SUPREME COURT OF QUEENSLAND

CITATION:	*Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 94
PARTIES:	**NORTHBUILD CONSTRUCTION PTY LTD** (applicant) **v** **DISCOVERY BEACH PROJECT PTY LTD** (respondent)
FILE NO/S:	10086 of 2009 10155 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 and 25 November 2009
JUDGE:	Martin J
ORDER:	**On the application by Northbuild Construction Pty Ltd: THAT THE AWARD BE REMITTED TO THE ARBITRATOR** **On the application by Discovery Beach Project Pty Ltd: THAT THE APPLICATION IS ADJOURNED TO A DATE TO BE FIXED**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – ERROR OF LAW – where the applicant and respondent agreed in an amendment to a building contract not to make claims or deductions from amounts payable to the applicant unless by consent – where amounts owed by the applicant to the respondent were not to be taken into account – where the matter went to arbitration – where amounts owed by the applicant to the respondent were taken into account by the arbitrator – whether this was a manifest error of law ADMINISTRATIVE LAW – JUDICIAL REVIEW – ERROR OF LAW – where a building matter went to arbitration – where the arbitrator reached a conclusion – whether there was sufficient evidence on the face of the award to allow the arbitrator to make any finding – whether the arbitrator gave sufficient reasons ADMINISTRATIVE LAW – JUDICIAL REVIEW –

NATURAL JUSTICE – where a building matter went to arbitration – where the arbitrator did not consider specific variation orders – where the specific variation orders were mentioned in pleadings, written submissions and/or amounted to a defects and omissions notice – whether this amounted to misconduct on behalf of the arbitrator

ADMINISTRATIVE LAW – JUDICIAL REVIEW – NATURAL JUSTICE – where a building matter went to arbitration – where errors were made by a quantity surveyor in preparing specific payment certificates – where the arbitrator relied upon the incorrect payment certificates – whether this was a breach of natural justice

ADMINISTRATIVE LAW – JUDICIAL REVIEW – NATURAL JUSTICE – where a building matter went to arbitration – where errors were made by a quantity surveyor in preparing specific payment certificates – whether s 30 *Commercial Arbitration Act* 1990 (Qld) permits an arbitrator to correct a payment certificate

Commercial Arbitration Act 1990 (Qld), s29, s 30, s 38, s 42

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191
Cypressvale Pty Ltd v Retail Shop Leases Tribunal [1996] 2 Qd R 462
Hewitt v McKensey [2003] NSWSC 1186
Kleerstyle Homes v Dixon (unreported, SC 8037 of 1997, 16 September 1997)
M1 v L1 [2007] NSWSC 346
Natoli v Walker (1994) 217 ALR 201
Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1) [2005] 2 Qd R 174
Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 2) [2005] 2 Qd R 180
Oil Basins Ltd v BHP Billiton Ltd (2007) 18 VR 346
Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd [2004] NSWSC 204
Promenade Investments Pty Ltd v New South Wales (1991) 26 NSWLR 184
Promenade Investments Pty Ltd v New South Wales (1992) 26 NSWLR 203
Re Poyser & Mills' Arbitration [1964] 2 QB 467

COUNSEL: D A Savage SC and R Morton for the applicant
B T Porter for the respondent

SOLICITORS: D L A Philips Fox for the applicant
Clayton Utz for the respondent

[1] There are two applications before the court.

[2] In the first, Northbuild Construction Pty Ltd ("Northbuild") seeks:

(a) Leave under s 38 of the *Commercial Arbitration Act* 1990 ("the Act") to appeal an award made on 3 September 2009,
(b) An order setting aside the award,
(c) An order that Discovery Bay Project Pty Ltd ("DBP") pay Northbuild the sum of $1,279,252.12,
(d) In the alternative, that the award be corrected.

[3] In the second application, DBP seeks leave to enforce the award made on 3 September 2009 and that judgment be entered in its favour for $1,146,644.89.

Background

[4] In May 2003, Northbuild entered into a building contract ("the contract") with DBP to rebuild the Surfair complex at Marcoola. The contract was for a guaranteed maximum price of $27,250,000.

[5] From time to time, various disputes arose and further agreements were put in place. One of those was the further agreement of August 2004 ("the August agreement"). In clause 8.1 of the August agreement it was provided:

> "8.1 DBP agrees not to set off or make any deductions or claims from Northbuild from amounts which are otherwise payable to Northbuild unless either it has Northbuild's agreement or there is a resolution of the dispute by expert determination or litigation which authorises the deduction …"

[6] Between October 2004 and March 2005 DBP issued "negative" variation orders ("VOs") and defects and omission notices ("DONs"). The VOs deleted work from the works the subject of the contract and, so, reduced the amount payable by DBP for the overall contract sum. Northbuild argues that when DBP issued those VOs it was doing so in breach of its obligations under cl 8.1 of the August agreement.

[7] After issuing the VOs, Northbuild gave notice to Napier & Blakeley (the quantity surveyor engaged under the contract). Napier & Blakeley was told by DBP that the August agreement had been terminated. Acting on that basis Napier & Blakeley deducted the amount represented by those VOs from the contract sum. Northbuild did not accept that the August agreement had been terminated.

[8] Northbuild made an application to the Institute of Arbitrators and Mediators Australia for the nomination of an arbitrator to determine disputes in relation to those VOs and DONs. Mr Warren Fischer ("the arbitrator") was nominated by the Institute. The arbitration of those variations and notices was referred to by the parties as the "Waves Arbitration".

[9] Disputes had also arisen between Northbuild and DBP with respect to progress certificates 19, 20 and 21 and Mr Fisher was again nominated as the arbitrator. This arbitration was referred to as the "Progress Claims Arbitration".

[10] In February 2005 the arbitrator gave an interim award in the Waves Arbitration. In the interim award the arbitrator ruled that:

(a) On the proper interpretation of clause 8.1 of the August agreement, DBP was not entitled to unilaterally set off or deduct an amount from any amount payable to Northbuild whether or not a VO had been issued, unless the amount of the set off or deduction had either been agreed between the parties or determined by "expert determination, arbitration or litigation",

(b) DBP should make no deduction for payments to Northbuild with respect to each of 15 specified VOs until such time as the amount of any deduction had either been agreed between the parties or determined by "expert determination, arbitration or litigation".

[11] The interim award was the subject of two decisions by Muir J (as his Honour then was) in 2005: *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 1)* [2005] 2 Qd R 174 and *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 2)* [2005] 2 Qd R 180.

[12] One of the orders made in the latter decision was that judgment was entered against DBP in favour of the applicant in the sum of $1,234,488. That sum was paid by DBP on or about 31 March 2005.

[13] In September 2006 the arbitrator was nominated again to deal with further disputes between the parties in respect of the final claim ("the Final Claim Arbitration"). The arbitrator made an order consolidating the Waves Arbitration, the Progress Claim Arbitration and the Final Claim Arbitration. He made an interim award in June 2009, an award on the Final Claim Arbitration in August 2009 and a further award in the Waves Arbitration ("the Waves Quantum award") in September 2009.

[14] The arbitrator had proceeded in a step-by-step fashion determining issues and then seeking further submissions. In his award of June 2009 he determined the validity of certain deductions and made declarations about whether they had been properly issued or not. He then sought further submissions as to the form of a further award. Both parties submitted that the arbitrator ought make an order for payment of money and not leave that matter until eventual resolution of the other outstanding matters in the arbitration. Each party contended that it should be the beneficiary of a payment order. The Waves Quantum award was published on 3 September 2009. Most of it deals with the allocation of dollar values to various deductions which had been included in progress certificates.

[15] The arbitrator made the following orders and declarations:

(a) That Northbuild pay DBP a total sum of $1,146,644.80 (inc. GST)

(b) That DBP is entitled to have the gross maximum price reduced by $51,227.19 (inc. GST) .

(c) That further findings as to VO 91 and VO85 be reserved pending expert determinations.

[16] The debate between the parties relates to the manner in which the arbitrator arrived at those findings and how he determined how much was owed and by whom.

***Commercial Arbitration Act* 1990 – Judicial Review of Awards**

[17] The Supreme Court is given the power to hear and determine an appeal from a question of law arising out of an award by s 38 of the *Commercial Arbitration Act* 1990. That section provides:

> "**38 Judicial review of awards**
>
> (1) Without prejudice to the right of appeal conferred by subsection (2), the court shall not have jurisdiction to set aside or remit an award on the ground of error of fact or law on the face of the award.
>
> (2) Subject to subsection (4), an appeal shall lie to the Supreme Court on any question of law arising out of an award.
>
> (3) On the determination of an appeal under subsection (2) the Supreme Court may by order—
>
> (a) confirm, vary or set aside the award; or
>
> (b) remit the award, together with the Supreme Court's opinion on the question of law which was the subject of the appeal, to the arbitrator or umpire for reconsideration or, where a new arbitrator or umpire has been appointed, to that arbitrator or umpire for consideration;
>
> and where the award is remitted under paragraph (b) the arbitrator or umpire shall, unless the order otherwise directs, make the award within 3 months after the date of the order.
>
> (4) An appeal under subsection (2) may be brought by any of the parties to an arbitration agreement—
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> (a) with the consent of all the other parties to the arbitration agreement; or
>
> (b) subject to section 40, with the leave of the Supreme Court.
>
> (5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that—
>
> (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the arbitration agreement; and
>
> (b) there is—
>
> (i) a manifest error of law on the face of the award; or
>
> (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.
>
> (6) The Supreme Court may make any leave which it grants under subsection (4)(b) subject to the applicant complying with any conditions it considers appropriate.
>
> (7) Where the award of an arbitrator or umpire is varied on an appeal under subsection (2), the award as varied shall have

> effect (except for the purposes of this section) as if it were the award of the arbitrator or umpire."

[18] In this case the applicant seeks to demonstrate that there is a manifest error on the face of the award in order to satisfy s 38(5)(b)(i) of the Act.

[19] I am satisfied that the determination of the question of law concerned could substantially affect the rights of the applicant and the respondent. I need, therefore, to consider whether there has been a manifest error of law demonstrated on the face of the award. The following principles appear to be accepted with respect to that requirement:

(a) "The expression 'error of law on the face of the award' is one of a type well-known to courts. The award having been examined the question is whether there is apparent (and such is the denotation of the word 'manifest') an error of law". "[Manifest error] is used to indicate something evident or obvious rather than arguable … [I]n the context of the subsection, which contemplates the grant of leave before an appeal can be pursued, [the term] connotes an error of law that is more than arguable. There should, in my opinion, before leave is granted be powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law." *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 at 225-226 per Sheller JA.

(b) "Obviously, there is a difficulty in the word 'manifest'. What may be 'manifest' to one judicial officer may fail to persuade another. The criterion cannot be the swiftness of mind of the sharpest intellect. Nor can it be the perception of one whose whole career has been devoted to examining and reflecting upon building contracts. An objective, not a subjective, test for what is 'manifest' is contemplated. But the word will not go away. Against the background of its history in this contest it requires swift and easy persuasion and rapid recognition of the suggested error . … The price of lengthy exploration and reconsideration may prove warranted in a particular case. But, in the administration of justice as a whole, it is not." *Natoli v Walker* (1994) 217 ALR 201 at 215 per Kirby P.

(c) The applicant should be able to point to an obvious, if not compelling error. *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 206 per Lord Diplock.

(d) "The authorities make it clear that for there to be a manifest error of law the error must be 'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.' *(Re Caf-Grains* [1994] 2 Qd R 252) and a conclusion which is 'fairly arguable' will not evidence such an error (*Re Tiki Village International Limited* [1994] 2 Qd R 674)." *Kleerstyle Homes v Dixon* (unreported, SC 8037 of 1997, 16 September 1997).

[20] In this case the argument extended over two days and reference was made to a number of documents. This has been a difficult case because of, among other things, the number of awards which have been made and the number of issues which have been dealt with in those various awards. Despite the fact that it did take two days to argue I do not think that that, alone, disqualifies the applicant from demonstrating a manifest error of law. Sometimes it is necessary to become familiar with the detailed background of a case before an error does become manifest. Sometimes an error can only be recognised when the person hearing the application for leave is made aware of the manner in which different issues are affected by earlier decisions and the general background to the case itself.

[21] The applicant identifies, in its written submission, these errors which it says satisfy s 38(5). They are:

(a) The incorrect application of clause 8.1 of the August agreement.
(b) A denial of natural justice by the arbitrator not giving notice to either party that he proposed to assume a certain state of affairs.
(c) A lack of reasons in that the arbitrator did not disclose the basis upon which he proceeded to recalculate amounts.
(d) A number of manifest mathematical errors.
(e) An error of jurisdiction by refusing to determine that VOs 99 and 102 were outside the jurisdiction of the arbitrator.

[22] The fourth item mentioned above - manifest mathematical errors – is clearly a matter relating to issues of fact. Failing to take into account payments made in other matters and making incorrect calculations do not amount to errors of law and I will not proceed further with that particular submission so far as s 38 is concerned.

Misapplication of clause 8.1

[23] I have already referred to clause 8.1 of the August agreement in [5] above.

[24] In the June interim award the arbitrator held that an amount of $2,273,671.76 had been wrongly deducted from PCs 19, 20, 21 and 22. In the same award the arbitrator also held that DBP was entitled to certain unvalued credits. In the September award the arbitrator assessed the value of those credits in the Waves Quantum award in the sum of $213,887.70. Northbuild argues that the logical conclusion to be drawn from those findings was that Northbuild would be entitled to the sum of $2,273,671.76 less the amount which had already been paid on account of $1,234,488, that is, an amount of $1,039,183.76. That, though, did not happen.

[25] What occurred in the September award is sometimes difficult to understand. I have read each of the awards a number of times. An award should, generally, be capable of being read and understood without necessary reference to earlier awards. Of course, in complicated matters there will be occasions when it would be repetitive and wasteful to set out all previous findings. An arbitrator is entitled to assume that the parties are, at least, familiar with earlier decisions. Nevertheless, in this case I have been unable to understand the manner in which the arbitrator approached certain parts of his task because of a lack of reasons. I will return to this later. I cannot arrive at a concluded view, but it was submitted that the reconciliation contained in paragraph 231 of the September award may have been arrived at by totalling the amounts which the arbitrator found to have been wrongly withheld for

each of PC 19 to 22. This then provided him with a new figure for the total amount certified in each of those payment certificates. Then, it seems, he deducted what had been paid or should have been paid in order to arrive at a running balance and then interest was calculated on that balance and added to the total of the running account.

[26] The arbitrator described the result (in very restrained language) as something which "might be startling to the parties". No doubt it was. The result was that Northbuild was ordered to pay DBP $1,197,845.08.

[27] Northbuild argues that the arbitrator's methodology was erroneous for many reasons. Not least that the quantity surveyors had proceeded on a basis which was incorrect, namely that the August agreement had been terminated. It was common ground that the August agreement had not been terminated and that clause 8.1 was effective. Nevertheless, the arbitrator adopted the calculations made by the quantity surveyors which, as I have said, were based on a contrary and incorrect assumption.

[28] The conditions under which clause 8.1 would allow for the making of a deduction had not arisen. There had been no resolution by agreement or by "expert determination or litigation". The submission for DBP is that the arbitrator had, in his interim award, determined that:

> "On the proper interpretation of clause 8.1 of the interim agreement dated 19 August 2004, DBP is not entitled unilaterally to set off or deduct an amount from any amount payable to Northbuild, whether or not a variation order has been issued, unless the amount of the set off or deduction has either been agreed between the parties or determined by expert determination, **arbitration** or litigation".

[29] The insertion of the word "arbitration" into that understanding of clause 8.1 is neither explained nor justified. Mr Porter, for DBP, argued that as the interim award had not been appealed it remained binding upon the parties and that it was not an error in the award under consideration for the arbitrator to rely on an earlier unappealed ruling. In oral submissions Mr Porter adopted the proposition that it was permissible for an arbitrator who makes an error to continue to make that error, in the absence of any appeal, and in doing so it ceases to be an error to rely. Mr Porter also conceded that the arbitrator could not have made the decision which he in fact made except by basing it upon the wrong interpretation of clause 8.1.

[30] I do not accept that an arbitrator does not make an error of law by following an earlier ruling made in an unappealed decision which was an error of law itself. The construction of documents is a question of law and a failure to properly construe a document is an error of law. An arbitrator who follows an earlier unappealed decision does not achieve any form of protection for the later decision simply on that basis. The error is committed each time the arbitrator applies an incorrect construction. Thus, the construction which was applied in the award under attack, being incorrect, constitutes an error of law.

[31] The argument for Northbuild was that negative VOs cannot take effect as deductions against progress certificates because their true effect is on the guaranteed maximum price, rather than on the running account between the parties.

[32] The effect of the arbitrator's decision on this point is that he proceeded on the basis, wrongly as I have found, that where there had been a valid negative payment certificate issued by the quantity surveyor, Northbuild would have been obliged to repay the relevant amount of DBP. That finding has no support in the contract between the parties.

[33] The relevant contractual provision is in clause 10.2 of the original building contract – Decon2. It deals with progress payments and only contemplates that payments will flow from the principal to the contractor. There is no provision, even in the event of a valid certification of the quantity surveyor of a negative amount, which would create an obligation in Northbuild to pay such an amount. Any such negative certificate should be held over for consideration in arriving at the final sum to be paid by DBP.

[34] The construction of cl 8.1 by the arbitrator and its application to these circumstances evidences a manifest error of law on the face of the record. Clause 8.1 did not allow any negative amounts to be taken into consideration unless the conditions in that clause had been satisfied. They had not.

Lack of reasons

[35] Section 29(1)(c) of the *Commercial Arbitration Act* 1990 provides that an arbitrator shall include in the award a statement of the reasons for making the award.

[36] The purpose of the requirement to state reasons is so that the parties to an arbitration will know the basis upon which the decision was made. Ordinarily, an arbitrator is not required to provide elaborate or overly extensive reasons for the decision. But the reasons which are given must be sufficient to enable the parties to understand the basis for the decision. In order to do that, the facts which are relied upon by the arbitrator must be set out and any legal principles which were applied to those facts must also be made obvious. If the arbitrator has proceeded to a decision by rejecting submissions by one or more of the parties as to either fact or law then that must be made obvious. In this case, the extent to which reasons have been given is the subject of debate. Likewise, the extent to which reasons should have been given is also the subject of debate.

[37] In order to determine whether reasons are adequate one must have reference to the nature of the case, the amount which is involved, the complexity of the issues, the length of the hearing, and the experience of the arbitrator. A failure to comply with the requirement of s 29(1)(c) will amount to an error of law on the face of the award. The reasoning for that was described in *Re Poyser & Mills' Arbitration* [1964] 2 QB 467 where (at 478) Megaw J said:

> "Up to [the enactment of section 12 of the *Tribunals and Inquiries Act* 1956], people's property and other interests might be gravely affected by a decision of some official. The decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of section 12 was to remedy that, and to remedy it in relation to arbitrations under this Act. Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The

> reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award. It is a material error of form … No one here suggests for a moment actual misconduct on the part of the arbitrator, but it may well be that what has gone wrong here is something which is capable properly of being described as both misconduct and error of law on the face of the award … I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked."

[38] The extent to which an arbitrator must go in setting out reasons has recently been considered by the Victorian Court of Appeal in *Oil Basins Limited v BHP Billiton Limited* (2007) 18 VR 346. In a joint decision the court referred to *Re Poyser & Mills' Arbitration* and then went on to say:

> "[63] More particularly, it has been held that the requirement for an arbitrator to give reasons under s 29(1)(c) of the Commercial Arbitration Act has the effect that an arbitrator's failure to include a statement of proper, adequate reasons, is an error of law on the face of the award within the meaning of s 38(5)(b)(i) of the Act. As Kirby P [as his Honour then was] put it in *Warley Pty Ltd v Adco Constructions Pty Ltd* …:
>
> > 'The same obligation of reasoned decisions which falls upon judges is applied by the Act to arbitrators who make awards. They are required by s 29(1)(c) to include in the award "a statement of the reasons for making the award". This statutory obligation to provide reasons appears to be equivalent to the common law obligation imposed on judicial officers to provide such reasons. In the case of arbitrators, the reasons must be such as the Act envisages.
> >
> > A failure to give "reasons" as the Act envisages would amount to an error of law. It would be such as to attract the operation of s 38 of the Act …'
>
> [64] The point is reinforced by the New South Wales Court of Appeal's decision in *Promenade Investments Pty Ltd v State of New South* Wales …as follows:
>
> > 'In applying s 38, as amended, a construction that would promote the purpose or object underlying the Act must be preferred to a construction that would not promote that purpose or object; s 33 of the Interpretation Act 1987 … The expression "error of law on the face of the award" is one of a type well-known to courts. The award having been examined

> the question is whether there is apparent (and such is the denotation of the word "manifest") an error of law. "Manifest error" is an expression sometimes used in reference to reasons given by judges or the approach taken by juries: see, eg, s 107(c)(iii) of the Supreme Court Act 1970 and the judgments of Kirby P in *Azzopardi v Tasman UEB Industries Ltd* (at 151) and *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 181. It is used to indicate something evident or obvious rather than arguable: see generally per McHugh JA in *Larkin v Parole Board* (1987) 10 NSWLR 57 at 70–71. Nothing more is to be learnt from the language used but of course the discretion of the court as to whether or not it will grant leave remains and regard must be had to the requirement of subs (5)(a). The matters referred to by Lord Diplock in *The Nema* remain important factors in determining whether leave should be given.

[65] Clarke JA, speaking for the New South Wales Court of Appeal in *Friend and Brooker Pty Ltd v Eurobodalla Shire Council…*, added further emphasis in a case in which it was contended that the arbitrator's reasons were inadequate because the findings set out were an inadequate foundation for the conclusion reached:

> 'My conclusion is that the critical finding by the Arbitrator is equivocal and incapable of supporting either the amount awarded or the total loss for which Mr Bennett QC opts. On the other hand I do not think it can be said that the finding leads to the consequence that nothing should be awarded. The findings of fact are simply an inadequate foundation for any conclusion.
>
> In the result there is a manifest error of law – in the sense in which that word is used in the Commercial Arbitration Act 1984, s 38(5) as discussed in *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203 at 255 – in that the Arbitrator has failed to find the facts necessary in law to support his conclusion. As a consequence leave to appeal from this part of his Award ought to have been granted by Cole J and the appeal allowed. This Court, which has the powers enjoyed by Cole J (Supreme Court Act, s 75A(6)) ought therefore, in my opinion, to grant leave to appeal and to allow the appeal.'

The same approach been followed consistently in this State."

[39] The views expressed in *Oil Basins Limited v BHP Billiton Limited* have been the subject of recent consideration by the Court of Appeal in New South Wales in *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57. In that case Allsop P (with whom Spigelman CJ and Macfarlan JA agreed) considered in detail the requirements of the Act with respect to the giving of reasons. His Honour said that, contrary to what was said in *Oil Basins Limited*, arbitrators did not have the same legal obligation to provide reasons as judges do. At [218] he said:

> "The essential requirement mandated by s 29(1)(c) … is a statement of reasons for making the award that was made. This will require a statement of factual findings and legal or other reasons which led the arbitrators to conclude as they did. These provisions do not in terms require the arbitrators to resolve other issues or deal with other matters not necessary to explain why they have come to the view that they have. What is required in any particular case may be a question open to debate. However, nothing … leads to the legitimacy of any conclusion that [s 29(1)(c)] mandates in law a standard of reasons equivalent to those required of a judge at common law, in particular one subject to appellate review on questions of fact and law."

[40] A disagreement between courts of appeal in different States on an issue of this nature would ordinarily cause concern to a trial judge. Fortunately, this issue has been considered by the Court of Appeal in this State in *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462. That case may not have been referred to the court in *Gordian Runoff*. No mention is made of it. Nevertheless it is authority which I will follow in this case for the proposition that whether the reasons which have been given are adequate needs to be considered against the background of the arbitration as a whole. It was put this way by McPherson and Davies JJA (at 485):

> "The calibre, legal training and experience of members of the judiciary raise expectations that reasons they give for their decisions will attain a high level of sophistication. The same would not always be true of decisions of persons whose primary qualification for decision-making consists of specialist knowledge or experience rather than ability to produce reasons conforming to accepted judicial tradition. Reasons that would not be considered adequate if given by a judge may nevertheless suffice for some other decision-makers not chosen for their task because of their resemblance to the judiciary. In the end, the question whether reasons are 'adequate' falls to be considered in the context afforded by the nature of the question which has to be decided and other factors, including the functions, talents and attributes of the tribunal members or the individual in whom the duty of deciding questions of that kind has been vested. Considerations of the cost to litigants and the general public in requiring reasons to be given is another factor which must be weighed: *Soulemezis v. Dudley (Holdings) Pty Ltd* (1987) 10 N.S.W.L.R. 247, 279, per McHugh J."

[41] In the section of his reasons under the subheading "The payments between the parties" the arbitrator refers to the order of Muir J in 2005 (*Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 2)*) when his Honour ordered DBP to pay $1,234,488 to Northbuild. He says, in paragraph 192, that that payment is a payment which he ought to take into account in determining the amount payable in this award. But, for reasons which he does not explain, he excludes from consideration the payment made pursuant to his order made in November 2007 that DBP pay Northbuild the sum of $1,000,000. His only reasoning appears in paragraph 200 where he says that that payment was "dealt with in determining the final amount that is payable as between the parties" and because the award under consideration does not deal with the final amount that is payable then no

consideration should be given to that amount of $1,000,000. But he does not say why the amount ordered to be paid by Muir J should not be treated in the same way.

[42] The payment ordered in November 2007 was pursuant to an award, by consent, in the arbitration relating to PCs 21 and 22. In paragraph 201 he says that one of the issues he needs to determine is whether any consideration ought be given to the amount said to be payable under PCs 21 and 22. This appears to be in conflict with his earlier statement about not taking that matter into account.

[43] In paragraph 203 the arbitrator says:

> "Northbuild submitted that I ought to consider the VOs and DONs in isolation from the balance of the quantity surveyor's certification. That appears to have been the approach adopted by his Honour Mr Justice Muir. Unfortunately, I find that I am now in the position that I have to adopt a wider view."

[44] No reasons are given for his arriving at this position. Nor does the arbitrator provide any description of the boundaries of this "wider view".

[45] Finally, there is the table set out in paragraph 231 to which I have already referred. The most that can be said about the process of reasoning which arrived at the conclusion expressed in paragraph 231 is that, in the words of DBP, the arbitrator recalculated amounts from payment certificates and then "plugged" those results into the matrix of payments set out in PCs 19 to 22. That might be correct. That might also not be correct. I am unable to determine from the decision of the arbitrator his reasons for proceeding as he did.

[46] In any event, the arbitrator has not given reasons for the conclusions and statements referred to above. That is a manifest error of law on the face of the record.

No evidence

[47] It was contended by Northbuild that there was no evidence in the arbitration which allowed the arbitrator to make any finding in support of the facts set up in PC 22. In response, it was argued by DBP that where the only way to demonstrate that there has been such an error is by considering evidence tendered in the arbitration then the error cannot be said to arise out of the award. Reference was made to the decision of McDougall J in *Hewitt v McKensey* [2003] NSWSC 1186, where his Honour said:

> "[34] Further, in my view, the question of whether or not there is evidence to support a conclusion of fact reached by an arbitrator may not be a question of law arising out of the award. That is so even where, it is said, no reasonable arbitrator could have reached the challenged conclusion of fact. Under s 38(2) of the Act, an appeal will lie (subject to agreement or leave under sub s (4)) 'on any question of law arising out of an award'. If it is necessary to go beyond the award to examine the question, then the question cannot be said to be one 'arising out of' the award. Thus, where it is said that there is no evidence to support a particular conclusion (or, as I have put it earlier, that no reasonable arbitrator could have come to

> that conclusion) it is necessary, if the submission is to be made good, to examine the evidence that was before the arbitrator. This cannot be done under s 38. See *The Barenbels* [1985] 1 Lloyd's Rep 528, 531-532 (Robert Goff LJ, who gave the judgment of the Court); *Universal Petroleum Co Ltd v Handels und Transport GmbH* [1987] 1 WLR 1178, 1189.
>
> [35] If an award does not make it clear upon what basis an arbitrator reached a particular conclusion of fact, the Court may remit the matter to the arbitrator pursuant to s 43 of the Act. If the arbitrator then reconsidered the matter and gave further reasons, it may be that a question of law "arising out of the award" (as so supplemented) may be seen to arise. But that has not been done in the present case.
>
> [36] In *Warley Pty Ltd v Adco Constructions Pty Ltd* (1988) 5 BCL 141, Smart J, having referred to and considered (among others) the authorities referred to in para [34] above, concluded at 146-147 that the Court could 'go to the relevant and often bulky documents to understand and assess the point being made on the leave application': particularly in respect of (for example) the contract and related documents, a knowledge of which 'is sometimes assumed in the award'. By contrast, his Honour noted that it would be 'another matter for the Court to have to go through the evidence and the materials to deal with a no evidence point or a point that upon the whole of the evidence certain conclusions were not reasonably open'. As I understand it, his Honour was of the opinion that the latter approach was not available in an application for leave under s 38. If I am correct in so understanding what his Honour said, then I respectfully agree."

[48] In order to demonstrate that there was no evidence to support a finding Northbuild has had to go beyond the award in its attempt to demonstrate its point. It is necessary to show that the absence of evidence can be established on the face of the award itself. This has not been done.

Denial of natural justice

[49] This was not a matter which was advanced in great detail by Northbuild. It appears to have been based on matters leading up to the arbitration which, it was said, did not alert the parties to the approach which the arbitrator intended to take. That, though, demonstrates that the applicant needs to rely on events outside the award, that is, the conduct of the arbitration. As such, as it does not appear on the face of the award, there cannot be a relevant error in the usual sense.

[50] It is a matter which, if it can be raised, can only be raised as an issue of misconduct under s 42 of the Act.

Lack of jurisdiction – VOs 99 and 102

[51] This matter can only be demonstrated by Northbuild by reference to documents which do not appear on the face of the award nor are they incorporated into it. I will deal with it under the heading of misconduct.

***Commercial Arbitration Act* 1990 – Misconduct**

[52] Section 42 of the *Commercial Arbitration Act* 1990 provides:

> "**42 Power to set aside award**
>
> (1) Where -
>
> (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
>
> (b) the arbitration or award has been improperly procured; the court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.
>
> (2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.
>
> (3) Where an application is made under this section to set aside an award, the court may order that any money made payable by the award shall be paid into court or otherwise secured pending the determination of the application."

[53] Northbuild relies upon the grounds it advanced under s 38 as being grounds that are also available to it under s 42.

[54] There are many instances in which misconduct has been established. The following examples are of cases in which misconduct has been held to have occurred. They are drawn from *Halsbury's Laws of Australia* (25-530):

> "(1) if the arbitrator or umpire fails to decide all the matters which were referred to him or her;
>
> (2) if by the award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement of reference;
>
> (3) if the award is inconsistent or is uncertain or ambiguous or even if there is some mistake of fact, although in that case the mistake must either be admitted or be clear beyond any reasonable doubt;
>
> (4) if there has been an irregularity in the proceedings;
>
> (5) if the arbitrator or umpire has failed to act fairly towards both parties;
>
> (6) if the arbitrator or umpire delegates any part of his or her authority whether to a stranger, to one of the parties or even to a co-arbitrator;
>
> (7) if the arbitrator or umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing the decision or with the consequence that a party might reasonably apprehend a lack of impartiality;
>
> (8) if the arbitrator or umpire acquires an interest in the subject matter of the reference or is otherwise an interested party;
>
> (9) if the arbitrator or umpire takes a bribe from either party;

(10) if the arbitrator or umpire fails to ensure natural justice or procedural fairness;
(11) if the arbitrator or umpire has acted with bias or conveys the impression of bias;
(12) if the arbitrator unilaterally attempts to renegotiate the fee provisions in the arbitration agreement without consent of the parties;
(13) if the arbitrator fails to disclose previous or current dealings with a party; or
(14) if the arbitrator fails to provide adequate reasons for their decision."

[55] The matters which remain outstanding and which can be dealt with under this heading are those relating to the natural justice claim, and the claim about lack of jurisdiction.

Natural justice

[56] It was argued by Northbuild that the approach taken by the arbitrator breached the rules of natural justice because he proceeded on a basis that neither party sought and did so without notice to the parties. Where an arbitrator does proceed to decide matters on a basis which has not been advanced by either party then there can be a breach of s 42 on the basis that no party had an opportunity to make submissions. In considering whether or not there has been a breach of the relevant rules, it is appropriate not to be concerned with any possible miscalculations or other errors in the approach taken because the essence of the complaint is that there was no notification of the approach in general.

[57] As best I can understand, the process undertaken by the arbitrator was to determine the relevant quantum by reconciling payment certificates to findings he made as to the validity of certain deductions.

[58] It was argued on behalf of DBP that this approach was one which was not only open to the arbitrator but also one which it was well known to the parties he was going to take.

[59] It was put on behalf of DBP that there were four matters which demonstrated that the parties were aware of, and able to make submissions about, the process. First, DBP says that the submissions made by Northbuild in the proceedings leading to the quantum award clearly relate to matters concerning the reconstruction of payment certificates and that it "would be necessary to attempt to construct rectified progress certificates 20, 21 and 22 in the light of the arbitrator's findings". This, it is said, demonstrates that Northbuild knew what the arbitrator contemplated, and attempted to dissuade him from that course. Thus, it was aware of the route the arbitrator intended to take.

[60] Secondly, DBP says that it made submissions supporting the overall approach adopted by the arbitrator and this, of course, was known to Northbuild.

[61] Thirdly, Northbuild's submissions on this point had been rejected by the arbitrator and Northbuild knew that he had rejected them.

[62] Finally, DBP says that the arbitrator had raised his proposed course of action in a letter of June 2006 and that the true position, so far as DBP submits, is that both parties made submissions as to how the arbitrator ought proceed and that the process he eventually followed was one which was inconsistent with Northbuild's submissions and more like those supported by DBP. In those circumstances, DBP argues, there was no breach of the requirements of natural justice.

[63] In response to that, Northbuild does not effectively challenge the contention that the arbitrator had made known and had received submissions about the course he intended to undertake. Rather, the complaint made by Northbuild is that the arbitrator made errors such as, for example, that the certifications by the quantity surveyor up to and including PC 21 were incorrect, yet he relied upon them. The arguments put forward by Northbuild do not, in my view, establish that there was the departure from the rules of natural justice such as would establish misconduct on the part of the arbitrator.

Failure to exercise jurisdiction

[64] It seems clear that the arbitrator was in error when he says that VO 99 and VO 102 were not before him. Each of those VOs was either referred to in the pleadings, the subject of evidence, the subject of written submissions or each amounted to the same thing as a DON. These matters were before the arbitrator and to have regarded them as not being before him is misconduct in the technical sense.

***Commercial Arbitration Act* 1990 – Power to correct award**

[65] Northbuild seeks orders under s 30 of the *Commercial Arbitration Act* 1990. That section provides:

> "**30 Power to correct award**
> Where an award made under an arbitration agreement contains –
> (a) a clerical mistake; or
> (b) an error arising from an accidental slip or omission; or
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the award; or
> (d) a defect of form;
> the arbitrator or umpire may correct the award or the court, on the application of a party to the agreement, may make an order correcting the award."

[66] In paragraphs [81] to [97] of its first set of written submissions, Northbuild sets out seven "miscalculations". Of these, the first five relate to what are said to be mistakes made in PC 21 and PC 22. If these are errors, then they were made by the quantity surveyor and not the arbitrator. When, in s 30 of the *Commercial Arbitration Act*, there is a reference to clerical mistake or error arising from an accidental slip or omission, or a material miscalculation of figures etc, these are references to mistakes, errors or miscalculations by the arbitrator. That much is obvious from the balance of the section which says that the arbitrator may correct the award. It is not open to an arbitrator to correct a payment certificate. If an arbitrator is aware of an error in a payment certificate then that may be taken into account, of course, but merely adopting figures in a payment certificate will not

amount to a clerical mistake, error or miscalculation. It follows then that the alleged miscalculations numbered 1-5 do not come within s 30.

[67] Miscalculation 6 relates to GST. In the order of Muir J whereby an amount of $1,234,486 was ordered to be paid, Northbuild says that it was obliged to remit to the Australian Tax Office an amount of $112,226 being the amount of GST on that payment. Northbuild says that the award does not account for that amount and therefore should be corrected. Once again, that appears not to be a miscalculation but an error of fact not able to be remedied under s 30.

[68] On the other hand, in paragraph 231 of the award the arbitrator has taken the amount "cumulative underpayment and interest (inc. GST)" of $250,503.62 from the amount of $1,234,486 (including GST) to get a result of $983,984.38 (excluding GST). I accept Northbuild's submission that an amount which includes GST cannot, when taken from another amount including GST, arrive at a result excluding GST. That is a material miscalculation and should be corrected.

[69] The last miscalculation alleged by Northbuild is with respect to interest. It is argued that the amount of interest payable should be recalculated as a result of the corrections which Northbuild says should be made to reflect the miscalculations it has set out in its submissions. Certainly the amount of interest will need to be recalculated after correction of the miscalculation concerning GST. There may also be a need for recalculation of interest as a result of the order I intend to make for the remittal of this award to the arbitrator.

Orders

[70] As I noted in the commencement of these reasons each party seeks orders which would result in the other party paying money to it.

[71] The first matter I need to deal with is whether leave should be granted under s 38(4)(b). Ordinarily, an application for leave will be determined and then, if granted, the appeal itself will be heard by another judge. See *Promenade Investments Pty Ltd v New South Wales* (1991) 26 NSWLR 184, *Panmal Constructions Pty Ltd v Warringah Formwork Pty Ltd* [2004] NSWSC 204; and *M1* v *L1* [2007] NSWSC 346. In *Gordian Runoff*, the New South Wales Court of Appeal considered the procedural issue of whether the primary judge should, in that case, have heard the leave issue before the argument on appeal. Allsop P said:

> "[112] The context and purpose of leave to appeal in s 38 make it plain what the approach should be except in special, indeed exceptional, cases. I have no hesitation in concluding that the primary judge was wrong in principle to conduct the application as he did."

In other words, in that case, the trial judge should have restricted himself to a consideration of the leave question before embarking on hearing the appeal.

[72] While it is an invariable practice that the application for leave should be argued as a preliminary before any appeal, there are circumstances in which it is appropriate that the matter be dealt with at the one time. In this case both parties obviously sought final relief and there have been numerous applications before the Court by

these two parties arising out of the contract. Further, Northbuild sought relief under ss 30 and 42. Leave is not necessary to obtain orders under either of those sections. There was also a coincidence of many of the grounds relied upon by the applicant under both s 38 and s 42, for example, a failure to give reasons. For that reason I have decided to proceed.

[73] The matters raised by the applicant concerning the construction of clause 8.1, and the lack of reasons, especially with respect to paragraph 231, satisfy me that there has been demonstrated by the applicant a manifest error of law on the face of the award with respect to those two matters. For that reason I grant leave to appeal with respect to each of those headings.

[74] I have also determined that there has been a failure to exercise jurisdiction with respect to VO 99 and VO 102 and that there has been a material miscalculation of figures with respect to GST and interest as outlined above.

[75] The finding that the arbitrator misconstrued clause 8.1 leads to the conclusion that there will need to be a review of the payment certificates certified by the quantity surveyor in light of the correct construction of clause 8.1. While I was urged to deal with the matters on the basis of the submissions made, it would not be appropriate, given the complexity of the issues, the need for background knowledge and familiarity with the documents, and the other relevant factors involved in the litigation between the parties for me to proceed to make orders for payment by one party to the other.

[76] In a case where leave to appeal is granted on the basis that reasons were not given, and where that also amounts to misconduct under s 42, it would, in my opinion be inconsistent with the intent of the *Commercial Arbitration Act* 1990 to proceed to make orders when the arbitrator may have had unimpeachable, but unstated, reasons for his conclusions. Section 38 allows the court to remit the award together the court's opinion on the question of law to the arbitrator for reconsideration. I intend to do that. Similarly, s 43 allows for the remittal of any matter referred to arbitration together with any directions thought proper to the arbitrator for reconsideration. I intend to do that also. This will allow the arbitrator to expose his reasoning.

[77] I do not wish to prolong this matter any more than is absolutely necessary. But it does seem to me that, given the disputation which has already occurred between these parties, it will conduce to a more confined reconsideration if the parties agree on the directions to be given under s 43 of the Act. For that reason, I will give directions, after hearing the parties, as to the appropriate directions to be given to the arbitrator.

[78] The application by DBP cannot be considered until the arbitrator has dealt with his award in accordance with the terms of the remittal. That application is adjourned to a date to be fixed.