SUPREME COURT OF QUEENSLAND

CITATION:	*Richard Kirk Architect Pty Ltd v Australian Broadcasting Corporation & Ors* [2012] QSC 177
PARTIES:	**RICHARD KIRK ARCHITECT PTY LTD** (applicant) **v** **AUSTRALIAN BROADCASTING CORPORATION** (first respondent) and **THE INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA** (second respondent) and **JONATHON SMITH** (third respondent)
FILE NO:	3649 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2012
JUDGE:	Daubney J
ORDERS:	**1. The application is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS FOR REVIEW – JURISDICTIONAL MATTERS – where the applicant entered into a contract with the first respondent for the provision of architectural services – where the applicant served a payment claim on the first respondent pursuant to the *Building Construction Industry Payments Act* 2004 ("the Act") – where the first respondent contended that the payment claim was void or invalid or in the alternative if the claim was valid it amounted to $NIL – where the applicant served further documents on the first respondent in reference to the claim – where the first respondent disputed the documents formed part of the payment claim – where the applicant sort an adjudication of the payment claim – where the first respondent maintained its position that the payment claim was void throughout the adjudication – where the adjudicator found that the payment

claim was valid and amounted to $NIL – where the adjudicator ruled the further documents did not form part of payment claim – where the applicant claims the decision of the adjudicator is void or liable to be set aside for want of jurisdiction – where the applicant now adopts the first respondents argument that the payment claim was not a valid payment claim as defined under the Act – where the applicant further submits that the adjudicator should have taken the further documents into account when making his decision – whether the adjudication decision is void or liable to be set aside

Building Construction Industry Payments Act 2004 (Qld), s 17
Judicial Review Act 1991 (Qld)

Broad Construction Services (NSW) Pty Ltd v Michael Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR
Hitachi Limited v O'Donnell Griffin P/L & Ors; O'Donnell Griffin P/L v Hitachi Ltd v Ors [2008] QSC 135
J Hutchison Pty Ltd v Galform Pty Ltd [2008] QSC 205
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2011] QCA 22
Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor [2009] QSC 165
Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd, [2011] QSC 293
Verdasz t/as Australasian Piling Co (2008) 73 NSWLR 149
Walton Construction (Qld) Pty Ltd v Salce [2008] QSC 235

COUNSEL: M D Ambrose for the applicant
G D Beacham for the respondent

SOLICITORS: Holding Redlich for the applicant
ClarkeKann for the respondent

[1] The applicant ("RKA") seeks a declaration that an adjudication decision made by the third respondent pursuant to the *Building Construction Industry Payments Act* 2004 ("*BCIPA*") is void or liable to be set aside.

Background

[2] On 28 January 2010, RKA entered into a contract with the first respondent ("ABC") for the provision of architectural services in respect of a building project known as the "ABC Brisbane Accommodation Project" ("the project"). It was not in issue

that this was a "construction contract", within the meaning of that term in the *BCIPA*.

[3] On 15 February 2012, RKA sent a letter to the ABC which said:

> "I enclose by way of service a payment claim pursuant to the *Building & Construction Industry Payments Act 2004*.
>
> This notice is being served at the same time as a Notice of Dispute pursuant to the General Conditions of Contract. It is RKA's preference to proceed to Expert Determination as provided for in the contract and provided the ABC agrees to that approach, then this claim under the *Building & Construction Industry Payments Act* will not proceed. However, it is considered appropriate to serve this claim in order to preserve RKA's position in the event that the ABC does not, for any reason, wish to proceed with Expert Determination."

[4] Attached to that letter was a one page document entitled "Payment Claim", which was expressed to be a payment claim under the *BCIPA*. The payment claim identified the contract and the project, stated that the "reference date (date when claimant can claim and to which claim is calculated)" was 22 December 2011, and specified the total amount of the payment claim as "$244,410.45 inc GST". The document then stated:

> "The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in the Attachment(s) to this Payment Claim"

[5] In fact, there were no attachments to the payment claim document. On the same day, however, RKA sent another letter dated 15 February 2012 to the ABC which said:

> "I enclose by way of service notice of dispute pursuant to the provisions of clause 15.4 of the general conditions of contract.
>
> It is proposed that Warren Fischer of Alternative Dispute Resolution Services ... be appointed as the Expert for the purposes of that determination.
>
> I look forward to receiving your response as to whether Mr Fischer is acceptable."

[6] Attached to this letter was a Notice of Dispute, in which RKA set out at some length particulars of the outstanding fees which it claimed were owed to it by the ABC. This Notice of Dispute identified in some detail the claimed basis for payment to RKA of both Construction Phase Services fees and Prolongation fees, including summaries of the facts giving rise to the disputes over those fees, and also included a schedule which set out a breakdown of the fees which it contended were payable to it but which had been withheld by the ABC. The total of the fees itemised in that schedule was $222,191.32 (exclusive of GST). That equates to $244,410.45 inclusive of GST, which of course is the same amount referred to in the *BCIPA* payment claim.

[7] These letters and documents were all sent as attachments to a single email from RKA to the ABC dated 15 February 2012, which said:

> "Please find attached the following:
>
> 1. Without prejudice letter RE Notice of Dispute and BCIPA claim dated 15 February 2012
>
> 2. Notice of Dispute dated 15 February 2012
>
> 3. BCIPA claim dated 15 February 2012
>
> All documents have also been issued to the ABC at 700 Harris Street, Ultimo by Express Post."

[8] Leighton Contractors ("Leightons") was the Design and Construction Director appointed by the ABC for the project. On 20 February 2012, Leightons wrote to RKA saying:

> "We refer to your payment claim dated 15 February 2012 (Second December Payment Claim).
>
> By way of background, on 22 December 2011, we received from RKA its payment claims for December 2011 and provided and (sic) assessment of the claim which was copied to RKA on 13 January 2012.
>
> On 13 February 2012, we received from RKA its payment claims for January 2012 and provided to you a payment schedule in response on 20 February 2012.
>
> The Second December Payment Claim is void or invalid for the following reasons.
>
> 1. Section 17 of the *Building and Construction Payments Act 2004* **(BCIPA)** states;
>
>   '(2) A payment claim –
>
>   (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
>   ...
>
>   (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.'
>
> 2. The Second December Payment Claim does not identify the '*related goods and services to which the progress payment relates'*. We are, therefore, unable to assess whether the work the subject of the Second December Payment Claim is complete because RKA has not stated which is the completed work.
>
> 3. The Second December Payment Claim claims an amount that is different to the amounts previously assessed and certified but provides no detail or break-up of the claimed amount. We are, therefore, unable to assess to what extent, if any, the Second December Claim replaces or supersedes any part of the RKA December 2011 payment claim.

4. RKA has submitted more than one payment claim for the same reference date and, therefore, the Second December Payment Claim is void by operation of the BCIPA.

For the avoidance of doubt, we enclose a copy of the payment schedule that was served on RKA in response to its December 2011 payment claim."

[9] On 23 February 2012, RKA responded with a letter directed to the ABC in which RKA said:

"With reference to the letter received 20 February from your Agent LCPL regarding the RKA Payment Claim dated 15 February 2012, RKA offer the following responses with corresponding numbering to the LCPL letter:

1(a). In support of the RKA Payment Claim dated 15 February 2012, we attach further information in the way of invoices and supporting documentation from April 2011 to December 2011 to clarify the good and services that the claim relates to.

1(b). The RKA Payment Claim dated 15 February 2012 made under the *Building & Construction Industry Payments Act* is the first such claim. No previous RKA payment claim has included a statement that the claim is made under the *Building & Construction Payments Act*.

2) Refer Item 1(a) above in reference to identification of construction work or related goods and services to which the payment relates.

3) In support of the RKA Payment Claim dated 15 February 2012, we attach further information in the way of a breakdown of the claimed amount clearly showing payment withheld from relevant April 2011 to December 2011 invoices, copies of the relevant invoices and copies of corresponding ABC Remittance Advice to confirm amounts paid.

4) The RKA Payment Claim dated 15 February 2012 made under the *Building & Construction Industry Payments Act* is the first such claim and is therefore not 'void by operation of the BCIPA' as LCPL asserts.

RKA request that the additional information provided be accepted as incorporated in the payment notice already served.

RKA did not receive a copy of the 'payment schedule that was served on RKA in response to its December 2011 payment claim' in the 20 February letter from LCPL. Can this be resent if still applicable?"

[10] Attached to that letter was a further document in the form of a payment claim under the *BCIPA* and also purporting to be dated 15 February 2012. The amount referred to in this purported payment claim document was $244,410.45 inclusive of GST. This was not, however, the same as the payment claim which had actually been served on the ABC on 15 February 2012. In this document, the "reference date (date when claimant can claim and to which claim is calculated)" was specified as "9 May 2011 – 22 December 2011". The document also had a second page which listed a large number of attachments, including a breakdown of withheld fees and

copies of RKA invoices and ABC remittance advices. This second page also included "details of claim", which said:

> "Claim covers withheld payment from the attached RKA invoices for the provision of architectural design services rendered on the ABC Brisbane Accommodation Project between April 2011 and December 2011."

[11] The schedule of withheld fees and copies of invoices and remittance advices were then attached as a bundle to the document.

[12] On 27 February 2012, Leightons, on behalf of the ABC, wrote a letter to RKA headed:

> "Re: ABC Brisbane Accommodation Project
> Payment schedule for the purported RKA payment claim dated 15 February 2012."

[13] The letter commenced:

> "We refer to your purported *'payment claim dated 15 February 2012'* **(Second December payment claim)**, our letter in response dated 20 February 2012 and your letter dated 23 February 2012. **Appendix 1** is a copy of the Second December payment claim that is attached to this payment schedule."

[14] Under the heading **"PAYMENT CLAIM IS NOT A VALID CLAIM UNDER BCIPA"**, Leightons then advanced specific challenges to RKA's payment claim delivered on 15 February 2012. The letter stated, *inter alia*, as follows:

> "We deny that the Second December Payment Claim is a valid payment claim pursuant to the *Building and Construction Industry Payments Act 2004* (**BCIPA**) for the following reasons:
>
> (a) Second December Payment Claim is not in accordance with s 17 of the BCIPA
>
> ...
>
> (b) Second December Payment claim is void as there is no reference date stated
>
> ...
>
> (c) Second Defendant Payment Claim is different to other December progress claims
>
> ...
>
> (d) More than one Payment Claim for the same reference date.
>
> ...
>
> (e) Letter of 23 February 2012
>
> Your letter dated 23 February 2012 states; *"RKA request that the additional information provided be accepted as incorporated in the payment notice already served"* and attaches 116 pages of information in support of the payment claim submitted on 15 February 2012.

> You submitted the RKA Second December Payment Claim on 15 February 2012 under the BCIPA and accordingly we have 10 business days within which to assess your payment claim and provide our payment schedule.
>
> The BCIPA makes no provision for any staged delivery of the payment claim. Accordingly, RKA is not entitled to provide 116 additional pages of information in support of its Second December Payment Claim 8 days after serving the payment claim.
>
> Accordingly, we reject your request and will not assess the 116 additional pages of information as it does not form a part of the 15 February 2012 payment claim."

[15] The Leightons letter of 27 February 2012 then set out the heading "Payment Schedule", and said:

> "In the alternative, if the Second December payment claim is a valid payment claim under the BCIPA, which we deny, set out below are our reasons for withholding payment ..."

[16] The letter then set out challenges to specific tax invoices, and the payment schedule part of the letter concluded:

> "Accordingly, we confirm that the **scheduled amount in response to the purported payment claim dated 15 February 2012 is $NIL**."

[17] On 9 March 2012, RKA wrote directly to the ABC, saying:

> **"**We refer to the letter received 27 February from your Agent LCPL regarding the RKA Payment Claim dated 15 February 2012.
>
> It is unfortunate that the general approach adopted by the ABC is one of reliance upon purported technical non-compliance with the BCIPA, rather than addressing the substance of the matters in dispute.
>
> For the reasons set out below, RKA contend that a valid notice has been given pursuant to BCIPA. Addressing the matters raised in your letter (and adopting your numbering):
>
> 1(a). LCPL is well aware of the goods and services to which the progress claim relates. RKA has provided (under cover of letter dated 23 February 2012) copies of the relevant invoices. LCPL's claim that the goods and services have not been identified arises simply because LCPL refuses to take into account those invoices. Further, LCPL is well aware of the computation of the sum of $244,410.45 because it appears form the notice of dispute which was also served on 15 February 2012.
>
> 1(b). BCIPA does not require that a reference date be provided. In any event, in this case there is no one reference date because the failure to pay RKA's invoices extends over the period from May to December 2011.
>
> 1(c). The payment claim dated 15 February 2012 is not silent as to which services are being claimed and in any event, any uncertainty on

LCPL's part was resolved by provision of the copies of invoices under cover of RKA's letter dated 23 February 2012.

1(d). RKA are of the opinion that the progress claim for December 2011 submitted on 22 December 2011 was not made under BCIPA as the invoices did not contain the required wording under the Act.

2. RKA note that the ABC have provided a payment schedule amount of $NIL in response to the RKA Payment Claim dated 15 February 2012.

The claimed amount is due and unpaid and RKA have provided sufficient evidence to support the claim."

[18] Then on 9 March 2012, and pursuant to s 21 of the *BCIPA*, RKA made application to the first respondent (which is an "authorised nominating authority" under the *BCIPA*) for an adjudication of the payment claim. The adjudication application, which was completed in handwriting, included "payment claim details" which specified that the "payment claim amount" was "$244,410.45 (inc GST)" and that the payment claim had been served on the ABC on 15 February 2012.

[19] The adjudication application (which appears to have had annexed to it not just a copy of the payment claim served on 15 February 2012 but also copies of the Notice of Dispute dated 15 February 2012 and of other correspondence between the parties, including copies of substantiating invoices, etc.) was served on the ABC in two tranches on 9 and 13 March 2012.

[20] On 13 March 2012, the third respondent was nominated as adjudicator by the second respondent.

[21] On 20 March 2012, the ABC lodged and served its adjudication response, in accordance with s 24 of the *BCIPA*.

[22] The introduction to the adjudication response stated, *inter alia*, as follows:

"1.1 This Adjudication Response is made pursuant to section 24 of the *Building and Construction Industry Payments Act 2004* (Qld) (**BCIPA**).

1.2 On 15 February 2012, the Claimant submitted a payment claim (the **First Payment Claim dated 15 February 2012**) to the Respondent. **Attachment 2** is a copy of the First Payment Claim dated 15 February 2012.

1.3 On 23 February 2012, the Claimant served a letter to the Respondent and a payment claim dated 15 February 2012 (the **Second Payment Claim dated 15 February 2012**) with numerous tax invoices attached. The Second Payment Claim dated 15 February 2012 was different to the First Payment Claim dated 15 February 2012. **Attachment 3** is a copy of the Second Payment Claim dated 15 February 2012.

1.4 On 27 February 2012, the Respondent served its Payment Schedule in response to the First Payment Claim dated 15 February 2012 pursuant to s18 of the BCIPA. The Payment Schedule stated that the Scheduled Amount was $ NIL. **Attachment 4** is a copy of Payment Schedule.

1.5 On 12 March 2012, the Claimant served a part of its Adjudication Application for a payment claim (Adjudication Application). The Adjudication Application referred to two different payment claims. Specifically, the Adjudication Application referred to:

(a) The First Payment Claim dated 15 February 2012; and

(b) The Second Payment Claim dated 15 February 2012;

Attachment 5 is a copy of the Adjudication Application."

[23] In the course of its adjudication response, the ABC critically analysed what it described as the "first payment claim dated 15 February 2012" and the "second payment claim dated 15 February 2012". In relation to the "first payment claim dated 15 February 2012", the adjudication response said:

"3.1 On 15 February 2012, the Claimant served its First Payment Claim dated 15 February 2012 on the Respondent.

3.2 The First Payment Claim dated 15 February 2012 was comprised of a cover letter and a one page payment claim that;

(a) states it was made pursuant to the BCIPA in accordance with s17(2)(c) of the BCIPA;

(b) does not comply with 17(2)(a) because it provided no description of the *'construction work or related goods and services to which the progress payment relates'*;

(c) states that;

(i) it was for; '*Multiple Claims*' contrary to s17(5) of the BCIPA;

(ii) referred to; '*Contract dated 2 December 2009 for the provision of architectural services to the ABC Brisbane Accommodation Project*'.

(iii) the Reference date relating to the First Payment Claim dated 15 February 2012 is 22 December 2011.

(d) states that the amount claimed under the First Payment Claim dated 15 February 2012 is $244,410.45 (incl GST) (amount claimed) in accordance with s17(2)(b) of the BCIPA.

(e) the Claim Reference No. is; '*Multiple Claims*'; and

(f) states; '*the construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in the*

> *Attachment(s) to this Payment Claim*' and there were no attachments to the First Payment Claim dated 15 February 2012.
>
> 3.3 **Attachment 2** is a copy of the First Payment Claim dated 15 February 2012.
>
> 3.4 The First Payment Claim dated 15 January 2012 is invalid for the above stated reasons. Specifically, the First Payment Claim dated 15 January 2012 does not comply with sections 17(2)(a) and 17(5) of the BCIPA.
>
> 3.5 If the Adjudicator decides that the First Payment Claim dated 15 February 2012 is the relevant payment claim that is the subject of the Adjudication Application, which is denied, we respectfully suggest that the Adjudicator has no jurisdiction to decide this Adjudication Application because the First Payment Claim dated 15 February 2012 is not a payment claim under the BCIPA."

[24] On 29 March 2012, the third respondent issued his decision on the adjudication application, and determined that the "adjudicated amount in respect of the Adjudication Application ... is nil." In the course of his reasons for the adjudication, the third respondent determined:

(a) that the payment claim served on 15 February 2012 was a valid payment claim, and rejected the ABC's arguments that the form of payment claim was defective, and

(b) decided that the supporting documentation contained in RKA's letter of 23 February 2012 did not form part of the payment claim, and that the information delivered to the ABC on 23 February 2012 was not a properly made submission for the purposes of the *BCIPA* payment claim process.

The present application

[25] As noted, RKA seeks to have the third respondent's adjudicator's decision declared void or set aside. RKA says that the adjudicator's decision ought to be declared void for want of jurisdiction for two reasons:

(a) The payment claim served on 15 February 2012 did not identify the related goods or service for which the amount of $244,410.45 was claimed, and was therefore not a document which could qualify as a "payment claim", as defined in s 17(2) of the *BCIPA*.

(b) The third respondent erred in rejecting consideration of the documents sent with RKA's letter of 23 February 2012, that the third respondent ought have seen these as "relevant documentation", and taken them into account in making his decision, and that his failure to do so was a failure to attend to his task in accordance with his statutory obligations resulting in his decision being made without jurisdiction.

RKA's arguments

[26] RKA advanced before me precisely the same objection under s 17(2)(a) of the *BCIPA* that the ABC had taken to the payment claim, which RKA had so stoutly contradicted, and which was rejected by the adjudicator. The essence of RKA's present primary position is that the ABC's previous contention that the payment claim served on 15 February 2012 was not efficacious for lack of compliance with s 17(2)(a) was right, and by finding to the contrary (as he had been urged by RKA) the adjudicator committed a jurisdictional error.

[27] The adjudicator's relevant findings on this point were as follows:

> "46. The Payment Schedule of the 27th February 2012 makes five separate submissions as to why what it calls the '*Second December Payment Claim*' is not a valid claim under the Act. I am satisfied it was referring to the Payment Claim that has been referred to me.
>
> 47. Firstly it says that the Claim does not satisfy s 17 of the Act as it does not identify the related goods and services to which the payment relates. As 1(a0 (sic) of the Payment Schedule it says that it is '*unable to assess whether the Services supposedly provided and claimed under the Second December Payment Claim are complete or carried out in accordance with the contract and cannot be assessed in any way at all*.'
>
> 48. The Claim was served on the Respondent on the 15th of February and says "*This notice is being served at the same time as Notice of Dispute* ..." That Notice of Dispute is at a different Tab to that of the Payment Claim letter in the Application. I ask myself the question, did the Claimant think it was supplying the Respondent with details of the amount claimed in the Notice of Dispute as part of its Claim?
>
> 49. Whilst the email that delivered the claim had three separate attachments the Respondent has taken the claim to include the Notice of Dispute. It includes the documents 'as one' under Tab 2 of its Adjudication Response and says that Tab 2 is the 15 February 2012 Payment Claim. I take that to read the whole of Tab2 is the Payment Claim.
>
> 50. I am satisfied that in sending all of the information at once the Claimant was supporting one with the other and thus the Notice of Dispute was a document supporting and therefore forming part of its Payment Claim. The Respondent has treated it as such in including it under the heading '15 February 2012 Payment Claim' at Tab 2 of the Adjudication Response as forming part of that Payment Claim.
>
> 51. The Notice of Dispute provides significant detail of what is claimed or significantly of correspondence that has passed between the parties.
>
> 52. I refer the parties to the decision of Palmer J. in *Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140* at [76]-[77] (My Emphasis) ...
>
> *76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have*

> *produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.*
>
> *77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint; they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.*
>
> 53. In this case I believe that the parties (and their agents); fit into the group that regularly give and receive payment claims and payment schedules and who are experienced in the construction industry and thus significantly more cryptic descriptions are sufficient to appraise the other party of the substance of their submissions. Appraising each other of the substance of the submission does not mean that they have to agree with it merely that they understand it. An Adjudicator is not privy to this same level of intimate knowledge of the subject matter but must be satisfied that the party receiving such a submission is aware of its meaning.
>
> 54. Thus I disagree that the Payment Claim fails to adequately identify the services claimed with sufficient particularity to apprise the ABC of what were those services. The Notice of Dispute refers to a significant amount of correspondence between the parties.
>
> 55. I am satisfied that it does not breach s 17(2))a) of the Act."

[28] The specific argument advanced before me relied on s 17(2)(a), which provides that a payment claim "must identify the construction work or related goods and services to which the progress payment relates". It was argued that the payment claim served on 15 February 2012 did not identify the related goods or services for which the sum of $244,410.45 was claimed, nor did it set out the previous history of claims to enable an assessment of "new work". Counsel for RKA highlighted the fact that there were no attachments containing such details attached to the one page payment claim document.

[29] I was referred to numerous authorities in which the requirements of s 17(2) have been considered, and which have affirmed the principle that the section requires that the payment claim must purport in a reasonable way to identify the work the subject of the claim so that a respondent can understand the basis of the claim.[1]

[30] RKA's submissions adopted, and advanced as its own, arguments which the ABC had made on this point in its payment schedule and its adjudication response. It was argued that the adjudicator erred in having regard to the contents of the Notice of Dispute (notwithstanding its contemporaneous delivery), and that the other documents which were delivered at the same time as the payment claim fell within the category of "extraneous circumstances or previous communications" which cannot be relied on to cure a defect in the payment claim.[2] On that basis, it was submitted for RKA that:

- the Notice of Dispute was a separate document that did not form part of the payment claim;

- the payment claim was deficient for its non-compliance with s 17(2)(a), and for that reason was incapable of triggering the jurisdiction of the *BCIPA* for an adjudication to take place;

- the decision of the third respondent was without jurisdiction and void.

[31] RKA, therefore, sought to invoke the supervisory jurisdiction of this Court, contending, in effect, that the third respondent's decision did not meet the statutory conditions essential for a valid decision. It is convenient, in that regard, to repeat the following observations I made in *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd*[3]:

> "[18] The making of payment claims and the adjudication of disputed payment claims are governed by Part 3 of *BCIPA*. In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[4] White JA comprehensively explained[5] the legislative background to and effect of the relevant provisions in Part 3. I respectfully adopt all that was said by her Honour without repeating it here at length. It is convenient, however, to quote the following:
>
> > '[59] Part 3 Div 2, which is now excluded from the purview of the *Judicial Review Act*, deals with the adjudication of disputes about a payment claim by an adjudicator. A claimant may apply for adjudication of a payment claim if the respondent serves a payment schedule and the amount is less than the claimed amount or the respondent fails to pay the whole or any part of the amount identified for payment in the payment schedule, or, if the respondent fails to serve a payment schedule or

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1 See, for example, *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd* [2010] QCA 381 per Philippides J at [35] – [36]; *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aus) Pty Ltd* [2011] QSC 292 at [59].

2 RKA relied, in that regard, on the judgment of Austin J in *Gemzone Pty Ltd v Trydan Pty Ltd* [2002] NSWSC 395 at [41] – [46].

3 [2011] QSC 293 at [18] – [22].

4 [2011] QCA 22.

5 At [52] – [66].

> fails to pay the whole or any part of the claimed amount by the due date. An adjudication application must be made to an authorised nominating authority chosen by the claimant and within quite limited time frames, for example, where a payment schedule has been received, within 10 business days. Apart from administrative matters, the adjudication application may contain the submissions relevant to the application which the claimant chooses to include. A copy must be served on the respondent. The authorised nominating authority must refer the application as soon as practicable to a person eligible to be an adjudicator under the provisions in the *Payments Act*. If the respondent has given a payment schedule, the respondent may give to the adjudicator a response to the claimant's adjudication application within either five business days after receiving a copy of the application or two business days after receiving notice of an adjudicator's acceptance of the application. A respondent cannot include in the response any reasons for withholding payment unless those reasons had already been included in the payment schedule served on the claimant.' (citations omitted)

[19] The Court of Appeal in *Northbuild Construction* also applied to decisions made under *BCIPA* the proposition drawn from *Kirk v Industrial Court (NSW)*[6] that the legislature cannot exclude the power of a State Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error in executive and judicial decision making. McMurdo P further observed[7] that:

> 'There is no doubt that an adjudicator's decision under the *Payments Act* is an administrative decision over which the Supreme Court of Queensland has a supervisory jurisdiction, despite s 18(2) *Judicial Review Act* ...'

[20] Chesterman JA[8] considered that the judgment of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*[9] in relation to the equivalent New South Wales scheme remained authority for the proposition that adjudications which do not comply with the essential statutory requirements are void and the Court may, when non-compliance has been demonstrated, make declarations and/or grant injunctions to prevent a void adjudication being acted on.

[21] White JA said:

> '[78] In these proceedings Northbuild sought and continues to seek declaratory and injunctive relief. Although the legislature clearly seeks a "fast track" investigation into an entitlement, on an interim basis, to a progress payment, there is nothing in the language of the *Payments Act* in the nature of a privative clause

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6 (2010) 239 CLR 531.
7 At [6].
8 At [32].
9 (2004) 61 NSWLR 421.

attempting to exclude the supervisory role of the Supreme Court and s 31(4)(a) does not do so. It is a reference only to proceedings to have a judgment based on an adjudication certificate set aside and that must be in respect of an adjudication reached in conformity with the *Payments Act*. After *Kirk v Industrial Court (NSW)*, the exclusion of Pt 3 Div 2 from the *Judicial Review Act* is limited to review of decisions not infected by jurisdictional error. Even before *Kirk* (and *Craig*) longstanding authority demonstrates that a prohibition against challenging an administrative decision would be interpreted to mean a decision not infected by jurisdictional error.

[79] The "only" matters which an adjudicator may consider in reaching a decision are the provisions of the *Payments Act*, the terms of the construction contract, the payment claim and response and all submissions properly made so that if the arbitrator departed from that list and considered, for example, what he regarded as a "fair thing" he would have made a decision without authority and, if he truly disregarded a claimant's submissions, his decision would not be one envisaged by the *Payments Act*.

[80] Accepting the criticisms which have been levelled at *Brodyn* on the question of the availability of prerogative review for jurisdictional error, Hodgson JA's observation that an adjudicator's purported decision would be void if it did not meet the statutory conditions essential for a valid decision are unexceptional. So, too, where the necessary level of procedural fairness had not been accorded to a party. By quoting extensively from and relying on passages in *Brodyn* the primary Judge did not fall into error, since he considered whether the adjudicator had performed the task assigned to him by s 26 which did not require, in this case, any articulation of the distinction between adherence to "basic requirements" and jurisdictional error.' (citations omitted)

[22] The first argument advanced for Syntech was that the adjudicator's decision in this case was void for jurisdictional error because the adjudicator, in rejecting the spreadsheets, did not comply with the essential statutory requirements for an adjudication under *BCIPA*."

[32] I also respectfully refer to and adopt the following observations by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd*[10]:

"[18] The courts have recognised that an adjudication decision is void if:

1. it fails to comply with the basic requirements of the Act or;

2. it is not a bona fide attempt by the adjudicator to exercise the relevant power; or

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10 [2010] 1 Qd R 302 at [18] – [21].

3. there has been a substantial denial of natural justice to a party;

and only a declaration regarding its invalidity (and perhaps injunctive relief, if necessary) is needed to give it its *quietus*.

[19] Thus in *Brodyn Pty Ltd v Davenport*[11] Hodgson JA said:

> '[I]t is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction ...
>
> ...
> What was intended to be essential was compliance with the basic requirement ..., a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power ... and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination.'

[20] The approach in *Brodyn* has been adopted in Queensland: *Hitachi Limited v O'Donnell Griffin Pty Ltd*;[12] *Walton Construction (Qld) Pty Ltd v Salce*;[13] and *J Hutchison Pty Ltd v Galform Pty Ltd*.[14]

[21] I add that the statutory scheme also was helpfully described by P Lyons J recently in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor*[15]. His Honour surveyed authorities to the effect that a condition of validity of the exercise of an adjudicator's power is that the adjudicator act in good faith. His Honour concluded:

> 'It may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture House Ltd v Wednesbury Corporation*,[16] is not a decision for the purposes of s 26 of the *Payments Act*. Otherwise, I do not consider an adjudicator's

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11 (2004) 61 NSWLR 421 at 441 [52], 442 [55].
12 [2008] QSC 135.
13 [2008] QSC 235.
14 [2008] QSC 205.
15 [2009] QSC 165.
16 [1948] 1 KB 223.

> decision purporting to be made under the *Payments Act* will be invalid if it is not "reasonable". The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of "reasonableness".
>
> I am therefore of the opinion that the test advanced on behalf of *QBWSA* is too widely formulated. If the broad test for good faith is to be adopted, then what is required is a genuine attempt to exercise the power in accordance with the provisions in the *Payments Act*. Specifically, in relation to a consideration of the construction contract, what is required is a genuine attempt to understand and apply that contract.'[17]
>
> In arguing this matter the parties agreed that his Honour's reasons state the appropriate test to be adopted, and I respectfully adopt his Honour's view."

[33] RKA's complaint in the present case that the third respondent failed to comply with the basic requirements of the *BCIPA* is, in my opinion, hollow. It is clear that the third respondent determined that the Notice of Dispute, which was delivered contemporaneously with the payment claim document on 15 February 2012, formed part of the payment claim – see paragraph 50 of the adjudication. That was a determination about the scope of the payment claim, and was a determination within the adjudicator's jurisdiction. As noted above, a payment claim must, in a reasonable way, identify the work the subject of the claim so that the person receiving it can understand the basis of the claim. It almost goes without saying that this requirement is for the benefit of the recipient – it is to be assumed that RKA well knew what its payment claim was. A failure to provide a payment claim which meets that requirement would, if the matter later proceeded to adjudication, impugn the jurisdiction to adjudicate if the payment claim did not meet that necessary purpose and effect; any consequent adjudication decision would have failed to comply with the basic requirements of the *BCIPA*.

[34] On the particular facts of this case (and, I might add again, at the urging of RKA and over the express objection of the ABC) the adjudicator found that the Notice of Dispute formed part of the payment claim delivered on 15 February 2012, and that the Notice of Dispute provided significant detail of what was claimed. This determination by the adjudicator about the scope of the payment claim on which RKA was seeking to recover did not constitute a jurisdictional error by the third respondent.

[35] RKA's second argument, *viz* that the third respondent erred in rejecting consideration of the documents sent with RKA's letter of 23 February 2012, relies on s 26(2) of the *BCIPA*. That subsection provides:

> "(2) In deciding an adjudication application, the adjudicator is to consider the following matters only –

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[17] *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* supra at [32] – [33].

> (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."

[36] The central argument advanced by RKA was that the documents provided under cover of the letter of 23 February 2012 were provided by RKA as part of its adjudication application and should have been considered by the adjudicator, at least on the basis that they constituted "relevant documentation".

[37] In truth, as is apparent from the background I have set out above, the documents were provided as attachments to a second purported "payment claim", which was different to the payment claim actually served on 15 February 2012 (being the payment claim under which RKA sought to have the adjudication).

[38] Critically, the adjudicator concluded[18]:

> "159. I have already decided that the supporting information in the letter of the 23rd February 2012 does not form part of the Payment Claim. It was delivered too late. For it to have been considered it needed to be delivered on the same day as the balance of the claim was served on the Respondent. Otherwise the Respondent does not have the full 10 days allowed under the Act to consider it and respond to it in its Payment Schedule. The information delivered to the Respondent on the 23rd February 2012 was not a **properly made submission**." (emphasis added)

[39] This conclusion by the third respondent was, quite clearly, a reference to s 26(2)(c), which relevantly provides that the adjudicator consider "all submissions, including relevant documentation, **that have been properly made** by the claimant in support of the claim" (emphasis added).

[40] The fact that RKA disagrees with the basis on which the adjudicator decided that the information delivered to the ABC was not a properly made submission is not to

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[18] In para 159 of the adjudication decision.

the point. Such a matter is for the adjudicator to decide.[19] Even if the adjudicator was wrong in the decision that the information was not a properly made submission for the purposes of s 26(2)(c), the error he made was not a jurisdictional error.

[41] I would therefore reject both of the arguments advanced on behalf of RKA.

Discretion

[42] Even if I am wrong on the questions of jurisdictional error, I am firmly of the view that this is a case in which the discretion to grant declaratory relief ought not be exercised.

[43] First, and foremost, there is not an ounce of utility in granting the declarations sought. The effect of the adjudicator's determination was to award RKA nothing under the payment claim. RKA's primary argument before me was that the payment claim was defective, and the adjudication decision void as a consequence. The necessary assumption on which that argument is based is that RKA can recover nothing on the defective payment claim. The making of the declaration sought by RKA adds nothing to the position determined as a consequence of the adjudication.

[44] Secondly, and powerfully, if the payment claim is invalid for a failure to comply with s 17(2)(a), then:

(a) this is something for which RKA is solely, and entirely, responsible; and

(b) RKA led the adjudicator into error because it submitted to the adjudicator that the payment claim did in fact comply with s 17(2)(a). As noted above, RKA has now adopted the contrary arguments advanced before the adjudicator on behalf of the ABC.

[45] The fact that RKA's conduct contributed to what it now contends to be the primary jurisdictional error committed by the adjudicator is clearly a relevant factor for consideration in the exercise of the discretion to grant the declaratory relief.[20]

[46] The adjudicator's decision has no effect on RKA's rights to pursue the ABC under the dispute resolution process provided for under the contract or by way of court proceedings.[21] There is no practical justification for granting the relief sought.

Conclusion

[47] Accordingly, the application will be dismissed.

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19 *Broad Construction Services (NSW) Pty Ltd v Michael Verdasz t/as Australasian Piling Co* (2008) 73 NSWLR 149.

20 See, in a cognate context under the *Judicial Review Act* 1991, the observations by Fraser JA in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2008] 2 Qd R 295 at [78].

21 See s 100.

[48] I will hear the parties as to costs.