $nil to a positive sum on the facts of this case) should be recognised by framing the relief as an order to that effect.

[92] I make the following orders:

1. It is declared that:

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[29] There is no present occasion to determine whether the Court's power might extend to some other order on the basis that it was reasonably required or legally necessary to achieve the outcome of allowing the part of an adjudicator's decision not affected by jurisdictional error to remain binding on the parties to the proceeding.

(a) part 16.2 of the adjudicator's decision of the second respondent dated 14 October 2019 and numbered 554651 is affected by jurisdictional error and void; and

(b) part 17 of the adjudicator's decision insofar as it concerns Contributions payable by the applicant is affected by jurisdictional error and void.

2. It is declared that the balance of the adjudicator's decision remains binding on the parties to the proceeding.

3. The "adjudicated amount" (as that term is defined by s 88(1)(a) of the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld)) for the adjudicator's decision is $462,853.15 and €308,675.19.

4. I will hear the parties as to costs.