

# SUPREME COURT OF QUEENSLAND

CITATION: *VK Property Group Pty Ltd and Ors v A A D DESIGN PTY LTD and Anor* [2011] QSC 54

PARTIES: **VK PROPERTY GROUP PTY LTD**  
**ACN 105 801 750**  
(First Applicant)

and

**CONIAS PROPERTIES PTY LTD**  
**ACN 010 551 630**  
(Second Applicant)

and

**VASILLIOS KAVVADAS**  
(Third Applicant)

and

**THEODOSIA CONIAS**  
(Fourth Applicant)

and

**JACK CONIAS**  
(Fifth Applicant)

v

**A A D DESIGN PTY LTD**  
**ACN 090 793 570**  
(First Respondent)

and

**PHILIP DAVENPORT**  
(Second Respondent)

FILE NO/S: 12780 of 2010

DIVISION: Trial Division

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 1 April 2011

DELIVERED AT: Brisbane

HEARING DATE: 15 February 2011

JUDGE: Boddice J

**ORDER:**                   **The application is dismissed**

**CATCHWORDS:**       CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – Where the applicants and first respondent entered into a contract in respect of a unit complex development proposal – Where the first respondent made three payment claims – Where payment claim 1 was accepted as invalid and payment claims 2 and 3 were adjudicated under the *Building and Construction Industry Payments Act 2004 (Qld)* (“the Act”) – Where the applicants allege the decision of the second respondent is void or should otherwise be set aside by reason of jurisdictional error – Whether the applicants have established such jurisdictional error

*Building and Construction Industry Payments Act 2004 (Qld)*

*AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135

*Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190

*John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159

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

*Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd and Ors* [2011] QCA 22

*Spankie and Ors v James Trowse Constructions Pty Limited* [2010] QCA 355

**COUNSEL:**               Whitten, B for the Applicants

                                  Ambrose, MD for the Respondents

**SOLICITORS:**           Mills Oakley Lawyers for the First, Second, Third, Fourth and Fifth Applicants

                                  Samford Lawyers for the First Respondent

- [1] The applicants seek declaratory and injunctive relief in respect of an adjudication decision of the second respondent dated 15 November 2010 in relation to a payment claim made under the *Building and Construction Industry Payments Act 2004* (“the Act”) for fees charged for work undertaken by the first respondent. The applicants allege the decision of the second respondent is void or should otherwise be set aside by reason of jurisdictional error. They rely on numerous grounds in support thereof, including, abuse of process, issue estoppel, failing to accord natural justice, and failing to adopt the *Anshun* principle.

- [2] The basis upon which an adjudication decision made under the Act can properly be the subject of challenge has recently been considered in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd and Ors.*<sup>1</sup> It is, however, unnecessary in the present case to consider further the basis for such challenge as it is not disputed such a decision is open to challenge on the grounds of jurisdictional error.
- [3] The issue for determination is whether the applicants have established such jurisdictional error.

### **Background**

- [4] The applicants engaged the first respondent, who carries on business as a “built environment” designer, to undertake works necessary to submit a development application with respect to a proposal to develop a unit complex at Sunnybank Hills. A written contract was entered into on or about 17 June 2009. It contained terms as to the scope of work and fees to be charged for the work undertaken by the first respondent.

- [5] The contract contained a specific clause with respect to payment. It provided:

#### **“Payment**

6. Based upon the work commencing on Tuesday 2 June 2009, the fee payment schedule is as follows:

- First payment of \$40,000 is due on Tuesday 30 June 2009 (invoice will be issued on Tuesday 23 June 2009). No drawings for concept or design development will be released prior to the receipt of this payment;
- Second payment of \$30,000 is due on Tuesday 28 July 2009 (invoice will be issued on Tuesday 21 July 2009); and
- Final payment of \$132,000 plus any outstanding consultant/s and/or Council lodgement fees are due on Tuesday 25 August 2009 (invoice will be issued on Tuesday 18 August 2009).”

- [6] The contract also provided that the first respondent was entitled to additional fees if the scope of work was varied at the applicants’ request or necessity.<sup>2</sup> The contract did not provide further dates for the payment of additional moneys relating to variations.

- [7] The first respondent made three payment claims pursuant to the Act. Claim 1 was dated 5 July 2010. It was for \$147,034.30 plus legal costs. It included claims for two variations. The first respondent alleged agreement to undertake the first variation was reached on 22 July 2009, and agreement on the second variation was reached on or around 13 October 2009.

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<sup>1</sup> [2011] QCA 22.

<sup>2</sup> Clause 13 of the contract.

- [8] The applicants' disputed claim 1. They argued in their payment schedule it was invalid. One reason specified for that invalidity was that it had been served on only two of the applicants. Under the Act a payment claim is to be served on the person who is or may be liable to make the payment.<sup>3</sup> The invalidity of claim 1 was accepted by the first respondent by letter dated 30 July 2010.
- [9] Claim 2 was dated 5 August 2010. It also claimed in respect of the two variations. That claim was referred to adjudication. A decision was made by Ian Murphy. It was dated 20 September 2010. Mr Murphy found claim 2 invalid because it included claims for services provided after the reference date for the payment claim. Mr Murphy did not decide the remaining issues as the payment claim was invalid.
- [10] Claim 3 was dated 5 October 2010. It claimed the same items as claim 2 save for the addition of a claim for interest. The applicants provided a payments schedule in which they disputed claim 3 on the basis it was invalid as:
- (a) it was an abuse of process as the same claims had been previously adjudicated;
  - (b) issue estoppel prevented the re-agitation of the claim;
  - (c) section 17(5) prohibits the bringing of a second payment claim in respect of the same reference date, which this was; and
  - (d) two identical payment claims cannot be brought, and the July or August payment claims were relevantly identical.
- [11] Claim 3 was referred for adjudication. The second respondent determined the adjudication, in a decision dated 15 November 2010. The second respondent rejected the applicants' assertion claim 3 was invalid. His decision was that the applicant was required to pay the first respondent the sum of \$102,513 (inclusive of GST) plus interest, plus pay 100% of his fees.

### **The Act**

- [12] The Act provides a legislative scheme for the payment of progress payments in a construction contract. This scheme operates whether or not the construction contract makes provision for payments of that kind. To ensure the objects of the Act are met, the Act established a statutory based scheme of rapid adjudication for the interim resolution of disputes involving building and construction work contracts. The scheme has strict requirements. An adjudicator is entitled to consider certain matters only in deciding an adjudication application.<sup>4</sup>
- [13] Relevantly, the Act provides:
- “17 Payment claims**
- (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).
  - (2) A payment claim—

<sup>3</sup> *Building and Construction Industry Payments Act 2004*, s 17(1).

<sup>4</sup> For a discussion of the scheme see, generally, *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd and Ors* [2011] QCA 22 per White JA at 52-66.

- (a) must identify the construction work or related goods and services to which the progress payment relates; and
  - (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
  - (c) must state that it is made under this Act.
- (3) The claimed amount may include any amount—
- (a) that the respondent is liable to pay the claimant under section 33(3); or
  - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within the later of—
- (a) the period worked out under the construction contract; or
  - (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
- (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

## **18 Payment schedules**

- (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
- (2) A payment schedule—
- (a) must identify the payment claim to which it relates; and
  - (b) must state the amount of the payment, if any, that the respondent proposes to make (the *scheduled amount*).

- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
- (4) Subsection (5) applies if—
  - (a) a claimant serves a payment claim on a respondent; and
  - (b) the respondent does not serve a payment schedule on the claimant within the earlier of—
    - (i) the time required by the relevant construction contract; or
    - (ii) 10 business days after the payment claim is served.
- (5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

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## **21 Adjudication application**

- (1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if—
  - (a) the respondent serves a payment schedule under division 1 but—
    - (i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or
    - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or
  - (b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies can not be made unless—

- (a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
  - (b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application—
- (a) must be in writing; and
  - (b) must be made to an authorised nominating authority chosen by the claimant; and
  - (c) must be made within the following times—
    - (i) for an application under subsection (1)(a)(i)—within 10 business days after the claimant receives the payment schedule;
    - (ii) for an application under subsection (1)(a)(ii)—within 20 business days after the due date for payment;
    - (iii) for an application under subsection (1)(b)—within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and
  - (d) must identify the payment claim and the payment schedule, if any, to which it relates; and
  - (e) must be accompanied by the application fee, if any, decided by the authorised nominating authority; and
  - (f) may contain the submissions relevant to the application the claimant chooses to include.
- (4) The amount of an application fee must not exceed the amount, if any, prescribed under a regulation.
- (5) A copy of an adjudication application must be served on the respondent.
- (6) The authorised nominating authority to which an adjudication application is made must refer the application, as soon as practicable, to a person eligible to be an adjudicator under section 22.

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**24 Adjudication responses**

- (1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the *adjudication response*) at any time within the later of the following to end—
  - (a) 5 business days after receiving a copy of the application;
  - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application.
- (2) The adjudication response—
  - (a) must be in writing; and
  - (b) must identify the adjudication application to which it relates; and
  - (c) may contain the submissions relevant to the response the respondent chooses to include.
- (3) The respondent may give the adjudication response to the adjudicator only if the respondent has served a payment schedule on the claimant within the time specified in section 18(4)(b) or 21(2)(b).
- (4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.
- (5) A copy of the adjudication response must be served on the claimant.

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**26 Adjudicator's decision**

- (1) An adjudicator is to decide—
  - (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the *adjudicated amount*); and
  - (b) the date on which any amount became or becomes payable; and
  - (c) the rate of interest payable on any amount.

- (2) In deciding an adjudication application, the adjudicator is to consider the following matters only—
- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
  - (b) the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
  - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's decision must—
- (a) be in writing; and
  - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

## **27 Valuation of work etc. in later adjudication application**

- (1) Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14, decided—
- (a) the value of any construction work carried out under a construction contract; or
  - (b) the value of any related goods and services supplied under a construction contract.
- (2) The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided

unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision.”

- [14] An adjudication decision does not finally determine a party’s rights as any rights under a construction contract are able to be litigated in later court proceedings.<sup>5</sup>

### **The decision**

- [15] The adjudication decision was lengthy. It dealt with the applicant’s contentions in detail. Relevantly, the second respondent held:
- (a) He did not have authority as an adjudicator to determine that a payment claim is an abuse of process.
  - (b) The first respondent had not had a payment claim under the Act adjudicated as the first adjudication was frustrated by an argument that the payment claim was invalid. The previous adjudicator did not reject the previous claims for the works for want of evidence or because there had not been made out a legal entitlement to be paid for the works. The payment claim was invalid because several items in it were supplied after the reference date. As such the claim was made prematurely.
  - (c) Issue estoppel did not apply where the payment claim is invalid because it is premature.
  - (d) There had not been previously served a payment claim for identical construction work or related goods and services as the two earlier payment claims were not payments within the meaning of the Act. They were both invalid.<sup>6</sup> The present claim was a valid payment claim and therefore not identical to an invalid payment claim.
  - (e) Whilst the applicants were now contending payment claim 1 was a valid payment claim under the Act, and for that reason payment claim 3 is not a valid payment claim, it was not now open to the applicants to assert that payment claim was valid as the applicants had previously asserted it was invalid and that had been accepted by the respondent.<sup>7</sup> In any event, the applicants had not satisfied him that their previously stated reasons for invalidity were not met and that payment claim 1 had been duly served.<sup>8</sup>
  - (f) The applicants’ contention that payment claim 3 was not a valid payment claim because it included works in payment claim 2, the subject of an adjudication by Mr Murphy, was incorrect as payment claim 2 could not be said to have been adjudicated. The work which was included in that payment claim had not been valued by the previous adjudicator.<sup>9</sup>
  - (g) The adjudicator of payment claim 2 did not decide the last reference date under the contract was 18 August 2010. Rather, the adjudicator found that as there was no dispute that the consultants services and the legal service were supplied after the reference date the payment claim 2 was invalid.<sup>10</sup> No issue estoppel arises in relation to that issue.

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<sup>5</sup> The Act, s 100.

<sup>6</sup> At [19], [ 21].

<sup>7</sup> At [24], [25].

<sup>8</sup> At [31].

<sup>9</sup> At [33].

<sup>10</sup> At [37].

- (h) A construction contract cannot prescribe a last reference date that pre-dates the completion of services and thereby exclude a claimant from an entitlement to a progress payment on account of the completion of services.
- (i) Whilst a second payment claim cannot be identical to a previous payment claim, that does not mean that a second payment claim cannot be for the same work that was included in a previous payment claim. In any event, payment claim 3 was not identical to any previous claim as it included a claim for an amount of interest.

### **The application**

#### *Abuse of process*

- [16] The applicants contend there is jurisdictional error in the second respondent's adjudication because he embarked on an evaluation of whether there was, in fact, an abuse of process in issuing payment claim 3 in circumstances where he had correctly held he had no jurisdiction to determine whether there was an abuse of process. A plain reading of the adjudicator's decision establishes the adjudicator correctly held that his jurisdiction was to decide matters covered by the Act. The balance of the discussion related to a consideration of submissions advanced by the applicants. The adjudicator is specifically required to consider all submissions.<sup>11</sup> That he did so does not constitute jurisdictional error.
- [17] The applicants further contend the second respondent fell into jurisdictional error in determining this issue in that he incorrectly identified the basis Mr Murphy had rejected payment claim 2. In the adjudication decision, the second respondent<sup>12</sup> stated Mr Murphy did not reject the prior claim because "the claimant had not made out any entitlement to be paid for the works". The applicants submit this was an error because Mr Murphy rejected that claim on the basis there was no entitlement to be paid for the works by virtue of the invalid payment claim, and the second respondent impermissibly embarked on an assessment of the material in circumstances where s 26 of the Act specifies the matters to be considered by the adjudicator and this was not such a matter.
- [18] A proper reading of Mr Murphy's adjudication decision supports the second respondent's conclusion that Mr Murphy found payment claim 2 was invalid as it contained claims for amounts which accrued after the reference date relied upon in that claim. Mr Murphy did not consider any of the constituent parts of the claim, or value or dismiss any such parts. The second respondent's characterisation of Mr Murphy's decision did not constitute jurisdictional error.

#### *Issue estoppel*

- [19] The applicants contend the second respondent fell into jurisdictional error in his consideration of what constituted the issue estoppel. In order to determine this contention, it is necessary to briefly consider issue estoppel in the context of the Act. Those principles are helpfully set out in *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd*.<sup>13</sup> Applegarth J,<sup>14</sup> stated the principles thus:

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<sup>11</sup> The Act, s 26(2)(d).

<sup>12</sup> At [15].

<sup>13</sup> [2010] QSC 135.

<sup>14</sup> At [32].

- “(a) The concept of issue estoppel, insofar as it is applicable to determination by adjudicators under the Act, includes the *Anshun* principle.
- (b) For the purposes of issue estoppel, the issue determined by the adjudicator is to be ascertained by reference to the payment claim, payment schedule, relevant supporting submissions, the provisions of the contract and the provisions of the Act. Accordingly, the relevant issue for determination by the adjudicator was whether Stowe was entitled to a progress payment pursuant to the statutory mechanisms contained in the Act in respect of the relevant items for the amounts claimed.
- (c) The particular basis upon which the adjudicator determined each contested item and the December claim in general (whether it be lack of legal entitlement, insufficiency of explanation of the basis of the claim, insufficiency of evidence, a failure to establish an entitlement in the amount claimed or some other basis) does not detract from the proposition that the issue he determined was Stowe’s entitlement to an interim progress payment in the amounts claimed by it, say for claims that were withdrawn.
- (d) The principle of issue estoppel discussed in the majority judgment in *Dualcorp* applies when the previous adjudicator does not allow a claim for want of evidence.
- (e) The principle of issue estoppel applies when the previous adjudicator determines that an entitlement to be paid has not been made out for one or more of a variety of reasons that include:
- (i) there is no entitlement;
  - (ii) the claimed entitlement is not made out because the basis for it is not demonstrated, or there is insufficiency of proof as to entitlement, valuation or both.”

[20] *AE & E* did not involve a consideration of the circumstance where the prior adjudication was determined on a jurisdictional objection. In *AE & E*, the issue was whether issue estoppel arose in circumstances where there had been a prior adjudication in which claimed items had been disallowed on the basis there was insufficient supporting information to substantiate the claim, or that there had not been demonstrated an entitlement under the contract to be paid the amount claimed. That is a different situation to the matter under consideration here.

[21] The present case is akin to a rejection by an adjudicator based upon the progress claim being premature. In such circumstances, a later claim is not precluded on the grounds of issue estoppel.<sup>15</sup> That issue estoppel does not arise unless the issue

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<sup>15</sup> *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 at [69].

sought to be re-agitated has been earlier determined was accepted by this Court in *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd*.<sup>16</sup>

- [22] The applicants contend the second respondent also made a jurisdictional error in failing to find that Mr Murphy had made a determination in payment claim 2 as to the last reference date, and that the first respondent was precluded from issuing payment claim 3 in respect of yet another reference date where no further work had been undertaken. In support of this submission the applicants rely on the judgment of Allsop P in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*<sup>17</sup> where the President, in respect of corresponding New South Wales legislation, found there is a prohibition on creating fresh reference dates where no further construction work has been performed.
- [23] Allsop P's reasons in *Dualcorp* must be considered in their context. That context was that the New South Wales legislation was not intended to permit the repetitious use of the adjudication process so as to allow a party dissatisfied with the result of a first adjudication to seek to reignite the adjudication process at will in order to have further goes at that process.<sup>18</sup> The first respondent is not in that position. Payment claim 2 was adjudicated to be invalid as premature. There was no determination of the merits of that claim.
- [24] In any event, s 17(6) of the Act does not impose any restriction upon the generally expressed entitlement in s 17(1), namely an entitlement to claim an unpaid amount of work done earlier before an earlier reference date, whether or not it was claimed in an earlier payment claim. The effect of s 17(6) of the Act is merely to ensure that no implication may be drawn that s 17(5) precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim.<sup>19</sup> There is no general implication in the Act against "re-agitation" of a payment claim in a subsequent payment claim where there has been no adjudication determination.
- [25] What is required, in conformity with s 17(5) of the Act, is that the payment claim should be made in relation to different "reference dates". The second respondent found that payment claim 3 was a valid payment claim properly made in relation to a different reference date. That reference date arose not by reason of the contract, which did not contain any date in relation to any variation, but by reason of the definition of "reference date" in Schedule 2 of the Act. That was a finding open to the second respondent. There was no jurisdictional error in reaching that finding.

#### *Natural Justice*

- [26] The applicants further contend the second respondent made a jurisdictional error in failing to find that the first respondent, having elected to choose the reference dates it asserted in payment claim 2, was bound by that election in payment claim 3 where there was no evidence of further work appearing to have been undertaken. As was required by s 26 of the Act, the second respondent considered, as part of his consideration of the submissions made, the basis upon which payment claim 2 was found invalid. Having done so, he was required to determine the applicable reference date in respect of payment claim 3. There was no issue estoppel requiring him to find that that reference date had been pre-determined, nor was there any

<sup>16</sup> [2010] QSC 159 at [48]-[49].

<sup>17</sup> [2009] NSWCA 69 at [13]-[14].

<sup>18</sup> See *Spankie and Ors v James Trowse Constructions Pty Ltd* [2010] QCA 355.

<sup>19</sup> *Spankie* per Fraser JA (with whom Holmes JA and Chesterman JA agreed) at [23].

requirement for him to find that there had been an election by the first respondent to choose a reference date in accordance with that asserted in payment claim 2. Payment claim 2 was ruled invalid as being premature.

- [27] The second respondent correctly considered payment claim 3 afresh, as he was required to do pursuant to s 26 of the Act. A proper reading of the provisions of the Act does not prevent the first respondent from making payment claim 3. If it were otherwise, it would mean a claimant in respect of a payment claim adjudicated to be invalid as premature would be practically unable to issue a further payment claim in respect of moneys claimed in that payment claim by reason of the fact that they had made the first payment claim. Such a conclusion is inconsistent with the provisions of the Act, and the reasons of the Court of Appeal in *Spankie*.
- [28] The applicants further contend the second respondent fell into jurisdictional error in finding that the applicants had conceded, at paragraph 12.1 of the adjudication response, that the applicable reference date was 30 September 2010, and that the second respondent failed to accord the applicants natural justice by asserting such a concession was made, and in failing to call for submissions in relation thereto, and in failing to provide adequate reasons for his conclusions.
- [29] In their adjudication response at paragraph 12.1, the applicants said:  
 “In the alternative to reason 3, and in the event that the contract does not provide a reference date in respect of variation 1 and variation 2 (which is denied) then, pursuant to the BCIPA, then the respondents concede that there will be a reference date in relation to variation 1 and 2 on the last day of the named month in which the construction work was first carried out for that variation or the related goods and services were first supplied for that variation, and the last day of each later named month.”

The second respondent did not make a jurisdictional error in finding that constituted a concession. He was obliged to consider the submission, and properly did so. There was no denial of natural justice in respect of that matter and no need for him to provide further reasons in those circumstances. The requirement to afford justice is shaped by the relevant legislation and the particular circumstances of the case.<sup>20</sup> This was not a situation where the adjudicator was considering something about which no submission was made. He was addressing a particular submission.

- [30] The applicants further contend the second respondent made a jurisdictional error in determining that both payment claim 1 and payment claim 2 were invalid as the applicants now contended payment claim 1 was a valid claim. Two jurisdictional errors are relied upon in this respect. First, that the second respondent accepted an approbation/ reprobation argument without affording natural justice to the applicants. Second, that the second respondent erred in placing an onus on the applicants to prove that the claim had been properly served.
- [31] The applicants specifically contended, as a ground for invalidity of payment claim 1, that it had not been served on each applicant as required by the Act. The first respondent accepted the applicants’ assertion that the payment claim was invalid and subsequently issued a payment claim 2. After payment claim 2 had been issued, the applicants contended payment claim 1 was valid. In payment claim 3,

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<sup>20</sup> See, generally, *John Holland Pty Ltd v TAC Pacific Pty Limited* [2010] 1 Qd R 302.

there was an assertion, not supported by any evidence, that payment claims had been served on the applicants.

- [32] Whether the applicants' changed position constituted approbating and reprobating was specifically canvassed in the first respondent's adjudication application, and in the applicants' adjudication response. It was a matter properly to be considered by the second respondent. There was no need for the second respondent to inform the applicants of his proposed conclusion. There was no denial of natural justice, and no jurisdictional error on the part of the second respondent, in proceeding to determine that issue adverse to the applicants.
- [33] The question whether there was evidence of service was referred to by the second respondent in the context of addressing the situation if he was wrong in his determination. As such, it was not a material finding. Compliance with the requirements of natural justice in relation to whether there was evidence of service could have made no difference to the outcome.

#### *Anshun Principle*

- [34] Finally, the applicants contend the second respondent made a jurisdictional error in failing to give attention to the application to the *Anshun* principle regarding the claim for interest, and in determining that payment claim 3 was not identical to payment claim 1. As to the first, that was not an issue raised in submissions. In any event, that interest was claimed in payment claim 3 but not claimed by payment claim 1 or payment claim 2, both of which were not valid payment claims, does not raise an estoppel against it being properly claimed in payment claim 3. There was no jurisdictional error by the second respondent in failing to consider this issue.
- [35] As to the second, payment claim 1 was not a valid payment claim. The second respondent correctly determined that payment claim 3 was not relevantly identical to payment claim 1. There was no jurisdictional error by the second respondent in determining that payment claim 3 was not relevantly identical with payment claim 1.

#### **Conclusion**

- [36] The applicants have failed to establish that the second respondent made any jurisdictional error in determining the adjudication decision the subject of this application. The application is dismissed.
- [37] I shall hear the parties as to the form of orders, and costs.