SUPREME COURT OF QUEENSLAND

CITATION:	*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346
PARTIES:	**BM ALLIANCE COAL OPERATIONS PTY LTD ABN 67 096 412 752** (applicant) **v** **BGC CONTRACTING PTY LTD ABN 88 008 766 407** (first respondent) and **RUSSELL WELSH** (second respondent) and **RICS DISPUTE RESOLUTION SERVICE** (third respondent)
FILE NO:	BS 4422 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2012
JUDGE:	Applegarth J
ORDER:	**Declare the decision of the second respondent dated 7 May 2012 in relation to Adjudication Application No 1064504-831 void.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant ("BMA") entered into a contract with the first respondent ("BGC") for the construction of a dam – where BGC served a payment claim on BMA pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) – where the payment claim was referred to adjudication – where BMA contends the adjudicator's decision is affected by three jurisdictional errors and is therefore void – whether the adjudicator fell into jurisdictional error and the adjudication should be set aside *Building and Construction Industry Payments Act* 2004 (Qld), ss26, 100

Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd [2010] VSC 300, distinguished
Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation (1992) 39 NSWLR 468, cited
Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] AC, cited
Cant Contracting Pty Ltd v Casella [2007] 2 Qd R 13, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd [2011] NSWSC 1039, followed
Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385, followed
Craig v South Australia (1995) 184 CLR 163 at 177, cited
Downer Construction (Australia) Pty Ltd v Energy Australia [2007] 69 NSWLR 72, cited
James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd [2011] QSC 145, cited
Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142, cited
Northbuild Construction Pty Ltd v Central Interior Lining Pty Ltd [2012] 1 Qd R 525, cited
Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd [2009] NSWSC 320 at 43, cited
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2012] QCA 276, cited

COUNSEL: P J Dunning SC and G D Beacham for the applicant
R A Holt SC and M D Ambrose for the first respondent

SOLICITORS: Herbert Smith Freehills for the applicant
McCullough Robertson for the first respondent
The second and third respondents did not appear and abided the order of the Court

[1] The applicant ("BMA") and the first respondent ("BGC") entered into a contract dated 17 December 2010 for the construction of a dam at the Goonyella Riverside Mine near Moranbah in Central Queensland. By letter dated 12 December 2011 BMA terminated the contract effective 30 days from the date of that notification.

[2] On 10 February 2012, BGC served BMA with a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 ("the Act"). It claimed a progress payment of $35,806,055.99 (excluding GST). The progress claim included the following elements:

(a) claims for the work required under the contract;

(b) claims for variations, delay and disruption costs, and other "extras", which were separately identified as "VO1" to "VO61";

(c) some other claims, which were not identified with a "VO" number. For example, one claim, which is considered below, is described as the "December 2011 costs claim".

[3] BMA served a payment schedule in response to the BGC payment claim and the matter was referred to adjudication under the Act. The second respondent was appointed as the adjudicator. The adjudicator delivered his decision on 7 May 2012.

[4] BMA seeks a declaration that the adjudicator's decision is void. It contends that the decision is affected by jurisdictional error in three respects, such that the whole decision is rendered void. The three alleged jurisdictional errors are:

(a) awarding a sum of $8,662,655.12 to BGC in respect of a latent condition claim in circumstances in which BMA submits that there is no contractual entitlement to be paid for a latent condition that had arisen (Ground 1);

(b) finding the latent condition claim substantiated (Ground 2);

(c) including certain sums which total $4,345,377.42 described as amounts for "VO61: Termination Costs from 9 December 2011 to 20 December 2011" and "December 2011 Costs Claim from 21.12.11 up to 31.12.11" when, according to BMA, any entitlement to those sums could not have arisen on or before the relevant reference date,1 January 2012 (Ground 3).

In response BGC contends:

(a) there was no error in construing the contract as conferring an entitlement to be paid for the latent condition;

(b) the adjudicator did not find the quantum of the latent condition claim "fully substantiated", but on the information before him arrived at a valuation that he considered appropriate, and thereby performed the task required of him by the Act;

(c) the items awarded in respect of VO61 and the December costs claim related to costs incurred before the reference date of 1 January 2012, and were able to be claimed during the course of the contract;

(d) in any event, the alleged errors are not "jurisdictional errors".

The scheme of the Act and "jurisdictional error"

[5] The scheme of the Act has been explained in many cases, including by White JA in *Northbuild Construction Pty Ltd v Central Interior Lining Pty Ltd*.[1] The Court of Appeal in that case confirmed that an adjudicator's decision may be declared void for jurisdictional error.[2] The categories of jurisdictional error have been discussed recently by the Court of Appeal in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd*.[3]

[6] In general terms, in a case in which the jurisdiction of the adjudicator to make a decision is engaged, the adjudicator is empowered to determine under s 26 of the Act the extent and value of construction work and related goods and services.

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1 [2012] 1 Qd R 525 at 546-547 [52] – [56]; [2011] QCA 22 at [52] – [66].

2 Following *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190.

3 [2012] QCA 276 at [95] – [105].

[7] Where matters are entrusted to an adjudicator for decision, a decision involving an error of law is not, for that reason alone, a decision beyond jurisdiction.[4] As McDougall J stated in *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd*:

> "In determining the amount of a progress payment, adjudicators are required to consider, among other things, the provisions of the construction contract under which the claimed entitlement arises (s 22(2)(b)).[5] Presumably, they are required to do so so that they can work out 'the amount calculated in accordance with the terms of' that contract. In other words, their task requires them to identify the contractual provisions that are relevant to quantification of the amount of a progress payment, to decide (where there is a contest) the proper construction of those provisions and to apply them to the facts of the particular dispute. As Palmer J said in *Multiplex* at [58]:[6]
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> > '... If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.'"[7]

[8] An adjudicator who misconstrues or misapplies a relevant contractual provision and, as a result, does not correctly decide the amount of the progress payment, if any, to be paid to the claimant does not, for that reason alone, make a jurisdictional error.[8] As Hodgson JA stated in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*:

> "The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33] – [36]. **The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim**." (emphasis added)[9]

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4 *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd* [2011] NSWSC 1039 at [43].

5 The New South Wales counterpart of s 26(2)(b) of the Queensland Act.

6 [2003] NSWSC 1140 at [58].

7 Ibid at [44].

8 *Clyde Bergemann Senior Thermal Pty Ltd v Varley Power Services Pty Ltd* (supra) at [33] – [53].

9 (2005) 63 NSWLR 385 at 399 [52]; [2005] NSWCA 228 at [52]; Basten and Ipp JJA agreed with the reasons of Hodgson JA. The view of Hodgson JA has been cited with approval in subsequent

[9] The adjudicator may lack jurisdiction because the claimed amounts are not referrable to "construction work" or "related goods and services". There may be other reasons why a claim cannot be sustained, for example, because the claimant is an unlicensed builder.[10] A jurisdictional error may be made by the adjudicator in proceeding to determine an adjudication for a number of reasons. The determination may be affected by jurisdictional error on one of the grounds discussed in *Craig v South Australia*.[11] For example, the adjudicator may disregard something which the relevant statute requires to be considered as a condition of jurisdiction or otherwise fall into jurisdictional error by determining something which the adjudicator lacks authority to determine. A distinction may be made between matters which are "an essential preliminary to the decision-making process" and "matters which can arise during the course of the decision-making process itself".[12] Where matters are entrusted to an adjudicator to decide, an error of law made in the course of the decision-making process is not, of itself, a jurisdictional error. An error in construing the terms of the contract under which an entitlement is claimed is not, of itself, a jurisdictional error. The position is otherwise where the error causes the adjudicator to make one or more of the jurisdictional errors identified in the leading authorities which consider the issue of "jurisdictional error" in the context of the Act and comparable legislation in other Australian jurisdictions.

Ground 1 – The latent condition claim

[10] This ground turns on the proper construction of cl 26 of the contract. BGC claimed under cl 26 for latent conditions arising because soil moisture conditions were significantly different to those which could reasonably have been anticipated. The claim was made by way of Item VO44. BMA rejected the claim and contended, amongst other things, that there was no latent condition.

[11] After considering the submissions of the parties about the moisture content, a geotechnical report included in the contract and the variances encountered, the adjudicator concluded that the variances were well in excess of what BGC might reasonably have expected. He was also satisfied that BGC was not in a position to carry out its own investigations prior to the contract being signed. It had raised issues about the ground condition at the time of tender. He was persuaded by BGC's submissions and concluded that it had a valid claim for latent conditions.

[12] Clause 26 is headed, "Contractor's Responsibility". It includes cl 26A which states:

> "The Parties agree that any matters beyond the control of the Contractor's actual knowledge or reasonable control, including labour rates due to labour market supply forces and the matters listed in clause 26.3, are not within the Contractors risk and the Price does not contain adequate allowance for them."

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cases, including by the Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* (supra) at [108].

10 *Cant Contracting Pty Ltd v Casella* [2007] 2 Qd R 13.

11 (1995) 184 CLR 163 at 177.

12 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (supra) at [43] – [44]; *Clyde Bergemann Pty Ltd v Varley Power Services Pty Ltd* (supra) at [42].

Clause 26.3 provides:

> "Subject to clause 26.2(c), the parties agree that conditions encountered on, in, under, near, or in connection with, the Site which have not been disclosed to the Contractor, or of which the Contractor could not otherwise reasonably have anticipated or been aware ('Latent Conditions'), are not within the Contractor's risk, and the Price does not contain allowance for them. If Latent Conditions are encountered, the Contractor must:
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> (a) use its reasonable endeavours to minimise the effect of such Latent Conditions on the Price and time for completion of the Services; and
>
> (b) promptly (but no later than 28 days after encountering the Latent Conditions) give written notice of the Latent Conditions to the Principal, including a description of the Latent conditions, and their anticipated impact (if any) on Price and time for completion of the Services.
>
> Within 10 Business Days after receipt by the Principal of a notice given under clause 26.3(b), the parties will meet to negotiate in good faith any changes to the Price and/or time for completion of the Services as a result of the Latent Conditions. If no agreement is reached within a further 10 Business Days, the parties must refer the matter to an independent expert for determination. If the parties cannot agree an independent expert, the independent expert will be nominated by the Institute of Arbitrators and Mediators Australia. The independent expert will determine any impact on Price by reference to the rates and prices specified in Schedule F, and to the extent that Schedule F does not apply, by reference to reasonable rates or prices. The parties will share the costs of the independent expert equally, and will use their reasonable endeavours to ensure that the independent expert makes his or her determination promptly. The independent expert's determination will be binding on the parties."

[13] BGC gave the written notice provided for in cl 26. The parties did not meet to negotiate "any changes to the Price and/or time for completion of the Services as a result of the Latent Conditions". The matter was not referred to an independent expert to determine any impact on price. As a result, at the time the payment claim was made and also at the time of the adjudicator's decision there had not been an expert determination of any change to the price specified in the contract. Because there was no expert determination of a new price, BMA submitted to the adjudicator that BGC had no entitlement to be paid in respect of the latent conditions. The adjudicator concluded that BGC was not barred from an entitlement to payment under cl 26.3 because the meeting contemplated by that clause had not occurred, particularly since the convening of a meeting could not be done unilaterally. He found that BGC had a valid claim for latent conditions and proceeded to value the claim.

[14] BMA submits that the adjudicator's interpretation of the clause is wrong. It submits that an entitlement to be paid could only arise by the operation of the mechanism set out in the clause, which provided for the parties to attempt to agree the matter and then for the matter to be determined by an expert.

[15] In addressing the proper construction of cl 26.3, BMA cites authority which makes a distinction between "an agreement that machinery is to be used to implement or to give effect to the contract and an agreement that the parties' rights are to be determined solely by means of that machinery."[13] BMA argues that by cl 26.3 the parties agree that entitlements in respect of latent conditions shall be determined by the machinery in the clause, and not otherwise. The result is that, the machinery in cl 26.3 having not resulted in an expert determination, there was no entitlement to be paid anything in relation to latent conditions. Reliance is placed on the fact that the clause provides that the expert's decision is binding. BMA submits that the parties thereby intended that the decision of the expert would be conclusive as to entitlements under the clause.

[16] Reference is made by BMA to other clauses in the contract which specify that certain rights and obligations in respect of matters such as variations and delays are to be assessed by BMA. They indicate an entitlement in respect of such matters. By contrast, according to BMA, in the event BGC came to believe there was a latent condition, the rights and obligations of the parties depended on the machinery in cl 26.3 resulting in an agreement between the parties, or, failing that, an expert determination.

[17] BMA's submissions prompt attention to the text of cl 26, and consideration of what is referred to the expert for binding determination. The words of cl 26.3 make clear that the independent expert is to "determine any impact on Price" by reference to specified rates or by reference to reasonable rates or prices. In short, the machinery is valuing an entitlement.

[18] Contrary to BMA's submissions, the machinery is not triggered simply by BGC's belief or contention that a latent condition exists. The clause is predicated on the existence of latent conditions: "If Latent Conditions are encountered ...".

[19] The existence of latent conditions (as defined) may be acknowledged by BMA, but if it is not, then a dispute about their existence may be resolved by the processes contained in the contract for dispute resolution, in particular cl 37. Clause 26.3 does not provide for the independent expert appointed under it to determine whether or not latent conditions exist. In a case in which there is a dispute about whether or not latent conditions exist, and once a notice is given under cl 26.3, the parties might delay reference of the valuation to an independent expert under cl 26.3 to await agreement or determination of whether latent conditions exist.

[20] That cl 26 is premised upon an entitlement to be paid for latent conditions is reinforced by cl 26A which states that "the Price does not contain adequate allowance for them".

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[13] *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] AC 266 at 288 per Lord Hope with whom Lord Lloyd agreed. See also *Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468 at 476 where a similar distinction is made.

[21] The second part of cl 26.3 provides for the valuation of the price consequences of latent conditions being encountered. Clause 26 as a whole assumes the existence of an entitlement to be paid for the impact of latent conditions. It creates a mechanism for the quantum of the entitlement to be agreed or determined by an independent expert.

[22] Incidentally, the contract provides for the contractor to continue to work after latent conditions are encountered and in doing so the contractor initially bears the cost of doing so until the value of its entitlement is agreed or determined in accordance with the machinery provided for in cl 26.3. If there was a protracted dispute about the existence of latent conditions or their cost consequences, the contractor might not be paid its entitlement under the contract for a substantial period.

[23] If latent conditions in fact exist, an entitlement to be paid exists, and might be the subject of a claim to payment in accordance with cl 9 of the contract. If such a claim formed part of a payment claim under the Act, it would fall to an adjudicator to construe the contract, consider the merits of the claim and, if valid, assess the value of the claim for the purposes of payment under the Act. The adjudicator's determination of the price that should be paid because of the impact of latent conditions on price is for the purposes of payment under the Act. A later expert determination of price impact for the purpose of determining the price that is payable under the contract might come to a different conclusion on price. To adopt the words of Hodgson JA in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*,[14] the adjudicator comes to a view about what is properly payable on what the adjudicator considers to be the true merits of the claim. That determination does not affect any right that a party to the contract may have under the contract, and in civil proceedings arising under the contract a court may make the orders it considers appropriate for the restitution of any amount paid pursuant to the decision.[15]

[24] On the issue of construction argued before me, cl 26 provides for the assessment of an entitlement to be paid for the impact of latent conditions. It provides for a valuation of that impact by an independent expert whose determination of the matter is binding. The valuation process assumes the existence of an entitlement to be paid the amount which is to be assessed. I do not accept BMA's argument that cl 26 provides that the existence of an entitlement to be paid for latent conditions is to be determined by the machinery in that clause, and not otherwise. The machinery for assessment of entitlements in the clause is premised on the existence of latent conditions which impact on price, and which create an entitlement to be paid an amount to be agreed, or, in default of agreement, to be assessed.

[25] The fact that the machinery for assessment of value under cl 26.3 has not been advanced by the holding of a meeting, the appointment of an independent expert and the independent expert's determination does not alter BGC's entitlement under the clause. It has an entitlement to be paid under the contract, and is able to seek payment in respect of that entitlement in the form of an interim payment under the Act.

[26] My conclusion that the adjudicator did not err in construing the contract makes it unnecessary to determine whether the alleged error was a jurisdictional error.

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14 Supra at 399 [52].

15 The Act, s 100.

However, based upon the authorities which I summarised at [5] – [9], had I concluded that the adjudicator erred in construing the contract, and thereby erred in concluding that BGC had an entitlement under cl 26 to claim for latent conditions, any such error would not have been a jurisdictional error. It would have been an error made in the course of the decision-making process itself based on what the adjudicator considered to be the true construction of the contract and the true merits of the claim. It was the adjudicator's duty to come to a view about those matters in deciding the amount, if any, to be paid by BMA to BGC under the Act. An erroneous construction of the contract by the adjudicator would not have been a jurisdictional error. Such an error would not have deprived him of the authority or jurisdiction to decide the latent condition claim.

[27] The adjudicator did not disregard a limitation on his functions and powers. The jurisdiction conferred on the adjudicator included the authority to construe the contract in order to determine whether there was an entitlement to be paid for latent conditions. Any error in construing the clause in that respect would have been one made in the exercise of jurisdiction, and not a jurisdictional error.

Ground 2 – The substantiation of the latent condition claim

[28] BMA submits that the adjudicator fell into error because, having found that BGC had not "fully substantiated" an element of the claim, he adopted the element in his calculation of the claim. In doing so the adjudicator is said to have failed to perform his statutory task of valuing the claim which was the subject of the payment claim.

[29] The adjudicator was presented with substantial material and submissions. He did not merely accept the figures put forward by BGC, which claimed $11,685,473.00. The amount he awarded for VO44 was $8,662,655.17, a difference of $3,022,817.83.

[30] BGC made its claim based upon the rates used in the schedule of rates in the contract, and then compared the budgeted costs with the actual costs for material types 1A and 1B conditioning and placement. BMA asserted that the budgeted costs had not been proven to be accurate, but produced no evidence to support this contention. The adjudicator accepted the methodology adopted by BGC as reasonable in the circumstances. The budgeted rates had been agreed upon by the parties to value the work. There also was evidence that the rates were based on commercial experience.

[31] As to actual rates, the adjudicator had substantial material about the quantities involved and the costs involved in the process. He was critical of the way in which BGC presented its documentary material in twelve sections of the adjudication application rather than combine them into one claim that was presented in a more systematic way. In its "letter 157" BGC set out the difference in cost between its budget and actual costs. This was summarised in a table to the end of September 2011. Its December claim included a summary, but did not provide a breakdown of the amounts claimed in terms of quantities or rates nor an indication of the actual costs incurred.

[32] After reviewing the material and considering the parties' submissions, the adjudicator found that BGC had not "fully substantiated" the actual costs incurred

as shown on its various cost reports. However, in the absence of "precise information" from BGC, the adjudicator valued the claim.

[33] The adjudicator did not find that the costs were "unsubstantiated". BMA's submissions proceed on the basis that the adjudicator used an "unsubstantiated element". The word "unsubstantiated" was not used by the adjudicator, and if he had found that BGC's claim, or an element of it was "unsubstantiated" then he would have said so. Instead, he found that the actual costs as shown on certain reports were not "fully substantiated".

[34] Based on the information before him, and in the absence of "precise information", the adjudicator valued the claim and in doing so adopted a significantly reduced rate than set out in "letter 157" for the type 1B material.

[35] BGC submits, and I accept, that the adjudicator performed the task required of him by the Act. He applied a rate which he considered appropriate to the relevant quantities. He considered the arguments and the material and accepted BGC's case about the quantity of material, rather than the lesser amount contended for by BMA. He did not merely accept BGC's quantum in respect of quantity or actual costs.

[36] This is not a case where an adjudicator fell into error by failing to make an assessment, or simply chose the claimant's quantum, having rejected the respondent's submissions.[16] The information before the adjudicator was sufficient to enable him to undertake the basic and essential task of determining the value of the latent condition claim. He undertook the task required of him of determining the amount that was properly payable, based upon the substantial information that was before him. He did not make a jurisdictional error in doing so.

Ground 3 – Claimed termination costs

[37] BMA submits that the adjudicator made a jurisdictional error because, having correctly identified the relevant reference date as 1 January 2012, he then proceeded to include certain sums (totalling $4,345,377.42) in the progress payment awarded to BGC, despite the fact that an entitlement to be paid those sums under the contract had not, and could not possibly have, arisen on or before 1 January 2012. This is said to be a jurisdictional error because the Act gives an applicant a right to a progress payment based only on contractual entitlements which have accrued on or before the reference date.

[38] BGC's payment claim included a claim for "termination costs" by way of items identified as VO61 and also included "the December 2011 costs claim". BGC's submissions sought both amounts under the heading "Termination Costs" and submitted that there was no functional difference between the rationales for the two claims. The only difference was that the first was previously included in a progress claim under the contract, and the latter was not. The basis of "contractual entitlement" was said to be the same and in paragraph 52.6 of its submissions BGC contended that all of the matters that it claimed "are matters arising under cl 17.4".

[39] That clause provided for BGC to make a written claim under cl 17.3(h) in accordance with cl 17.4 within 30 days after the effective date of termination.

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16 cf *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300 at [40] – [48].

Clause 17.4 identified the matters which might be claimed and which can be conveniently described as termination costs. As BMA points out, as at 1 January 2012, an entitlement to termination costs under cl 17.4 could not have arisen for two reasons. First, the notice of termination was effective on 11 January 2012. Secondly, the entitlement to be paid termination costs depended upon the delivery of a claim under cl 17.3(h). BGC did not make a cl 17 claim until it delivered that claim on 10 February 2012. This was the same day that it separately delivered a payment claim under the Act. As a result, BMA submits, and BGC apparently now accepts, that BMA could not have an entitlement to be paid anything under cl 17 as at 1 January 2012.

[40] In its payment schedule BMA rejected VO61 and the December 2011 costs claim on a number of grounds. As to VO61 the reasons included the fact that the sums claimed were not payable. The costs of performing the services were not claimable under the contract. The contract specified the price that was to be paid. The sums were said not to be claimable under cl 17.4. As to the December 2011 costs claim, BMA's payment schedule rejected the claims for reasons that included the fact that it did not identify the basis on which it was made, and the costs were not claimable as a variation. They were not claimable under cl 17.4 and were not otherwise claimable under the contract.

[41] In its adjudication application BGC pressed its claim under the heading "Termination Costs". It submitted that the claim was validly included in the payment claim and did not stray beyond the 1 January 2012 reference date because it concerned claims in respect of which "BGC's entitlement had crystallised before that date" and the last date for which "remuneration" was sought was 31 December 2011. In response to BMA's reliance upon cl 8.1 and cl 8.2 of the general conditions which specified the price for the services and stated that, unless the agreement specified otherwise, the "Price" was inclusive of all costs incurred by BGC in performing the services and the cost of any items used or supplied in conjunction with the services, BGC contended that these provisions needed to be read subject to cl 17.4, since otherwise cl 17.4 could not have any sensible meaning. In paragraph 52.6 of its adjudication application BMA stated:

> "All of the matters that BGC claims in this claim are matters arising under clause 17.4."

It made the point that the costs that BGC claimed were for the costs of plant and labour that BGC maintained on site during the period 9 December 2011 and 20 December 2011 and that the costs represented amounts incurred by BGC in the expectation of providing services under the contract. These claims were said to have "crystallised as at 31 December 2011". The submission continued, "We do not accept that anything in clause 17.3(h) of the general conditions disentitles". That sentence is incomplete. Presumably it was intended to make the submission that BGC's entitlement to make the claim which it did pursuant to cl 17.3(h) of the contract did not disentitle it from making a claim under the Act.

[42] In its adjudication response BMA noted that BGC made these claims under cl 17.4, yet a claim pursuant to cl 17.4 had to be made in a written claim under cl 17.3(h), and this occurred after 1 January 2012. As a result, the claim should be excluded from consideration by the adjudicator.

[43] This aspect has some curious features. In its payment claim of 10 February 2012 BGC sought to distinguish the claim that it made under the Act from its separate cl 17 termination claim. In paragraph 25.2 of its adjudication application it emphasised that its claim was not a cl 17.6 claim because it was made under the Act rather than the contract. Yet, in paragraph 52.6 of the same document it stated that the claims made for what it described as "Termination Costs" were matters arising under cl 17.4.

[44] In his decision in relation to "VO61: Termination costs from 9 December 2011 to 20 December 2011", the adjudicator stated:

> "366. The respondent argues that this claim should not be considered because the claimant's entitlement is derived from its claim dated 5th January 2012, which is made after the reference date of 1st January 2012. The claimant says that its entitlement had crystallised before the reference date. I am satisfied that the claimant is entitled to claim for these costs in the payment claim because they relate to costs incurred before the reference date. I do not accept the respondent's argument that the claimant's entitlement only follows from the claimant's claim pursuant to STC clause 17.4 which, on my reading, provides for a final assessment of the termination costs, rather than an interim progress payment pursuant to the Act which the claimant is pursuing."

The adjudicator found that BGC was entitled to claim the "December 2011 costs claim from 21 December 2011 up to 31 December 2011" for the same reason.

[45] BMA's arguments before me in relation to jurisdictional error are based on the following propositions:

(a) The fact that the relevant reference date was 1 January 2012, and that no subsequent reference dates were relied upon, or in fact arose;

(b) That the Act confers a right to a progress payment based only on contractual entitlements which arise on or before the reference date;

(c) That the BGC payment claim included sums for which an entitlement to be paid under the contract could not have arisen by 1 January 2012;

(d) The adjudicator made an award which included such sums, being sums for which no entitlement could have arisen.

[46] BGC does not contest the first two propositions. It relies upon the fact that the costs were incurred before the reference date of 1 January 2012, and were items with respect to which payment could be claimed during the course of the contract. The items are said not to be ones which could only arise by operation of cl 17.

[47] The point, however, is not whether BMA was able to identify any part of the claim which could only arise by operation of cl 17. The point is that BGC in its submissions to the adjudicator identified the basis of its claim as cl 17.4. It did not point to any other contractual entitlement to be paid these costs. It rested its claim on the fact that these costs had been incurred before the reference date, and this was

the basis upon which the adjudicator allowed them. As he said, "the claimant is entitled to claim for these costs in the payment claim because they relate to costs incurred before the reference date." The adjudicator did not identify any basis for an entitlement to be paid for these costs other than that they had been incurred.

[48] In seeking to defend the adjudicator's decision, senior counsel for BGC directed my attention to the items which include dry hire plant, wet hire plant, labour hire and the cost of subcontractors. He submitted that it was open to the adjudicator to find that these were costs properly incurred prior to the reference date, that BGC's description of them as "Termination Costs" was the cause of the problem and that they were able to be claimed as part of the progress claim. I also have regard to the fact that the letter of termination dated 12 December 2011 directed BGC to remove certain items from site by various dates in December 2011. However, BGC's claim before the adjudicator and before me did not rest on that basis, and these items relate to a few items of hire equipment.

[49] BMA's point remains that BGC failed to rest its claim for termination costs on a provision of the contract which entitled it to recover such costs, other than cl 17. The adjudicator's reasons did not identify any source of contractual entitlement. It is not now open to BGC to submit that it could have advanced all or part of its claim for termination costs upon some other provision of the contract or because it was requested to incur some of these costs. The adjudicator did not have the claim put to him on that basis, and he did not determine it on that basis.

[50] The relevant heading to VO61 makes clear that this part of the claim was advanced and adjudicated on the basis that they were termination costs. The December 2011 costs claim was advanced on the same basis, and determined on the same basis.

[51] BGC did not submit to the adjudicator that it had a contractual or other entitlement to be reimbursed costs apart from cl 17. However, its entitlement to be reimbursed certain costs pursuant to cl 17 depended upon a claim being made pursuant to cl 17.3(h) within 30 days after the effective date of termination. No entitlement to claim termination costs pursuant to cl 17 arose until such a claim was made, and no such claim was made until 10 February 2012, well after the reference date, and well after the notice of termination was given on 11 January 2012.

[52] In carrying out the functions entrusted to him or her, an adjudicator must consider the submissions that have been made. That does not mean that the consideration of the merits of the payment claim is limited to issues actually raised by the submissions.[17] An adjudicator's task is to come to a view as to what is properly payable, but the submissions do not set the parameters of the application or its determination. It may be that there are no submissions or only partial submissions.[18] However, BGC's submissions identified the source of the claimed entitlement as cl 17, and if the adjudicator was minded to assess that part of the claim on a different basis, natural justice would have required him to accord BMA the opportunity to respond.

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17 *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (supra) at 399 [52] citing *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33] – [36].

18 *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] 69 NSWLR 72 at 90 [63]; [2007] NSWCA 49 at [63].

[53] The adjudicator effectively adopted BGC's submission, and did not rest his finding that BGC was entitled to be paid for this part of its claim on a basis other than the fact that the costs had been incurred before the reference date.

[54] The adjudicator erred in concluding that because costs had been incurred before the reference date an entitlement to be paid for them existed and "had crystallised". The error was not one in construing the terms of the contract so as to constitute an error of law of a non-jurisdictional kind. His reasons do not disclose the source of any entitlement to recover the costs claimed by BGC before the reference date.

[55] BGC submits that in finding that BGC was entitled to claim these costs because they relate to costs incurred before the reference date, the adjudicator did not commit a jurisdictional error. BGC submits that he "merely construed the operational effect of the Contract by reference to the facts as found by him, that the claim related to costs incurred before the reference date." I am unable to agree. The adjudicator did not construe the contract and find a contractual entitlement to be paid the relevant costs. His reasons do not suggest that he regarded the entitlement as one sourced in cl 17 which, as the adjudicator pointed out, provides for a final assessment of the termination costs. Instead, his reasons indicate that he concluded that there was an entitlement simply because the costs had been incurred before the reference date.

[56] In *Roseville Bridge Marina Pty Ltd v Bellingham Marine Australia Pty Ltd*, Brereton J stated in respect of the comparable New South Wales statute:

> "The Act does not create a right to remuneration for construction work – that right is created by the construction contract. What the Act does is to create and regulate a right to obtain a progress payment."[19]

The adjudicator did not identify a contractual entitlement to be reimbursed the relevant costs. Instead, his reasons appear to assume an entitlement to be paid for costs incurred prior to the reference date. He failed to identify the contractual or other legal basis of the entitlement, and therefore to find an entitlement that arose prior to the reference date. By including sums which, as at the relevant date, BGC had no entitlement to be paid, and for which BGC had not shown an entitlement to be paid, the adjudicator ignored a limit on his jurisdiction and exceeded his jurisdiction. The fact that costs were incurred before the reference date was not sufficient to create an entitlement to be paid for those costs. In failing to identify and find a legal source for that entitlement the adjudicator made a jurisdictional error. The legislation requires the source of an entitlement to be paid to be found. In failing to consider and find the source of the entitlement, the adjudicator failed to take into account a matter he was required to take into account and thereby fell into jurisdictional error. Another way of characterising the jurisdictional error is to say that in finding that an entitlement to be paid existed simply because BGC incurred costs before the reference date, the adjudicator misconceived the nature of the functions he was performing or misapprehended the limits on his functions or powers.

[57] I conclude that the decision is affected by a jurisdictional error in respect of the awarding of termination costs.

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19 [2009] NSWSC 320 at [43].

Relief

[58] A decision affected by jurisdictional error is void. BMA cites a number of authorities in support of the proposition that in the context of the Act, there is no notion of partial invalidity. Jurisdictional error which affects one part of a decision will render the whole of it void. I need not consider certain Victorian authorities which, due in part to differences in legislation, have found an adjudication determination to be partly valid.[20] BGC does not contend that there is any scope to declare only part of the decision invalid. Its position reflects the position stated by Atkinson J in *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd*[21] that severance is not available under the Queensland Act.

[59] Consideration might be given to the need for legislative reform in this area. One of the purposes of the legislation is to facilitate the cash flow of contractors. Legislative reforms might permit a severable, invalid part of a decision to be declared invalid. One can imagine a case in which a jurisdictional error is found in respect of a relatively minor part of a claim. Without provision to declare part of the decision invalid, a contractor will be deprived of the benefit of the entire decision and ordinarily be required to repay the entire amount awarded under the decision, not just the small amount that has been successfully challenged. Such an outcome undermines the purposes of the Act.

[60] In this matter, large amounts are at stake, but the termination costs of $4.345M were a relatively small part of the total amount assessed at $28.16 M (excluding interest).

[61] In conclusion, BMA has succeeded in establishing one of the three jurisdictional errors alleged by it. It has established an entitlement to a declaration that the decision of the second respondent dated 7 May 2012 in relation to Adjudication Application No 1064504-831 is void.

[62] It will be necessary to consider consequential orders including an order remitting the matter to the second respondent for reconsideration.

[63] On 16 May 2012 BMA paid to BGC the adjudicated amount (excluding GST) together with accrued interest in accordance with the adjudication decision and the adjudication fee. In paragraph 3 of the originating application filed on 18 May 2012 BMA sought an order that BGC pay to it the sum of $26,135,709.37 together with interest from 16 May 2012. I will hear the parties in relation to the terms of orders including the rate of interest and on the issue of costs.

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20 See, for example, *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* (supra) at [129].

21 [2011] QSC 145 at [51] – [56].