SUPREME COURT OF QUEENSLAND

CITATION:	*Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4
PARTIES:	**MATRIX PROJECTS (QLD) PTY LTD** **ACN 089 633 607 trading as MATRIX HOMES** (Applicant) v **TONY JASON LUSCOMBE trading as LUSCOMBE BUILDERS** (First Respondent) and **ADJUDICATE TODAY PTY LTD** **ACN 109 605 021** (Second Respondent) and **PHILIP DAVENPORT** (Third Respondent)
FILE NO/S:	BS 11920 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2013
JUDGE:	Douglas J
ORDER:	**Order that the first respondent be restrained from seeking an adjudication certificate.** **Further submissions sought as to the form of the order and costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where decision made by adjudicator under the *Building and Construction Industry Payments Act* 2004 (Qld) – whether the adjudicator had jurisdiction to determine the adjudication application – whether the claim was in respect of one contract or arrangement for the carrying out of construction work – whether the adjudicator had performed his duty of assessing

the value of the construction work – whether the adjudicator had accorded natural justice in respect of his assessment of the value of the construction work – whether the adjudicator's errors went to his jurisdiction under the Act

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – whether the adjudicator had jurisdiction to determine the adjudication application – whether the claim was in respect of one contract or arrangement for the carrying out of construction work – whether the adjudicator had performed his duty of assessing the value of the construction work – whether the adjudicator had accorded natural justice in respect of his assessment of the value of the construction work – whether the adjudicator's errors went to his jurisdiction under the Act

Building and Construction Industry Payments Act 2004 (Qld) s 12, s 13, s 17, s 26, Schedule 2 definition of "construction contract"

B M Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346 applied
HM Hire Pty Ltd v National Plant and Equipment Pty Ltd [2013] QCA 6 referred
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302 referred
Machkevitch v Andrew Building Constructions [2012] NSWSC 546 referred
Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd [2004] NSWSC 116 referred
Rail Corporation of NSW v Nebax Constructions [2012] NSWSC 6 referred
Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd [2012] QCA 276 referred

COUNSEL:	M H Hindman for the applicant D C Kissane for the first respondent No appearances for the second and third respondents
SOLICITORS:	Mills Oakley Lawyers for the applicant Gadens Lawyers for the first respondent No appearances for the second and third respondents

[1] The adjudicator in this claim made under the *Building and Construction Industry Payments Act 2004* (Qld) is the third respondent. His decision to require the applicant, Matrix Projects (Qld) Pty Ltd ("Matrix Homes"), to pay the first respondent, Tony Jason Luscombe ("Luscombe Builders"), $407,445.19 is attacked, essentially, on two separate bases.

[2] The first is that Luscombe Builders was not a person mentioned in s 12 of the Act and therefore not a person entitled to serve a payment claim pursuant to s 17 of the Act because the payment claim comprised at least three distinct claims based on at least three different contracts and so is not a payment claim within the meaning of the Act. This may be described as "the contract ground" for attacking the decision.

[3] The decision was also attacked on the further bases that the adjudicator did not perform his required task of assessing the value of the work completed up to the relevant reference date and made findings about the amount owing that were not contended for by either of the parties without advising the applicant of his intention to do that. They were described as "the natural justice" and "the exercise of power" grounds for setting aside the decision but can be treated together for the purposes of the decision.

Background

[4] The parties signed a document dated 17 November 2011 called a "Period Subcontract" by which Luscombe Builders agreed "to perform and complete … Works yet to be agreed" for a period of 12 months from the date of the contract. Because of the indeterminacy of that phrase it was argued persuasively for the applicant that the Period Subcontract was not, of itself, a construction contract under the Act because it did not contain an undertaking to perform construction work, something to which I shall refer later.

[5] It was a lump sum agreement for repair works to be performed on buildings, required because of the damage caused by the 2011 floods in Brisbane. It also provided that a work order signed by the contractor for each project should be issued from time to time during the term of the contract and should be read in conjunction with the contract and that the work order issued from time to time should include project specific details. The Period Subcontract also provided that progress claims could be made fortnightly on the 15th or 30th of the month and that the time for payment was within 14 days of the date of the claim.

[6] Mr Luscombe's statutory declaration[1] says that Luscombe Builders was engaged by Matrix Homes to assist flood victims to rebuild their houses. He undertook work at a variety of addresses between 28 November 2011 and 30 August 2012, undertaking building work as instructed by Matrix Homes. For at least nine of the properties individual purchase orders were issued in writing by Matrix Homes where an entire house required flood rectification work. The purchase order would describe the work that would be undertaken. If so, he would receive a rough sketch or architectural plans and verbal directions about what to do on the property.

[7] Another five properties were ones where representatives of Matrix Homes verbally directed him to do work on the understanding that he would issue an invoice and be paid for the work. He described that as "do and charge" rectification work. The argument that it was not construction work was focussed on the submission that it

[1] See ex JAG-5 to the affidavit of J A Gordon filed 11 December 2012.

was not work under the Period Subcontract and involved no undertaking in the sense of a promise to carry out the contruction work until any direction to do it was accepted by Luscombe Builders.

[8] In addition to making claims for payment of sums owing in respect of those 14 properties, Luscombe Builders also made a claim in its payment claim of 17 October 2012 for $550 sponsorship for a junior football team's "training gear for the season". That claim appears to have been abandoned in the proceedings before the adjudicator.

[9] Mr Gordon of Matrix Homes said in his statutory declaration that it was always understood between the parties that the works for any specific project would be the subject of separate negotiations in respect of scope and price before any agreement was reached for that specific project and that the Period Subcontract was not intended to apply to the "do and charge" rectification work. Work orders as defined in the Period Subcontract and which were called purchase orders were issued to Luscombe Builders which it was entitled to accept or refuse.[2] They did not issue for the "do and charge" jobs.

The contract ground

[10] The adjudicator's reasons for deciding that the payment claim was based on a construction contract were as follows:

> "9. I am satisfied that the claimant carried out construction work [within the meaning of the Act] under a construction contract. The definition of 'construction contract' includes an arrangement under which one party undertakes to carry out construction work for the other. Under the Period Subcontract, the claimant undertook to carry out construction work for the respondent. The instructions from the respondent to the claimant to carry out particular construction work were part of the arrangement. The fact that the work orders were not all given at the same [sic] or on the date that the Period Subcontract was signed is irrelevant.
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> …
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> 12. At [2.69] of the adjudication response the respondent says that s 23C of the *Acts Interpretation Act 1954* Qld provides that unless the context otherwise requires, the singular includes the plural. I can't see why the work on premises for which work orders were issued has to be taken as carried out under separate construction contracts [within the meaning of the Act]. I can't see why the Period Subcontract and work orders [to which the Period Contract applies], instructions to carry out work on a 'do and charge' basis and

[2] See ex JAG-8, paras 31, 34 and 35 to the affidavit of J A Gordon filed 11 December 2012.

> variations cannot be considered as one arrangement, ie one construction contract.
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> …
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> 34. I can't see why, when the claimant carries out construction work directed by the respondent on a 'do and charge' basis, that construction work would not [be] carried out under the arrangement between the parties that I find is the construction contract. It does not appear to me that such directions are different to a variations [sic] directed under a construction contract.
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> 35. It seems to me that whether work was directed by the respondent under a work order or on a 'do and charge basis' it is still construction work under the construction contract.
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> …
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> 37. I am satisfied that all construction work carried out and related goods and services provided by the claimant to the respondent is [sic] respect of all 15 properties is construction work or related goods and services provided by the claimant to the respondent under the arrangement which is the 'construction contract' within the meaning of the Act."

[11] The applicant submitted that the adjudicator and the first respondent's reliance upon the presence of the word "arrangement" in the definition of "construction contract" was not sufficient to permit claims in respect of a number of contracts or arrangements to be made the subject of one payment claim. To understand the argument it is desirable to refer to the definition of "construction contract", s 12 and s 17 of the Act.

[12] The definition of "construction contract" in Schedule 2 is as follows:

> "***Construction contract*** means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."

[13] Section 12 of the Act provides:

> 12 **Rights to progress payments**
>
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

[14] Section 17 of the Act provides:

> "17 **Payment claims**

(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).

(2) A payment claim—

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 33(3); or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within the later of—

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

[15] The argument was that the use of the word "arrangement" contemplates a situation where future things will occur, namely, here, future construction work. Ms Hindman for the applicant submitted that the arrangement was, therefore, the preparatory measure or the previous plan governing the work. The submission continued to the effect that if the "arrangement" does not exist prior to the time at

which construction work is carried out, there is no "arrangement under which one party undertakes to carry out construction work" and that an "arrangement", in the context of the definition of "construction contract" in the Act, cannot arise after all of the construction work is complete.[3]

[16] She conceded that the separate contracts constituted by the acceptance of the various work orders may be sufficient to, together, satisfy the definition of an "arrangement" and thus be one construction contract for the purposes of the Act but described the "do and charge" work as being of an entirely different category, not work contemplated by the Period Subcontract and not part of that "arrangement". She described it as not work relating to the properties the subject of that arrangement under the Period Subcontract but instead as work in relation to the five other properties. She argued that the "do and charge" work, even if it was done separately as a contract, an agreement or an arrangement, was not the same arrangement or the same construction contract as governed the arrangement under the Period Subcontract.

[17] Therefore she characterised the payment claim as comprising at least three distinct claims based on at least three different "contracts" covering the work performed pursuant to the accepted work orders under the Period Subcontract, the "do and charge" work and the claim for the soccer sponsorship. She submitted that the conjunction of s 12 and s 17 had the effect that a payment claim must relate to only one construction contract in reliance on a decision of McDougall J in *Rail Corporation of NSW v Nebax Constructions*.[4] His Honour's conclusion is as follows:[5]

> "It seems to me that, because s 13(5)[6] prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract."

[18] That reasoning is persuasive and the conclusion is one with which I agree.

[19] It was argued for the first respondent that the view adopted by the adjudicator was correct and that the word "arrangement" was sufficient to cover both work under the lump sum Period Subcontract and the "do and charge" rectification work. The submission was that the evidence showed that there was an arrangement between Matrix and Luscombe Builders in which it undertook to do construction work as directed either by way of a work order or purchase order or in some less formal manner such as by an oral direction by one of the staff members of Matrix Homes.

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3 See *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 where McDougall J at [23] described an "arrangement or understanding" as requiring something more than a mere expectation and "some assumption of obligation, or assurance, or undertaking."

4 [2012] NSWSC 6.

5 [2012] NSWSC 6 at [44].

6 Section 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) is the equivalent of s 17(5) of the Queensland Act.

It seems to me, however, that the work done was divisible into work done pursuant to the Period Subcontract and the "do and charge" work done pursuant to another regime where Luscombe Builders retained the right to decide whether to perform that work when it was offered. In respect of that work there would also have been differing reference dates between the two different types of arrangement, either the 15th or 30th of the month under the Period Subcontract or the end of the month as the default reference date under the Act for the "do and charge" work.

[20] Accordingly the payment claim made cannot be described as one being made under a single construction contract whether the relationship be described more generally as an arrangement or not. Therefore the variety of different types of contract for construction work relied upon in the payment claim is fatal to its validity.

[21] Ms Hindman also submitted that the soccer sponsorship arrangement could not under any view fall within the definition of "construction contract" and that that invalidated the payment claim because it was entirely unrelated to any construction contract. She submitted that the claim did not, therefore, relate to a construction contract with the effect that Luscombe Builders was not a person mentioned in s 12 of the Act.

[22] Ms Hindman sought to distinguish a statement of Philippides J in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd*[7] to the effect that a contract or arrangement is a construction contract if it contains an undertaking of the type specified in the definition of construction contract, "notwithstanding that it contains other undertakings or imposes other obligations not within the definition …".

[23] The claim for the soccer sponsorship was not pressed, apparently, before the adjudicator who did not accept that its inclusion went to his jurisdiction.

[24] The argument for the first respondent was that all that was necessary was that the party undertake to carry out "some" construction work[8] and that the inclusion of the claim for the soccer sponsorship did not deprive the adjudicator of jurisdiction. I am inclined to accept that submission on the basis that it should be possible to treat the inclusion of such an obviously erroneous item in a payment claim as not depriving an adjudicator of jurisdiction. The jurisdiction is to determine the extent and value of the construction work under s 26 and the inclusion of a claim for an obviously irrelevant item for what is not construction work does not deprive the adjudicator of that jurisdiction.[9]

The natural justice and failure to exercise power grounds

[25] The amount of a progress payment to which a person is entitled in relation to a construction contract is, according to s 13(b) of the Act, if the contract does not

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7 [2012] QCA 276 at [56].

8 See per Philippides J in *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276 at [56].

9 See *Thiess Pty Ltd v Warren Bros Earthmoving Pty Ltd* [2012] QCA 276 at [3], [7] and [95]-[105] and *HM Hire Pty Ltd v National Plant and Equipment Pty Ltd* [2013] QCA 6 at [9].

provide for the matter, "the amount calculated on the basis of the value of the construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract."

[26] Here the relevant reference date was 30 August 2012. On or about 31 August 2012, Matrix Homes sent a letter to Luscombe Builders "withdrawing all Matrix Purchase Order for works to be carried under the above stated project by Luscombe Builders".[10]

[27] The argument for the applicant was that the value of the construction work had to be assessed as at the reference date when any relevant contract still remained on foot and that anything that occurred after that date in relation to any contract was of absolutely no relevance to the assessment to be undertaken. Its complaint was that the adjudicator, instead, calculated the progress payments by reference to the lump sum prices agreed without discounts for work being incomplete or for alleged defects instead of assessing the value of the construction work completed up to the reference date.[11] Luscombe Builders had asked to be paid for the work it had completed until 30 August 2012 but the adjudicator decided it was entitled to what was payable up to the completion of the contract.

[28] It appears that the adjudicator decided to approach the assessment of the claim on that basis because of his view of the termination of the construction contract on 31 August 2012. He said:[12]

> "27. … The respondent is contending that by the letter of 31/8/12 the respondent relieved the claimant of the obligation to complete the work but, nevertheless, the claimant is liable to the respondent for damages for not completing the work. The respondent cannot blow hot and cold. Having by the letter of 31/8/12 relieved the claimant of the obligation to complete the works, the respondent cannot turn around and claim damages because work is incomplete or the claimant has not rectified defects.
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> 28. If I agree to pay a contractor $100 to mow my lawn and weed my garden, and when the contractor has commenced work but before the contractor has finished I tell the contractor that I don't require the contractor to do any more work, I still have to pay the contractor the $100. After telling the contractor that I don't want the contractor to do any more work, I can't then claim damages from the contractor for not completing the work or for defective work, for example, not mowing the lawn short enough.
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> 29. The respondent is under the misapprehension that when the respondent relieved the claimant of the obligation to

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10 See ex TRA-9 to the affidavit of T R Adames filed 11 January 2013.

11 See the adjudicator's decision at paras 107-108 in ex JAG-10 to the affidavit of J A Gordon filed 11 December 2012.

12 See ex JAG-10 to the affidavit of J A Gordon filed 11 December 2012 at paras 27-29.

> complete work for which a price had been agreed, the respondent could adjust the price agreed for the work. The respondent's assessment of the progress payment due is flawed."

[29] That was not the basis on which Luscombe Builders had argued that its claim should be calculated as can be seen from paras 106 and 107 of the adjudicator's decision. Nor did he give Matrix Homes the opportunity to make submissions on his proposed finding that an assessment could be carried out on the basis that the whole of the lump sums were payable without any consideration as to the value of the work actually completed as at 30 August 2012 because of his view of the effect of the events occurring after the reference date on 31 August 2012.

[30] The applicant argued that the adjudicator's example was fundamentally flawed because, as at a particular reference date, an entitlement to a progress payment where work had not been complete would be part only of the lump sum amount reflecting the value of the work actually completed as at that date. The argument was that, for example, if the work completed was defective, its value as at the reference date may be nil. The submission was, and it seems to me to be correct, that there was no entitlement under the relevant contracts to recover the whole of the lump sum as at 30 August 2012 unless the whole of the work was complete and defect free. The evidence establishes that the whole of the work was not then complete.[13]

[31] The applicant also argued that, in reaching the view he did, the adjudicator failed to consider only the provisions of the construction contract as he was required to do under s 26(2)(b) of the Act and also failed to decide the amount of the progress payment as required by s 26(1)(a). In allowing the whole of the lump sum prices without considering whether that was a proper amount on the basis of the value of the construction work carried out, it was submitted that he did not perform the role he was required to perform. The effect of that was argued to be to allow Luscombe Builders damages for breach of contract in excess of the adjudicator's jurisdiction.[14]

[32] In respect of the natural justice point the applicant submitted that, had the adjudicator given it an opportunity to make submissions on this point, it could have made submissions which may reasonably have led to a different result. It led evidence before me of the nature of the submissions it might have made had that occurred, which lends support to that argument.[15]

[33] Luscombe Builders' submission was that, here, the adjudicator had identified, whether rightly or wrongly, that its entitlement arose by virtue of the entitlement to lump sum amounts calculated under the construction contract taking into account the significance of and the effect of the letter of 31 August 2012 which had been put

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13 See ex JAG-5 of the affidavit of J A Gordon filed 11 December 2012 at paras 64-65 and the other examples referred to at para 36 of the applicant's written submissions.

14 See *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd* [2004] NSWSC 116 at [26]-[27] and [34]-[35].

15 See ex 1 to the affidavit of D C Ho filed 21 December 2012.

in evidence before the adjudicator by Matrix Homes. It is true that the letter was in evidence but it was there for the purpose of laying the basis for an argument about whether a proper reference date had been established.

[34] Mr Kissane, for Luscombe Builders, also sought to distinguish the decisions relied on by Ms Hindman, *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd*[16] and a decision of Applegarth J in *B M Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*,[17] on the basis that, here, the adjudicator, at worst, may have erred in law in a non-jurisdictional manner.

[35] That submission does not appeal to me. The error seems to me to amount to a fundamental misapprehension of the task he faced and it is clear that his failure to entertain argument about the effect of the 31 August 2012 letter on his approach to the calculation of the value of the construction work amounted to a failure to accord natural justice for the same reasons as those expressed by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd*.[18] His Honour said:[19]

> "The statutory scheme may permit an adjudicator to make unreviewable errors of law in quickly deciding complex legal issues in adjudications of the present kind after considering the parties' submissions. The statutory scheme does not permit an adjudicator to determination an adjudication on the basis of a view of the law for which neither party has contended."

[36] Here the adjudicator has fallen into that error in failing to notify the parties of his proposed interpretation of Luscombe Builders' entitlements and has also committed the jurisdictional error of failing to perform the task required of him by the Act of assessing the value of the construction work carried out under the contract.

Conclusions and order

[37] The adjudicator's decision is, therefore, void because the payment claim covered more than one contract or arrangement, because the adjudicator failed to perform the task required of him by the legislation of assessing the value of the construction work and also failed to accord natural justice to the applicant by making factual and legal findings that were not contended for by either the applicant or the first respondent and by failing to give the applicant notice of his intention to do that.

[38] Accordingly, I shall restrain the first respondent from seeking an adjudication certificate and shall hear further submissions about the form of the order and costs.

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16 [2004] NSWSC 116.
17 [2012] QSC 346.
18 [2010] 1 Qd R 302 at [50], [54] and [57].
19 See *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302, 321 at [57].