SUPREME COURT OF QUEENSLAND

CITATION:	*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67
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:	22 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2012, 8 March 2013
JUDGE:	Applegarth J
ORDERS:	**Upon the undertaking of the first respondent by its counsel to pay to the applicant within 14 days:** **(a) the sum of $4,345,377.42; and** **(b) the sum of $147,992.84 (representing interest on the amount in (a) from 16 May 2012 to 22 March 2013); and** **(c) the sum of $434,537.74 (representing GST paid by the applicant to the first respondent in respect of the amount in (a)).** **the order of the Court is that:** **1. The application filed 18 May 2012 is dismissed.** **2. There be no order as to costs.**

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") – where BGC served a payment claim on BMA pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) – where second respondent made adjudication decision – where applicant established one of three alleged jurisdictional errors – where jurisdictional error affected an identifiable and relatively small part of the amount determined to be due by BMA to BGC – whether decision should be declared void

ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS –GENERALLY – where decision of adjudicator affected by jurisdictional error – whether decision should be declared void, with or without an order that the matter be remitted to second respondent – whether declaratory relief should be declined on condition that BGC undertake to pay the amount affected by error and interest to BMA – whether this is a more satisfactory remedy

Building and Construction Industry Payments Act 2004 (Qld) s 25(3)
Civil Proceedings Act 2011 (Qld), s 58(3)
Uniform Civil Procedure Rules 1999 (Qld), r 681

AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2) [2009] QSC 75, cited
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Alborn v Stephens [2010] QCA 58, cited
Allianz Australia Insurance Ltd v Crazzi (2006) 68 NSWLR 266; [2006] NSWSC 1090, cited
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346, cited
Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd [2012] QSC 388, cited
Cardinal Project Services Pty Ltd v Hanave Pty Ltd [2011] NSWCA 399, considered
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, followed
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd [2010] NSWSC 1167, followed
Cook's Constructions v Stork Food Systems Australia Pty Ltd [2008] QSC 220, cited
Emergency Services Superannuation Board v Davenport [2004] NSWSC 697, considered
Hansen Yuncken Pty Ltd v Ian James Ericson [2011] QSC 327, considered
Hughes v Western Australian Cricket Association Inc (1986) ATPR 40-748, cited

Jadwan Pty Ltd v Secretary, Department of Health and Aged Care (2003) 145 FCR 1; [2003] FCAFC 288, followed
John Fairfax & Sons v Police Tribunal of New South Wales (1986) 5 NSWLR 465, cited
Leung v Minister for Immigration & Multicultural Affairs [1997] 79 FCR 400, cited
Minister for Immigration and Citizenship v Maman (2012) 200 FCR 30; [2012] FCAFC 13, cited
Minister of Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, cited
Mulvaney Holdings Pty Ltd v Thorne (No 2) [2012] QSC 146, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 022, cited
R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389; [1949] HCA 33, cited
R v Ross-Jones; Ex parte Green (1984) 156 CLR 185; [1984] HCA 82, cited
RJ Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397, cited
Serisier Investments Pty Ltd v English [1989] 1 Qd R 678, cited
Solution 6 Holdings Ltd and Others v Industrial Relations Commission of New South Wales and Ors (2004) 60 NSWLR 558; [2004] NSWCA 200, cited
SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609; [2007] HCA 26, cited
Thiess Pty Ltd v President of the Industrial Court of Queensland [2011] 2 Qd R 387; [2011] QSC 294, cited

COUNSEL: P J Dunning SC and G D Beacham for the applicant
R A Holt SC and S B Hooper for the first respondent
T J Lewis (solicitor) for the second and third respondents

SOLICITORS: Herbert Smith Freehills for the applicant
McCullough Robertson for the first respondent
Holding Redlich for the second and third respondents

[1] In my reasons delivered on 13 November 2012 I concluded the applicant ("BMA") had established one of three jurisdictional errors alleged by it.[1] The error related to a relatively small part of the total amount of approximately $28M (excluding interest) assessed as being due to the first respondent ("BGC"), following an adjudication by the second respondent. When I delivered my reasons I anticipated making a declaration that the decision of the second respondent was void and making consequential orders, including an order remitting the matter to the second respondent for reconsideration. I anticipated the order to remit would involve a relatively simple exercise by the second respondent making a new adjudication decision which essentially deducted the termination costs of $4,345,377.42 (excluding GST) which had been erroneously included in the amount of

1 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346.

$28,160,834.50 (including GST) previously assessed by him. I also wished to provide the parties with the opportunity to resolve, if possible, or otherwise make submissions in relation to, the terms of the order, including the rate of interest, and the issue of costs.

[2] The parties did not resolve the terms of the order, and my expectation that the terms of an order remitting the matter to the second respondent for reconsideration would be agreed proved misplaced. At a review of the matter on 29 November 2012, BMA contended that I could not, or should not, remit the matter. As a consequence I set aside the declaratory order that I pronounced on 13 November 2012. The parties have now made further written and oral submissions about the appropriate orders that should be made.

[3] BMA submits that I should:

(a) declare the decision of the second respondent void;

(b) restrain BGC from enforcing or otherwise relying upon the decision in any way; and

(c) order BGC to pay it the following amounts:

(i) the sum of $26,135,709.37 (being the GST exclusive amount paid by BMA to BGC on 16 May 2012);

(ii) interest thereon from 16 May 2012; and

(iii) the sum of $2,613,570.65 (being GST paid by BMA to BGC in respect of the amount in (c)(i) above).

It also seeks an order that its costs of and incidental to the application be paid by BGC on the standard basis. BMA opposes any order for the matter to be remitted to the second respondent to enable the adjudication application to be determined according to law.

[4] The practical result of the orders sought by BMA would be to:

(a) deprive BGC of the amount of approximately $24M which was determined to be owed to it under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act") in addition to the amount of $4,345,377.42 which was erroneously included in the adjudicated amount; and

(b) prevent BGC from obtaining a new adjudication decision in respect of the $24M amount to which it proved an entitlement or, indeed, any other amount.

[5] BGC undertakes to the Court to pay to BMA within 14 days:

(a) the sum of $4,345,377.42;

(b) interest thereon from 16 May 2012; and

(c) the sum of $434,537.74 (representing GST paid by BMA to BGC in respect of the amount in (a)).

It submits that this undertaking, in lieu of an order in identical terms, is appropriate to remedy the jurisdictional error found by me and contends that, upon the giving of the undertaking, the application should be dismissed.

[6] The parties are in dispute in relation to rates of interest and the issue of costs. The first substantial issue is whether I should exercise my discretion to grant declaratory relief and declare the adjudication decision void.

The discretion to decline the declaratory relief sought by BMA

[7] An adjudication decision affected by jurisdictional error may be set aside in the exercise of the Court's supervisory jurisdiction.[2] A declaratory order may be made by the Court in the exercise of its supervisory jurisdiction.[3]

[8] Prerogative remedies and similar statutory remedies for jurisdictional error are discretionary, and the discretion is to be exercised judicially. In a clear case of want or excess of jurisdiction a prerogative writ will issue "almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course."[4] In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*, McDougall J observed that even in a case of clear jurisdictional error there is a residual discretion to not make an order in the nature of *certiorari* and that, in the ordinary case, such an order would be made "almost as of right."[5] One discretionary ground to decline to order *certiorari* is where there are "alternative and adequate remedies for the wrong of which complaint is made."[6]

[9] The High Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*, in referring to the jurisdiction under s 75 of the Commonwealth Constitution to issue a writ of mandamus against an officer of the Commonwealth referred to "well recognized grounds upon which the court may, in its discretion, withhold the remedy" and continued:

> "For example the writ may not be granted if **a more convenient and satisfactory remedy exists**, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless **circumstances appear making it just that the remedy should be withheld**." [7] (emphasis added)

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2 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

3 *Thiess Pty Ltd v President of the Industrial Court of Queensland* [2011] 2 Qd R 387.

4 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; followed in *Solution 6 Holdings Ltd and Others v Industrial Relations Commission of New South Wales and Others* (2004) 60 NSWLR 558, which was in turn followed in *Chase Oyster Bar Pty Ltd v Hamo Industries Ltd* (supra) at 446 - 449 [267] - [284].

5 Supra at 448 [275].

6 Ibid at 449 [284].

7 (1949) 78 CLR 389 at 400.

This passage has been cited with approval in more recent times.[8] I am not concerned with the grant of a constitutional writ, however, similar principles governing the exercise of the discretion to withhold a remedy in the exercise of the Court's supervisory jurisdiction apply. Where relief is sought in the form of an order quashing or setting aside an adjudication decision, or an order is sought declaring the decision to be void, an aggrieved applicant who has established a jurisdictional error ordinarily will be entitled to such a remedy, but the remedy may be withheld as a matter of discretion if the circumstances make it just to do so. One example is if a more convenient and satisfactory remedy exists.

[10] As to declaratory relief, although it has been said that it is neither possible nor desirable to fetter the discretion to grant declaratory relief by laying down rules as to the manner of its exercise,[9] the discretion to grant or to refuse declaratory relief is exercised according to principle. As with prerogative relief, relief is granted or withheld "according to principle rather than an unstructured judicial discretion."[10] Whether it will be appropriate to grant such relief depends upon the requirements of justice in the particular case.[11]

[11] Relief in the nature of prerogative relief may be refused if, in all the circumstances, that seems the proper course.[12] In referring to the general discretion to grant or withhold prerogative relief, or relief in the nature of prerogative relief, McDougall J stated the following in a case in which an adjudicator had no power to hear and determine an application brought in the absence of an essential statutory requirement:

> "[9] For the reasons that I gave in the Court of Appeal at [268] to [284], I think there is a general discretion to grant or withhold prerogative relief, or relief in the nature of prerogative relief, and that the discretion is relatively uncontrolled or, in other words, is wide. **However, I think, the exercise of the discretion must take into account both the policy underlying prerogative relief (as to which see my reasons at [279] to [281]) and the statutory context in which the application (in this case, under s 69) arises**.
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> [10] The general proposition, in relation to prerogative relief or its statutory equivalent, is that it was developed to prevent excess of jurisdiction. Thus, it exists to prevent a tribunal or inferior court from assuming a jurisdiction that it does not have, or from acting in excess of the jurisdiction that it does have. (This is not intended to be an exhaustive statement of the reasons for and limits of prerogative relief or its statutory equivalents.)
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> [11] In those circumstances, it seems to me, the fact that there may be an alternative right to sue for a debt is not a relevant discretionary consideration where a case is made out otherwise for the grant of

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8 *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [28]. In the same case Kirby J at [77] referred to "the need to conserve relief to cases where it is appropriate and required to do practical justice."

9 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

10 Aronson, M, Dyer, B, and Groves, M *Judicial Review of Administrative Action* 4th ed Thomson Reuters, NSW, 2009 at [10.100].

11 *John Fairfax & Sons v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 470.

12 *Allianz Australia Insurance Ltd v Crazzi* (2006) 68 NSWLR 266 at 303 [224].

> relief. The sorts of things that might justify the exercise of the discretion include those referred to in the Court of Appeal's reasons: for example, where the claimant has exercised its right to suspend work, relying on the determination and on s 24(1) of the Act. It does not seem to me that the fact that the claimant has in effect chosen to go down the path of adjudication, but has failed to do so in accordance with a relevant jurisdictional requirement is of itself something that should enliven any discretion; even where, as I think is the case, there may well be an alternative course still open under s 15(2)(a)(i)."[13] (emphasis added)

The relevant jurisdictional requirement in that case under comparable New South Wales legislation related to a claimant notifying the respondent within a specified period of the claimant's intention to apply for adjudication of the payment claim. Satisfaction of that requirement was essential to the validity of an adjudication application and to the existence of the power to adjudicate. It involved an essential element at the application stage of the decision-making process. It did not "involve consideration of matters which can arise during the course of the decision-making process itself."[14]

[12] In this matter BGC engaged the decision-making process and the second respondent had jurisdiction to value the construction work carried out under the construction contract. He lacked jurisdiction to include a component claimed for termination costs of approximately $4.345M. Absent this error he would have valued the construction work at an amount which can be precisely calculated, and which approximates $24M.

[13] The observations of McDougall J in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*, when sitting in the Equity Division on the same day that the Court of Appeal delivered its decision in that matter, are to the effect that the exercise of the discretion to grant or withhold relief must take account both the policy underlying prerogative relief and the statutory context in which the application arises. The former relates to judicial supervision of certain bodies to prevent a wrongful assumption of jurisdiction or acts in excess of jurisdiction. The latter, being the statutory context in which the application arose, requires consideration of the objects of the Act.

[14] Jackson J recently stated:

> "The essential operative effect of BCIPA is that it confers a statutory right to a provisional progress payment upon a claimant who qualifies for that right, with provisions to speedily value and establish the right without curial proceedings and to vindicate the established right by enforcing it as a court judgment. Commercially, that outcome has an important cash-flow effect."[15]

His Honour went on to observe, as did Keane JA (as his Honour then was) in *RJ Neller Building Pty Ltd v Ainsworth*,[16] that the Act reallocates rights and commercial risks. As Keane JA observed, the Act "seeks to preserve the cash flow

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13 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWSC 1167 at [9] – [11].

14 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (supra) at 405 [43] per Spigelman CJ.

15 *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2012] QSC 388 at [41].

16 [2009] 1 Qd R 390 at 401 [40].

to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate."[17]

[15] In a case in which a progress claim is disputed, and the jurisdiction of the adjudicator is properly engaged, each party to the adjudication process might be said to have a right to an adjudication decision which is unaffected by jurisdictional error. In the case of a claimant, such as BGC, this right would be reflected in a decision which determines the amount of the progress payment, if any, to be paid by the respondent to the claimant, being a decision free of jurisdictional error.

The parties' submissions about withholding declaratory relief

[16] The issue is whether there is a sound reason in the circumstances why a decision which is affected by an excess of jurisdiction, arising out of the inclusion of a relatively small component in the adjudicated amount, should not be declared void.

[17] BMA accepts that the Court has a discretion as to whether it grants relief or not. It submits there is no basis for exercising the Court's discretion by refusing to grant relief or by granting it only upon certain conditions, such as the condition that BGC repay to BMA the successfully disputed component together with interest. It submits that none of the conventional bases for refusing relief are made out.

[18] BGC submits the Court should exercise its discretion by declining to declare the decision void, subject to its undertaking to repay BMA the part of the award which was affected by jurisdictional error, together with interest. It submits this approach should be taken because the decision does not lack effect unless and until the Court declares it void, so that BGC is authorised to retain the money which was paid by BMA pursuant to the decision unless and until the Court declares the decision to be void. It further submits that, although part of the decision contained a jurisdictional error, a declaration that the decision is void would be unjust, and it is not appropriate or necessary to achieve practical justice. That can be achieved by its undertaking to repay BMA the part of the award which was affected by error.

[19] To the extent that "there usually has to be some public interest which cancels the plaintiff's prima facie right to have the Court declare for him",[18] BGC submits that there is a public interest in ensuring the objectives of the Act are achieved. In the circumstances of this case, this is said to require that BGC receive progress payments to the extent the adjudicator has validly concluded they should be paid. It relies upon the fact that BMA can point to no prejudice if it is required to pay the amount that is unaffected by jurisdictional error. Also, the substantial fees paid to the second respondent in respect of his decision would be wasted if no part of the decision (even the parts unaffected by error) were given effect.

[20] BGC submits the more appropriate remedy is for it to undertake to repay BMA that part of the adjudicator's award which was affected by error, together with interest and GST on that amount. Such an order is said to be appropriate because:

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17 Ibid.

18 BMA relies upon this formulation which appears in Young, PW *Declaratory Orders*, 2nd ed Butterworths, Sydney, 1984 at 720. BGC submits that the authorities do not suggest that there must always be public interest to justify the exercise of the discretion.

(a) BGC would otherwise be deprived of the benefit of the vast majority of the decision which was unaffected by jurisdictional error;

(b) It is possible to identify with accuracy the monetary amount of the particular component of the decision which was affected by jurisdictional error;

(c) It would be consistent with the purposes of the Act because it would allow BGC to retain, on an interim basis, the amounts which the second respondent determined, without any form of jurisdictional error, BGC should be entitled to obtain; and

(d) BGC would bear all the second respondent's cost of the adjudication, and by paying interest on the amount to be repaid as well as any GST paid by BMA on that amount, would fairly compensate BMA for having made that payment to BGC.

This result is said to best serve the interests of justice and the purpose of the Act.

The issue: is there a more convenient and satisfactory remedy?

[21] A critical issue is whether the form of conditional order proposed by BGC represents "a more convenient and satisfactory remedy" than an order declaring the decision void, together with an order for the repayment of the adjudicated amount in full, along with interest. More generally, the issue is whether the circumstances make it just to withhold the declaratory and other relief sought by BMA in the circumstances, which include the objectives of the Act, the nature of the jurisdictional error, its ascertainable monetary consequences and BGC's undertaking to remedy those consequences by repaying to BMA the component of the adjudicated amount, together with interest and GST.

The effect of the decision until it is set aside or declared void

[22] Similar forms of order have been made in cases in which it has been possible to ascertain an amount which has been unaffected by an erroneous determination. In *Emergency Services Superannuation Board v Davenport* the plaintiff succeeded on two of its three challenges.[19] The challenges were to individual items within the adjudicator's determination, not to the determination overall. But, as under the Queensland Act, there was but one determination and an order quashing it would have deprived the contractor of the benefit of the entire determination, including that portion which was not affected by reviewable error. McDougall J was prepared to grant relief on condition that the plaintiff pay the contractor the unaffected amount of the determination, together with interest thereon in accordance with the determination. The plaintiff indicated that it was prepared to accept the condition of payment, rather than have McDougall J exercise his discretion to withhold relief.

[23] In *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*, Basten JA observed in respect of the *Emergency Services Superannuation Board v Davenport* decision that the amount included in the condition proposed by McDougall J was not "arbitrarily selected" and was justified by reference to the otherwise invalid determination.[20] His Honour continued:

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19 [2004] NSWSC 697.

20 [2011] NSWCA 399 at [51].

> "Such an approach has much to recommend it, particularly, it might be added, if the claimant is otherwise unable to pursue its original payment claim to achieve a second adjudication. However, such conditional relief can itself only be valid if it is designed to achieve a legitimate purpose; cf *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11; 215 CLR 518 at [15] – [16] (Gleeson CJ); [39] (McHugh J); [68] Gummow and Hayne JJ). If the determination is indeed legally ineffective in all respects, it would be doubtful whether the Court could condition declaratory relief (or an order setting aside the decision) upon the applicant making such payment as would be required by the determination if validity could be determined part by part, like the curate's egg. Accordingly, the underlying assumption was inconsistent with total invalidity for all purposes."[21]

[24] The principal issue in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* was whether "the Second Determination" in that case should be declared void and quashed because the adjudicator lacked jurisdiction to make it. The first determination in that matter had been declared void by consent. The adjudicator who had issued that void determination was taken to have failed to determine the application, and this affected the time for filing a new adjudication application within the time limit fixed by s 26 of the New South Wales Act. I am not presently concerned with the issue of statutory interpretation which divided the New South Wales Court of Appeal. That issue is raised in connection with BGC's alternative submission that, if the Court exercises its discretion to declare the decision void, I should remit the matter to the second respondent and that s 25(3) of the Queensland Act does not preclude an order remitting the matter to the second respondent. That issue, and the problem which arose in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*, exist because the legislature in imposing time limits within which to make a new adjudication application did not address the situation where a determination is made by an adjudicator within the time limit imposed by the Act, but much later is set aside or declared invalid.

[25] I am not presently concerned with the consequences of a declaration of invalidity. I am concerned with the prior issue of whether such a declaration should be made. Also, I am not being invited by BGC to make an order which conditions declaratory relief (or an order setting aside the decision) upon a requirement that BMA pay the unaffected amount. As Basten JA observes in the passage that I have quoted, an order of that kind, as made in *Emergency Services Superannuation Board v Davenport*, is inconsistent with the proposition that a determination affected by jurisdictional error carries the consequence of "total invalidity for all purposes." I respectfully follow his Honour's discussion of the concept of nullity.[22]

[26] In my previous reasons for judgment, in previewing the form of relief which I was minded to order, subject to hearing the parties in relation to the terms of those orders, I remarked, "A decision affected by jurisdictional error is void."[23] I noted that BGC did not contend that there was any scope to declare only part of the decision invalid and, as a consequence, I anticipated declaring the decision void,

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21 Ibid at [52].

22 Supra at [38] – [43].

23 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* (supra) at [58].

with consequential orders including an order remitting the matter to the second respondent for reconsideration.

[27] My statement that a decision affected by jurisdictional error is void may be criticised for attaching labels. In *Minister of Immigration and Multicultural Affairs v Bhardwaj*, Gaudron and Gummow JJ stated:

> "In our view, it is neither necessary nor helpful to describe erroneous administrative decisions as "void", "voidable", "invalid", "vitiated" or, even, as "nullities". To categorise decisions in that way tends to ignore the fact that the real issue is whether the rights and liabilities of the individual to whom the decision relates are as specified in that decision. And, perhaps more importantly, it overlooks the fact that an administrative decision has only such force and effect as is given to it by the law pursuant to which it was made." [24]

In the same case, Hayne J observed:

> "Applying the description of "nullity" or some similar term is a statement of conclusion, not a statement of reasons for reaching the conclusion. The critical steps in the reasoning must, as I have said, begin and end in the statutory provisions which are the source of the power that it is said has been exercised."[25]

In the same case, Gleeson CJ quoted, with apparent approval, the following discussion by Finkelstein J in *Leung v Minister for Immigration and Multicultural Affairs* in relation to decisions that are invalid on the ground of jurisdictional error or on certain other grounds:

> "There is no doubt that an invalid administrative decision can have operational effect. For example **it may be necessary to treat an invalid administrative decision as valid** because no person seeks to have it set aside or ignored. The consequence may be the same **if a court has refused to declare an administrative decision to be invalid for a discretionary reason**. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside." [26] (emphasis added)

[28] The High Court's judgment in *Minister for Immigration and Multicultural Affairs v Bhardwaj* was considered by the Full Court of the Federal Court in *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*.[27] An issue was whether the judgment in *Minister of Immigration and Multicultural Affairs v Bhardwaj* is authority for the proposition that jurisdictional error causes an administrative decision to be regarded as a nullity, such that it must be treated as never having existed for any purpose. Gray and Downes JJ concluded that *Minister of Immigration and Multicultural Affairs v Bhardwaj* cannot be taken to be authority for a universal proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever.[28] I respectfully

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24 (2002) 209 CLR 597 at 613 [46].
25 Ibid at 647 [154].
26 [1997] 79 FCR 400 at 413.
27 (2003) 145 FCR 1.
28 Ibid at 16 [42]. See also *Minister for Immigration and Citizenship v Maman* (2012) 200 FCR 30 at 44 [44].

follow their Honours' analysis of *Minister of Immigration and Multicultural Affairs v Bhardwaj*.

[29] To reject the proposition that jurisdictional error on the part of a decision-maker will lead to the decision having no consequences whatsoever is not to embrace the different proposition that administrative decisions involving jurisdictional error are binding and have legal effect unless and until set aside by a Court. It is simply to recognise that a decision involving jurisdictional error is not invalid for all purposes. An administrative decision may have operational effect, despite being open to challenge for jurisdictional error, because it is not challenged. In such a case it may be presumed to be valid.[29] In a case in which the decision is challenged, and the Court declines to declare it invalid for a discretionary reason, the decision will remain binding. In other cases, a decision affected by jurisdictional error, such as a denial of natural justice, will lack validity without the need for a challenge in proceedings as to its validity, for example, where the decision-maker appreciates there has been a jurisdictional error and treats the decision as no decision at all.

[30] The learned authors Aronson, Dyer and Groves explain that "nullity" indicates the usual outcome for applicants who have established jurisdictional error, even though that outcome is not inevitable.[30] Where a jurisdictionally flawed decision has been made, the affected person will often need a court to declare that it lacks any relevantly adverse legal effect.[31] Jurisdictionally flawed decisions may have an effective existence in the eyes of the law, and so:

> "It is a mistake to assume that jurisdictional errors always lead to the same consequence, namely, nullity. It is also a mistake to assume that nullity represents the same legal consequence (namely, legal non-existence) for all contexts. Nullity does not automatically follow from jurisdictional error, and when it does follow, its effects can vary."[32]

The authors go on to remark:

> "In other words, a jurisdictional error usually produces nullity. But it takes a court to say so ..."

Whilst nullity, with a declaration to such effect, is the usual consequence that flows from a finding of jurisdictional error, other factors, including discretionary considerations that prompt a court to refuse relief even if jurisdictional error is established, may lead to different legal consequences.[33]

[31] The proposition that a decision involving jurisdictional error is not invalid for all purposes, and is not a "nullity" or "void" until a court declares it to be so is not inconsistent with dicta by Macfarlan JA in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* that "the effect **of an order** quashing a decision upon the ground of denial of procedural fairness is that the decision is a nullity unless the relevant statute expressly or impliedly provides otherwise."[34] (emphasis added)

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29 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (supra) at 646 [151] per Hayne J.

30 Supra at [10.20].

31 Ibid at [10.30].

32 Ibid at [10.35].

33 Ibid at [10.35].

34 Supra at [81]. The further observation at [83] that "Unless the relevant statute indicates otherwise, a void determination is not a determination at all" is cross-referenced to [81] and, in its context, should be taken to refer to a determination which is declared to be void.

[32] The second respondent's decision did not cease to have legal and other consequences upon BMA challenging it for jurisdictional error on three grounds, two of which failed, or even upon my finding that the third ground of alleged jurisdictional error was established. It continued to have operational effect and also provided the legal justification for BGC to retain the money which had been paid to it pursuant to the decision. An order declaring the decision void might be made conditional upon the payment of a certain amount, in the form of an order of the kind made in *Emergency Services Superannuation Board v Davenport*. As Basten JA observes, such an approach has much to recommend it, particularly if the claimant is otherwise unable to pursue its original payment claim to achieve a second adjudication. However, I have yet to make a declaration that the decision is void. As matters stand, the decision does not lack effect notwithstanding my finding of jurisdictional error. It retains effect unless and until I exercise my discretion to grant a declaration or make an order quashing or setting aside the decision.

The nature and consequences of the jurisdictional error

[33] In deciding whether to exercise my discretion, I have regard to the purpose of the Court's supervisory jurisdiction to prevent excess of jurisdiction and the nature and consequences of the jurisdictional error in this case. The second respondent correctly assumed a jurisdiction to decide the adjudication application. He exceeded his jurisdiction by including termination costs in the amount of the progress payment to be paid by BMA to BGC. The consequences of his jurisdictional error are readily ascertainable. The error affected his decision in that the statute requires him to make a single determination, not many. However, unlike a denial of natural justice or some other jurisdictional error which might have tainted the whole of the decision-making process, the jurisdictional error in this case did not affect the determination and quantification of other parts of BMA's claim. Absent the jurisdictional error, BGC would have obtained an adjudication decision for an ascertainable amount in the order of $24M.

[34] The error deprived the parties of an adjudication decision in accordance with law. If BMA is correct in its contention that there is no scope to remit the matter to the second respondent (or any other adjudicator) to determine the adjudication application according to law, then BGC (and indeed BMA) will have been deprived of their statutory entitlement to an adjudication decision according to law. BGC will have been deprived of its statutory entitlement to an interim payment of about $24M, with adverse consequences for its cash flow, contrary to the objects of the Act.

The course of declining to declare the decision void on condition that a payment is made

[35] In enacting and amending the Act, Parliament has not purported to regulate the Court's exercise of its supervisory jurisdiction, including the circumstances in which the Court will decline to declare an adjudication decision void. To decline to exercise the discretion to declare void an adjudication decision on condition that the claimant repays the amount found to have been erroneously included in an adjudication decision is not to legislate a remedy in the form of a declaration of partial invalidity. Instead, it is to exercise the discretion to decline declaratory

relief, or relief in the nature of prerogative relief, on a well-recognised basis, namely the availability of a more satisfactory remedy.

[36] To do so deprives BGC of the easily-identified amount that was paid to it as a result of the jurisdictional error, and no more. Account is taken of the nature of the jurisdictional error and the statutory context in which the jurisdictional error challenge arose. Requiring BGC to pay the amount in question and other amounts necessary to remedy the effect of the jurisdictional error is apt to remedy the excess of jurisdiction in the circumstances of the case.

[37] In many other cases, jurisdictional error is of a fundamental kind and ordinarily an adjudication decision will be quashed or set aside or a declaration made that the decision is void. The fact the jurisdictional error resulted in an identifiable and relatively small part of the adjudicated amount is a relevant consideration. This is not an "ordinary case" of jurisdictional error in which an order in the nature of *certiorari* would be made "almost as of right."[35]

[38] Contrary to BMA's submissions, a refusal to make the declaration sought by BMA will not "clothe the decision with a measure of legal validity." The decision already has a measure of validity. It is probably best to avoid such conclusionary labels as "nullity", "void" and "invalidity" at the stage of proceedings at which the Court is required to decide the consequences that flow from a finding of jurisdictional error. Declining to declare the decision void, on condition that BGC pay certain amounts to BMA, gives the decision the same validity which any decision has when a Court declines to set it aside on discretionary grounds. To the extent that declining to declare the decision void, on condition that BGC pay certain amounts to BMA, may be said to clothe the decision with a measure of legal validity, there is good reason to do so.

The course of declaring the decision void

[39] The course of declaring the decision void is a less satisfactory remedy. If, as a consequence of such a declaration, BGC was ordered to pay the whole of the adjudicated amount together with interest, including the amount of approximately $24M which is unaffected by the relevant error, a question would arise as to whether the matter should be remitted to the second respondent to be determined according to law.

[40] BMA advances substantial arguments against an order for remitter, including an argument based upon the New South Wales Court of Appeal decision in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* that because the period referred to in s 25(3) has expired, any further determination would be invalid. BMA advances other reasons against making an order remitting the matter. In response, BGC advances substantial submissions that the Court has power to, and should, make an order remitting the matter to the second respondent for consideration. It is unnecessary for me to determine these issues. Remitting the matter for a further determination by the second respondent may give rise to complex issues including whether the determination is to be based upon existing evidence and submissions or include matters which have come to light since the decision dated 7 May 2012. Such a further determination will generate additional costs. If, however, I was to conclude that I should not exercise the power to remit in the circumstances, BGC

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35 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (supra) at 448 [275].

might be deprived of the interim payment of approximately $24M for the value of construction work for claims which were either not challenged or unsuccessfully challenged.

[41] BMA argues that the problems associated with remitting the matter to the second respondent are partly BGC's fault, and arise because of the timing of the payment claim and because BGC had the opportunity during the adjudication process to withdraw or not press the impugned claim. I do not consider that these matters justify making a declaration that the original decision was void. The payment claim was made towards the end of the contract, but before the contract ended. It was permitted. The absence of a further available reference date does not affect the validity of the payment claim. BGC made a payment claim and an application for an adjudication in accordance with its statutory entitlements. The fact that one part of its claim was unmeritorious should not disentitle it to the benefit of the amount of approximately $24M which was adjudicated in its favour and which is unaffected by jurisdictional error.

Which is the more convenient and satisfactory course?

[42] The primary order sought by BGC, which incorporates its undertaking to pay the amount affected by jurisdictional error and other amounts will, in practical terms, reflect the position that would have prevailed if the second respondent had not made the jurisdictional error. Such an order is best suited to correct the error which resulted in the determination of an amount in excess of jurisdiction and to achieve a just result, being the result that would have been achieved had the adjudication decision been made without jurisdictional error.

[43] The course of exercising my discretion to decline to declare the decision void, subject to BGC's undertaking to repay BMA the part of the award that was affected by jurisdictional error and certain other amounts, is a more convenient and satisfactory remedy than declaring the decision void and making various consequential orders. It avoids the risk of further litigation, cost and complexity in relation to the conduct of a further adjudication and the validity of a further adjudication decision made outside the time period set by s 25 of the Act if I was to make a remittal order. It avoids BGC being deprived of approximately $24M if I declined to make a remittal order and ordered repayment of all of the monies paid pursuant to a decision declared to be void.

[44] BMA submits that the course for which BGC contends is simply a different way of treating the decision as if it were partially valid. I have already addressed that matter. To the extent it does, the course for which BGC contends constitutes a satisfactory alternative remedy. Such a course has much to commend it. In a different context, namely a case in which an adjudication decision was procured by fraud, McMurdo J fashioned relief so as to permit the contractor to obtain the substantial benefit of the adjudicator's decision, whilst depriving him of the benefit of his fraud.[36] McMurdo J concluded that to deprive the contractor of the benefit of the entirety of the adjudicator's decision would be to penalise him. Most of the claim was unaffected by the fraud and to deprive the contractor of the substantial benefit of the adjudicator's decision would not have been equitable. As McMurdo J observed in that case:

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36 *Hansen Yuncken Pty Ltd v Ian James Ericson* [2011] QSC 327.

> "To say that he can be left to an ultimate determination of all issues by a court is to disregard the policy behind and the intended effect of the statutory scheme."[37]

The same can be said in the present context.

[45] In addition, if BMA is correct in its contention that the power to remit should not be exercised because any further adjudication would be made outside the time period specified in s 25 of the Act, then this would be a compelling reason to prefer the form of orders urged by BGC, rather than make the orders sought by BMA. I have not been persuaded that in enacting s 25 of the Act the Parliament intended to govern the time within which an adjudication decision can be made in a case in which the original adjudication decision is set aside months or years later by a Court. But if this was Parliament's intent, then the objects of the Act are best advanced by making orders of the kind submitted by BGC.

[46] If BMA is correct in contending that the power to remit should not be exercised so as to have the second respondent make a new adjudication decision according to law, then the just course is to withhold prerogative and declaratory relief, since an alternative, appropriate and satisfactory course is available to redress the jurisdictional error which I have found.

Conclusion

[47] The order proposed by BGC represents a more convenient and satisfactory remedy for the jurisdictional error which I have found than the course of making a declaration that the decision is void, with or without an order for remitter with its associated costs and complexities.

[48] In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* and in later cases the High Court has recognised that a Court may exercise judicially its discretion to decline to grant relief where the circumstances make it just that the remedy should be withheld. This is such a case. The order which I propose to make takes account of both the policy underlying the granting of relief in the exercise of the Court's supervisory jurisdiction to correct jurisdictional error and the statutory context in which the application for such relief was made. The orders proposed by BGC are appropriate to remedy the jurisdictional error, whilst permitting BGC to retain the amount which would have been awarded to it if the second respondent had made his adjudication decision free of jurisdictional error. Such a course advances the policy of the Act. The particular circumstances of the case make it just that I decline to declare the decision void, subject to the condition that BGC pay BMA that part of the award which was affected by jurisdictional error, together with interest and GST.

Interest

[49] The issue of interest arose in the context of a proposed order (as distinct from an undertaking) for the return of money paid by BMA to BGC pursuant to the adjudication decision. BMA sought an order for interest from 16 May 2012 at the rate of 10 per cent per annum. The rate was based upon the interest rate for default

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37 Ibid at [150].

judgments before a Registrar. BMA submitted that "restitutionary interest" should be at the rate applied for default judgments unless special circumstances exist.

[50] In response, BGC submitted that the rate of 10 per cent on default judgments did not apply to awards of interest under s 58(3) of the *Civil Proceedings Act* 2011 (Qld) and that, in any event, the applicable rate is a matter for the Court's discretion. It relied upon affidavit evidence concerning commercial rates of interest awarded on investments in support of the submission that a rate of four per cent per annum reflected relevant commercial rates of interest over the applicable period, and would compensate BMA for loss of the use of its money.

[51] In reply BMA referred to *Serisier Investments Pty Ltd v English* in which Thomas J (with whom the other members of the Full Court agreed) stated:

> "It would be undesirable to encourage the calling of accountants or other experts to give evidence on applicable rates of interest in every case or even frequently. This would lead to multiplicity of issues, increasing costs and waste of human resources." [38]

However, evidence of commercial rates is admissible.[39]

[52] The evidence filed by BGC about interest rates is not contested. BMA advanced no evidence concerning commercial rates of interest, or that the rates of interest about which evidence was given did not bear upon the use to which it would have put the money which it paid to BGC pursuant to the adjudication decision.

[53] In circumstances in which BMA has given no evidence about how the monies would have been used by it had they not been paid to BGC pursuant to the adjudication decision,[40] despite having ample opportunity to do so, its submission that the rates available for cash deposits "are hardly indicative of what is required" to compensate it for the loss of use of its money carries little force. BMA provides no reason to suppose that the money in question would not have been held by it in a bank deposit if it had not been paid to BGC.

[54] In the circumstances, I consider that the rate of four per cent per annum is an appropriate rate of interest, and that this should be reflected in the terms of the undertaking given by BGC concerning payment to BMA.

Costs

[55] The starting point is that the costs of a proceeding are in the discretion of the Court, but follow the event, unless the Court orders otherwise.[41] In this matter there were three distinct grounds upon which the adjudication decision was alleged to be affected by jurisdictional error. However, success upon any one of those grounds *prima facie* entitled BMA to relief. It succeeded in obtaining a finding that the adjudication decision was affected by jurisdictional error. This was the substantial issue which occupied the hearing on 3 October 2012.

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38 [1989] 1 Qd R 678 at 681.

39 *Cook's Constructions v Stork Food Systems Australia Pty Ltd* [2008] QSC 220 at [41].

40 *Mulvaney Holdings Pty Ltd v Thorne (No 2)* [2012] QSC 146 at [25].

41 *Uniform Civil Procedure Rules* 1999 (Qld), r 681.

[56] Ordinarily, the fact that a successful applicant fails on particular issues does not mean that they should be deprived of some of its costs.[42] As Muir JA observed in *Alborn v Stephens*, "a party which has not been entirely successful is not inevitably or even, perhaps, normally deprived of some of its costs."[43] Still, a successful party which has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other party's costs of them.[44]

[57] In this matter there were not separate issues in a formal sense, but the three alleged jurisdictional errors gave rise to separate issues. The first ground, the latent condition claim, involved a substantial part of the hearing on 3 October 2012. Although there were three distinct alleged jurisdictional errors, BMA relied upon each of them on the basis that success upon any one of them would result in the decision being set aside or declared void. That has not in fact occurred. In that respect, BMA did not succeed in obtaining the relief that it sought in the proceeding. However, BMA's lack of success in obtaining the relief that it sought is best considered in the context of the costs associated with the further hearing on the issues of the appropriate remedial response to the jurisdictional error which it established.

[58] The fact BMA succeeded upon only one of the three grounds of jurisdictional error contended for by it at the 3 October 2012 hearing prompted BGC to submit in November 2012 that the appropriate order was that each party bear its own costs of the proceedings up to that point. I do not consider that such an order would have been appropriate to reflect BMA's success in establishing that the adjudication decision was affected by jurisdictional error. Still, its lack of success in establishing two out of the three jurisdictional errors contended for by it should be reflected in the order for costs associated with the 3 October 2012 hearing, preparation for that hearing and the costs of the proceeding overall. Whilst a finding in respect of each alleged jurisdictional error issue does not constitute an "event" within the meaning of r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld), the challenge to the determination did involve discreet issues. The nature of the proceeding is materially different to one in which, for example, a plaintiff in a personal injury proceeding alleges that a defendant motorist was negligent in three respects and establishes negligence only in one respect. Success on only one ground in such a case is sufficient to establish an entitlement to damages.

[59] Leaving aside for the moment, the later hearings about the appropriate remedy, and having regard to the proceedings up to and including the hearing on 3 October 2012, I consider that an appropriate exercise of discretion in relation to that phase of the proceeding would be to deprive BMA of some of its costs to reflect its failure on two out of the three grounds of jurisdictional error. To deprive it of all of its costs would not adequately reflect the measure of its success. Overall, I consider that an appropriate order for that part of the proceedings would be for BMA to recover 50 per cent of its costs of and incidental to the application up to and including 3 October 2012.

[60] The issue of appropriate orders, interest and costs was argued before me on 29 November 2012 and I was persuaded, in the light of BMA's position in relation to the issue of remitter, to not order at that stage that the decision be declared void.

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42 *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd (No 2)* [2009] QSC 75 at [15].

43 [2010] QCA 58 at [8].

44 *Hughes v Western Australian Cricket Association (Inc.)* (1986) ATPR 40-748 at [48136].

The discretion to decline declaratory relief, whether I should remit the matter to the second respondent and the terms of appropriate orders involved complex issues and the parties addressed them in staged written submissions in February and March 2013.

[61] The day after the hearing on 29 November 2012, BGC made the following open offer to BMA:

> "... our client offers to resolve the proceedings as follows, such that any further appearance before the Court in respect of matters pertaining to adjudication is rendered unnecessary:
>
> (a) BGC Contracting Pty Ltd (BGC) pay to BM Alliance Coal operations Pty Ltd (BMA) an amount of $5,094,669.92 representing:
>
> (i) $4,345,377.42 being the value of the portion of the adjudication application relating to 'termination costs' which were the subject of BMA's third ground of challenge in the proceedings;
>
> (ii) $434,537.74 being the value of GST paid on the amount outlined in paragraph 3(a)(i) above;
>
> (iii) $235,721.84 being interest on the amount outlined in paragraph 3(a)(i), calculated at a rate of 10% between 16 May 2012 and 30 November 2012; and
>
> (iv) $79,032.92 being the cost of the adjudicator's fees (including GST);
>
> (b) BGC retains the amount of $23,575,374.18 being the amount paid to BGC by BMA less the amount set out in paragraph 3(a) above;
>
> (c) the parties acknowledge and agree that they are each entitled to continue to hold (and use in operating their businesses in the ordinary manner) the amounts specified in paragraphs 3(a) and 3(b), on an interim basis, pending the final determination of the parties' rights, through civil proceedings or otherwise;
>
> (d) the parties acknowledge and agree their agreement as to how monies are to be held and dealt with on an interim basis, will not alter or diminish the parties' rights at law, to seek final determination in respect of their respective claims; and
>
> (e) the parties discontinue the proceedings, with no order as to costs."

The essence of the offer was that BGC would repay to BMA that part of the adjudicator's award which was affected by jurisdictional error, plus interest at 10 per cent and GST paid on that amount, as well as the second respondent's fees. The offer of 10 per cent interest was made notwithstanding the uncontroverted

evidence before the Court that the appropriate interest rate was four per cent. BMA rejected the offer.

[62] The issue of remedies was the subject of a full day hearing on 8 March 2013. The second and third respondents appeared by their solicitor that day and made submissions about the order which might be made in the event I made an order remitting the matter to the second respondent for re-determination.

[63] BGC was successful in persuading me to adopt the first course urged by it. This made it unnecessary for me to determine the issue of whether I could and should make an order for the matter to be remitted to the second respondent. To the extent that there was separate argument about the alternative course urged by BGC, namely remitter, neither party can be said to have succeeded on that issue.

[64] BMA failed to obtain the orders sought by it. Expressed differently, BGC succeeded in persuading me that I should exercise my discretion to not grant the relief sought by BMA, and did so over the substantial opposition of BMA. The hearing on 8 March 2013 involved preparation of substantial submissions and a large body of case law.

[65] Viewed in isolation, the preparation for and conduct of the hearing on 8 March 2013 and the substantial success which BGC achieved in arguing issues of remedies would ordinarily be reflected in an order that BMA pay a substantial part of BGC's costs of the remedial phase of the proceedings, being the hearings on 29 November 2012 and 8 March 2013.

[66] Regard should also be had to BGC's open offer of 30 November 2012. Although that offer proposed there be no order as to costs, whereas I have concluded that BMA was entitled to a substantial part of its costs of the original hearing, BGC's offer of 10 per cent interest involved a substantial measure of commercial compromise.

[67] It is preferable to avoid, if possible, there being two orders for costs: one in BMA's favour in connection with the original hearing, and one in favour of BGC in relation to the remedial phase of the proceeding.

[68] Having regard to the issues agitated during both phases of the proceeding, and the success or lack of success enjoyed by each party, I consider that the appropriate order in all the circumstances is that there be no order as to costs. The second and third respondents did not seek any order for costs arising out of their appearance by their solicitor at the hearing on 8 March 2013.

Orders

[69] The orders to be made will reflect the form of orders proposed by BGC at the hearing on 8 March 2013. The undertaking offered that day reflected the calculation of interest up to and including 8 March 2013. A slightly modified undertaking will be required in respect of interest calculated up to today's date. The orders which I propose are therefore as follows:

> Upon the undertaking of the first respondent by its counsel to pay to the applicant within 14 days:

(a) the sum of $4,345,377.42; and

(b) the sum of $147,992.84 (representing interest on the amount in (a) from 16 May 2012 to 22 March 2013); and

(c) the sum of $434,537.74 (representing GST paid by the applicant to the first respondent in respect of the amount in (a)).

the order of the Court is that:

1. The application filed 18 May 2012 is dismissed.

2. There be no order as to costs.