# SUPREME COURT OF QUEENSLAND

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| CITATION: | *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators appointed) (Receivers and Managers appointed) & Ors* [2013] QSC 223 |
| PARTIES: | **McCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD**<br>ACN 002 929 017<br>(applicant)<br>v<br>**HEAVY PLANT LEASING PTY LTD (Administrators appointed)(Receivers and Managers appointed)**<br>ACN 151 786 677<br>(first respondent)<br>**ABLE ADJUDICATION PTY LTD**<br>ACN 134 663 933<br>(second respondent)<br>**PAUL HICK**<br>(third respondent) |
| FILE NO/S: | BS 3702/13 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 26 August 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 8, 9 July 2013 |
| JUDGE: | Boddice J |
| ORDER: | **I shall hear the parties as to the form of orders, and costs.** |
| CATCHWORDS: | CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – SUBCONTRACTORS' CHARGES ACT (QLD) – where the applicant is a subcontractor providing earthworks and where the first respondent is its subcontractor – where the first respondent served the applicant with notices of claim of charges pursuant to s 10(1)(a) *Subcontractors' Charges Act* 1974 (Qld) (*Charges Act*) – where the applicant contended the notices were not sufficiently particularised and consequently invalid and "must be withdrawn" – where the first respondent accepted the notices were invalid – where the |

first respondent subsequently commenced adjudication proceedings pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) (*Payments Act*) – where the existence of a valid notice of claim of charge prohibits the making of an adjudication application – where the applicant contends the notices were not properly withdrawn pursuant to s 11(8) *Charges Act* – whether the notices were validly issued – whether there was an effective withdrawal of the notices

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant sent two letters dated 6 and 8 March 2013 in response to a payment claim served by the first respondent – where the third respondent concluded the 6 March document amounted to a payment schedule and determined the adjudication by that document – where the applicant contends the third respondent failed to consider the 8 March document as a valid payment schedule – where the applicant contends the 6 March document was an incomplete document when an incomplete document cannot be a payment schedule under the *Payments Act* – where the 8 March document was expressly identified as a payment schedule and its contents dealt with issues required by a payment schedule – whether the 6 March document constitutes a valid payment schedule – whether the refusal to consider material relevant to the determination of the payment claim constituted jurisdictional error

*Building and Construction Industry Payments Act* 2004 (Qld), s 4
*Subcontractors' Charges Act* 1974 (Qld), s 10, s 11(8)

*Bluestone Holdings Pty Ltd v Juniper Property Holding No 14 Pty Ltd* [2006] QSC 219, distinguished
*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors ( No 2)* [2013] QSC 67, cited
*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1, cited
*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors* [2007] QSC 333, considered, cited
*Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22, followed
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, applied
*QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors* [2011] QSC 292, cited
*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; [2007] HCA 26, cited

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| COUNSEL: | R A Holt QC, with M D Ambrose, for the applicant<br>P J Dunning QC, with D Keane, for the first respondent<br>No appearance for the second respondent<br>No appearance for the third respondent |
| SOLICITORS: | Norton Rose Australia for the applicant<br>Ashurst Australia for the first respondent<br>No appearance for the second respondent<br>No appearance for the third respondent |

[1] The applicant makes application to have an adjudication decision, made by the third respondent on 16 April 2013, declared void or set aside for want of jurisdiction. The first respondent opposes the making of that order. The second and third respondents have indicated their intention to abide the order of the court.

[2] The application initially relied upon five grounds. At the hearing, the applicant indicated its intention not to press the second ground. The remaining grounds are:

1. Service of the payment claim was prohibited by s 4 of the *Building and Construction Industry Payments Act* 2004 ("the Payments Act") as at the time of service there was a valid and subsisting charge pursuant to the *Subcontractors' Charges Act* 1974 ("the Charges Act") relating to construction work the subject of a construction contract;

3. The third respondent identified a demonstrably incomplete document as being the payment schedule when an incomplete document cannot be a payment schedule under the Payments Act;

4. If the third respondent correctly identified the payment schedule, he improperly refused to consider material provided in support of it, in contravention of s 26(2) of the Payments Act;

5. The third respondent decided the claims for variations on a basis for which neither party contended, and did not value or assess the merits of the variations claimed.

**Background**

[3] The applicant is a subcontractor to a head contractor, Fluor Australia Pty Ltd ("Fluor"), in a contract for the provision of earthworks at the site of a coal seam gas processing facility being constructed near Roma in the State of Queensland. The first respondent is a subcontractor to the applicant.

[4] The second respondent is an authorised nominating authority under the Payments Act. The third respondent is an adjudicator under the Payments Act.

[5] The adjudication decision related to payment claim 16 ("the payment claim"), served by the first respondent on the applicant on 25 February 2013. Prior to serving that payment claim, the first respondent issued to Fluor, as head contractor, on about 8 February 2013, notices of claim of charges ("the notices"), purportedly pursuant to s 10(1)(a) of the Charges Act. At or about the same time, notice of these claims was also served on the applicant, purportedly pursuant to s 10(1)(b) of the Charges Act.

[6] On 15 February 2013, the applicant wrote to the first respondent demanding it withdraw the notices immediately as they did not comply with the Charges Act, and were made without grounds. The applicant contended the notices did not set out

particulars of the claims, rendering it impossible to tell whether each claim was in respect of separate or distinguishable items of work reportedly done by the first respondent under the subcontract. As a consequence, the notices were invalid and "must be withdrawn".

[7] On 19 February 2013, Fluor wrote to the applicant advising it had received the notices from the first respondent. Fluor requested detailed particulars of the nature of the claims underlining the charges, the applicant's views as to their validity and the steps it proposed to take concerning the charges.

[8] By letter dated 20 February 2013 the first respondent advised the applicant:

> "HPL acknowledges your statement that the notices are not validly formed (in that they were insufficiently particularised) and are invalid. HPL accepts that a claim that is not compliant with the Act is not able to be validly issued and that those notices were not valid. It follows that the notices are of no effect and could not have been of any force or effect.
>
> A copy of this notice is being forwarded to Fluor Pty Ltd."

[9] On 20 February 2013 the first respondent sent Fluor a letter in the following terms:

> "HPL has issued to your company and McConnell Dowell Pty Ltd documents purporting to be notices of a charge under the *Subcontractors Charges Act* 1974. HPL has issued a notice to McConnell Dowell Pty Ltd, recognising the notices as issued were defective (see Annex A). It is accepted that those notices were invalid and can be of no force or effect.
>
> HPL apologises for any inconvenience that may have been caused."

Annexure A was a copy of the letter sent to the applicant by the first respondent dated 20 February 2013.

[10] Fluor subsequently received a letter dated 26 February 2013 from the first respondent advising the sums previously certified for payment by the applicant remained unpaid. By letter dated 28 February 2013, Fluor responded to HPL:

> "Fluor Australia Pty Ltd (Fluor) is in receipt of Heavy Plant Leasing Pty Ltd's (HPL) letter dated 26 February 2013 wherein HPL informs Fluor that sums, previously certified for payment by McConnell Dowell (MacDow) remain unpaid.
>
> This letter follows four (4) separate letters previously sent by HPL to Fluor. Three of these letters (claims) were directed to Fluor pursuant to the *Subcontractor's Charges Act* 1974 (Qld). Two of the letters (charge 1 and charge 2), were dated 8 February 2013 and the third (charge 3), was dated 11 February 2013. On 20 February 2013, in the fourth letter, HPL withdrew its previous three letters (charges 1-3), noting that the notices issued by HPL were defective, invalid and were of no force or effect.
>
> HPL, notwithstanding the fact that they previously characterized its claim notices as defective, invalid and of no force or effect, has now requested that Fluor intervene in HPL's contract dispute with MacDow. HPL has requested Fluor to issue a payment directly to

> HPL or take steps (unidentified by HPL) to ensure payment of subcontractors. Currently, Fluor has no standing to entertain HPL's request. The administration of the subcontract between HPL and MacDow is a matter for those parties only. HPL must look to its subcontract with MacDow to address the alleged failure of MacDow to pay agreed contract amounts."

A copy of that letter was also forwarded to the applicant.

**Applicable legal principles**

[11] The Payments Act and the Charges Act each create regimes for the determination of disputes concerning the performance of contracts in the construction industry. The regimes are mutually exclusive. The subcontractor has a choice as to which scheme to utilise in a particular case.[1] However, both schemes cannot be utilised at the same time. The existence of a valid notice of claim of charge under the Charges Act prohibits the making of an adjudication application under the Payments Act.[2]

[12] In *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*,[3] White JA usefully summarised the scheme established by the Payments Act. Relevantly, that scheme provides a mechanism for a rapid adjudication of payment claims the subject of dispute. This adjudication process does not extinguish a party's ordinary contractual rights, but is designed to ensure the quick resolution of disputes so as to maintain cash flows to parties during the course of the construction work.

[13] The adjudication process is subject to review by this court, which exercises a supervisory jurisdiction with respect to any adjudication decision found to be infected by jurisdictional error.[4] The concept of jurisdictional error includes an erroneous denial or assertion of jurisdiction, misapprehension or disregard of the nature or limits on the jurisdiction, considering a matter or making a decision that lies wholly or partly outside those limitations and proceeding in the absence of a jurisdictional fact or in disregard of a requirement of the relevant statute.[5]

[14] In the context of the Payments Act, jurisdictional error will arise if the statutory requirements of the Act are not satisfied, including there being in existence a construction contract, service of a payment claim, the making of an adjudication application, the reference of that application to an eligible adjudicator and the determination of that application by that adjudicator.

[15] The Charges Act also provides a scheme for the notification of claims. Relevantly, for present purposes, a subcontractor who intends to claim a charge on monies payable under the relevant contract to the subcontractor's contractor or to a superior contractor, is required to give notice to the entity by whom the money is payable, specifying the amount and particulars of the claim and requiring that they take the necessary steps to see that it is paid or secured to the subcontractor.[6] Where another person holds a security for the contract, notice must also be given in the approved form to that person as well as to the contractor to whom the money is payable.

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1 Second Reading Speech, BCIPB 2004.
2 *Building and Construction Industry Payments Act 2004*, s 4(2).
3 [2012] 1 Qd R 525 at 546-547.
4 *Northbuild* per McMurdo P at 537-538; Chesterman JA at 542-543 and White JA at 555-556.
5 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 573-574.
6 *Subcontractors' Charges Act* 1974, s 10(1).

[16] Under the Charges Act, once a claim has been made in accordance with s 10(1), a charge attaches to the money identified in the notice. The person upon whom the claim was made is then required to comply with s 11 of the Act, unless the charge is withdrawn pursuant to s 11(8), or lapses in accordance with the Act. Section 11(8) of the Charges Act provides for withdrawal of a notice of claim of charge by the giving of a notice in the approved form to both the superior contractor and the contractor to whom the money is payable.

**Applicant's submissions**

[17] The applicant contends that notwithstanding its initial written assertion that the notices purportedly issued under the Charges Act were invalid, and the acceptance of that assertion by the first respondent, those notices were at no time withdrawn by the first respondent pursuant to s 11(8) of the Charges Act. Accordingly, the adjudication proceedings were void as the first respondent was prohibited from proceeding under the Payments Act.

[18] The applicant further contends the third respondent committed jurisdictional error in undertaking the adjudication process by finding the relevant payment schedule was a document dated 6 March 2013 when that document was a patently incomplete document and the covering letter did not provide reasons as to the differences between the scheduled amount and the claimed amount in respect to variations.

[19] Alternatively, if the 6 March document was properly found to be a payment schedule, the third respondent committed jurisdictional error by failing to have regard to submissions made in support of it in a document dated 8 March 2013. The applicant contends that document contains submissions which were properly made in accordance with the Payments Act and were submissions the third respondent was required to have regard to pursuant to s 26 of that Act.

[20] Finally, the applicant contends the third respondent committed jurisdictional error by making findings in respect of the first respondent's claims for variations in a way which neither the applicant nor the first respondent submitted should be adopted by the third respondent. This approach deprived the applicant of the opportunity to make submissions in respect of the third respondent's proposed approach, and constituted a substantial denial of natural justice.

**First respondent's submissions**

[21] The first respondent contends its letter dated 20 February 2013 constituted an effective withdrawal of the notices and there was no prohibition on the third respondent proceeding to adjudicate the payment claim. Section 11(8) of the Charges Act requires an effective withdrawal of the notices. A failure to forward a withdrawal in the approved form cannot render a written withdrawal of the notices, which was clear and unambiguous, and which was sent in response to an assertion that the notices were invalid, of no effect.

[22] The first respondent further contends the third respondent properly determined the March 6 document was the payment schedule. That document fulfilled the necessary criteria. It related to the payment claim, it correctly set out the amount the subject of the claim and it provided reasons for the differences in the amount claimed. Once that conclusion is reached the third respondent properly did not have regard to the material contained in the March 8 document as it was not properly to be incorporated into the payment schedule. In any event, the failure to find it should be incorporated was not jurisdictional error.

[23] Finally, the first respondent contends the third respondent's reasons, read properly and not over-zealously scrutinized in search of error, set out the basis for his conclusions and do not constitute a failure to accord the applicant natural justice.

**Discussion**

*Ground 1*

[24] It is not in dispute that the relevant notice and payment claim 16 relate to the same work. The first respondent also accepts that if a valid notice pursuant to the Charges Act was in existence at the time the payment claim was issued, the adjudication application would not have been permitted by the Payments Act. The issues to be determined are whether the relevant notice was validly issued in accordance with the Charges Act, and whether it was withdrawn as required by the Charges Act prior to delivery of the payment claim.

[25] As to validity, the applicant contends the notices complied with the requirements of s 10 of the Charges Act and constitute valid notices. This somewhat surprising contention is made despite the applicant previously asserting it was "impossible to tell from the notices whether each claim is in respect of separate and distinguishable items of work purportedly done by HPL under the subcontract".

[26] The Charges Act requires the notice particularise the claim so as to allow a party receiving the notice to ascertain the work the subject of the notice of charge. This is particularly important having regard to the consequences which flow from the delivery of such notice, not only for the contractor, but also for other recipients of the notice in terms of the retention of monies, and subsequent dealings with those monies.

[27] To constitute a notice under the Charges Act, the notice must "specify the amount and particulars of the claim". Each of the notices contained the following, under the heading "Particulars of Claim":

> "Monies payable to claimant pursuant to subcontract for the earthworks, concrete and pond liner works on the project".

Each of the notices also gave, as the dates between which the work was carried out, "1 March 2012 to 31 January 2013".

[28] The particulars of claim, as supplied in each notice, were identical. Such particularisation does not provide sufficient information to allow an identification of the work the subject of the claim. As such, the notices failed to comply with the requirements of s 10 of the Act.

[29] The applicant contended the particulars of the claim were clarified by reference to Attachment A to each of the notices. It identified how the amount claimed was calculated, and advised the claim related to "variations and works to date" post the previous charge. It was contended this was sufficient to identify the dates upon which the work was done, and the nature of that work, as it identified it as work done subsequent to the earlier notice.

[30] However, such an interpretation of each notice requires a party reading the notice to disregard the particulars on the first page, and to interpret the document as meaning something different having regard to the later references. Such a notice does not satisfy the requirement of the Charges Act.

[31] This conclusion is consistent with the initial position advanced by the applicant upon receipt of the notice of charge. However, it is unnecessary to determine the consequences of the conclusion as I am satisfied any notices under the Charges Act were withdrawn prior to the delivery of payment claim 16.

[32] Section 11(8) of the Charges Act requires any withdrawal of a notice to be in the approved form. It is not in dispute the first respondent did not send a notice in the approved form. However, the first respondent unequivocally advised the applicant, and Fluor, that the notices issued by it were invalid and of no force and effect. In context, that amounted to a withdrawal of the notices. Fluor understood that to be the case. Its letter of 28 February 2013 expressly referred to that being the effect of the first respondent's correspondence.

[33] The applicant contended the notices were not withdrawn as that word was not used, and notice of withdrawal was not sent in the approved form. A consideration of the approved form indicates the information necessary to communicate a withdrawal of a notice under the Charges Act is particulars of the notice and the work it related to, together with a statement that the notice is wholly or partially withdrawn (and in that event the amount withdrawn). The form is to be signed by the claimant or its officer, and by a witness.

[34] The information conveyed by the first respondent's confirmation of the invalidity of the notice substantially satisfied those requirements. It conveyed no less information than required by the approved form.[7] The letter identified the notices to which the concession related, and unequivocally accepted that each of those notices was invalid and of no effect. The failure to use the word "withdraw" did not alter the effect of the correspondence. Similarly, the fact the letter was not witnessed did not alter the content, or effect, of the information.

[35] Whilst there is good reason why the Charges Act, which has, as its purpose, ensuring certainty in respect of the work the subject of a notice, would specify a form for notifying any withdrawal of a notice of claim of charge, that purpose is met by a party advising the relevant parties it clearly and unequivocally accepts that the notice issued by it was invalid and of no legal force and effect. To find otherwise would be to place form over substance.

[36] A failure to convey that information in the approved form does not render the withdrawal invalid. In *Project Blue Sky Inc v Australian Broadcasting Authority*[8] McHugh, Gummow, Kirby and Hayne JJ enunciated the test for determining invalidity, when considering a failure to follow a legislative requirement:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'." (citations omitted)

[37] There is nothing in the language of s 11(8), or the contents of the approved form, or the scope and object of the Charges Act, which supports a conclusion that it was the

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7 Compare *Bluestone Holdings Pty Ltd v Juniper Property Holding No 14 Pty Ltd* [2006] QSC 219, adopting the observations of Gibbs J (as he then was) in *Equipment Investments Pty Ltd v M J Dowthaite & Co Pty Ltd* (1969) 16 FLR 23.

8 (1998) 194 CLR 355 at 390, 391.

legislative intention that a failure to give notice of withdrawal in the approved form renders a clear and unequivocal statement that the notice of claim of charge is invalid ineffective to constitute a withdrawal of the requisite notice in accordance with s 11(8) of the Charges Act.

[38] The applicant contended such a conclusion should not follow because s 49(2) of the *Acts Interpretation Act* 1954 (Qld) necessitated strict compliance. However, s 11(8) does not require the approved form be completed in a specified way, or that specified information or documents be included in it or attached to it or verified in a special way. The reference in the approved form to the signature of the claimant being witnessed does not require witnessing by any particular class of person, or that the truth of the content of the form be attested to or affirmed by the claimant. As such, the need for witnessing does not amount to a requirement that the form be "verified in a special way". Section 11(8) merely requires notice to be given "in the approved form". That being so, substantial compliance is sufficient.[9]

[39] Even if the Charges Act is properly to be interpreted as requiring any notice of withdrawal to be given in the approved form, I would, in the exercise of my discretion, decline to set aside the adjudication decision on the ground the delivery of the payment claim was prohibited by reason of the existence of a notice of claim of charge at the time the payment claim was served on the applicant.

[40] The Court has a discretion not to exercise its supervisory jurisdiction.[10] That discretion is to be exercised judicially, but can be exercised if circumstances render the withholding of the relief appropriate.[11] The circumstances of this case would warrant the withholding of any relief on this ground, had it otherwise succeeded.

[41] The applicant's reliance upon this ground involves a totally unmeritorious attempt to set aside an adjudication decision on a ground inconsistent with its stated position at the time the notices were served, which position was immediately accepted as correct by the first respondent.

[42] Ground 1 fails.

*Ground 3*

[43] The third respondent was required to make a determination as to the document which amounted to a payment schedule, if he was to properly consider the issues the subject of the adjudication request. The third respondent concluded the document dated 6 March 2013 represented the payment schedule. The applicant contended the payment schedule was a document forwarded 8 March 2013.

[44] A payment schedule is an important part of any adjudication process. As Chesterman J (as he then was) observed in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors*:[12]

> "… The whole purpose of such a document is to identify what amounts are in dispute and why. The delivery of a payment claim and a payment schedule is meant to identify, at an early stage, the parameters of a dispute about payment for the quick and informal adjudication process for which the Act provides. If a builder wishes

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9 *Acts Interpretation Act* 1954 (Qld), s 49(1).

10 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors ( No 2)* [2013] QSC 67 at [9].

11 *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [28].

12 [2007] QSC 333 at [27].

> to take advantage of the Act to dispute the claim it must comply with its provisions and must, relevantly, take the trouble to respond to a payment claim in the manner required by the Act. The process is not difficult. The applicant was required to identify those parts of the claim which it objected to paying and to say what the grounds of its objections were."

[45] The Payments Act emphasises speed and informality. Whether a document satisfies the description of a payment schedule is not to be determined from an unduly critical viewpoint.[13] To constitute a payment schedule the document must:

1. identify the payment claim to which it is related;
2. state any amount which the recipient of the payment claim proposed to make in response to it;
3. if that amount is less than the amount claimed, state why it is less.

[46] The document dated 6 March 2013 was forwarded under cover of an email in the following terms:

> "Subject: GLNG Project – HPL Payment claim no. 16
>
> Geoff,
>
> Pls find attached MacDow's letter in reply (including accompanying payment certificate) to your payment claim number 16.
>
> Notwithstanding the attached payment certificate certifying that HPL owes MacDow $17,124,956.84, MacDow advises the following:-
>
> 1. it is prepared to pursue its various claims against Fluor; and
> 2. it is prepared to pay HPL's various creditors as requested by HPL.
>
> Please contact us with respect to item 2 above.
>
> Regards
>
> Andrew"

The accompanying letter had the reference:

> "Roma Hub and Pipelines Contract
>
> Subcontract: SC1458 012
>
> Re: Payment Claim No 16"

and commenced as follows:

> "Dear Sirs,
>
> Further to the Sub-contractor's Payment Claim No. 16 submitted to MacDow's site team on 25 February 2013 for Work completed from the (sic) 1 February 2013 to 25 February 2013, MacDow provides under attachment hereto Payment Certificate No 16 together with supporting documentation and below provides advice to the major adjustments made to the claimed amount."

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13 *Minimax* at [20].

[47] The document sent on 8 March 2013 identified on its face that it was the payment schedule for payment claim No 16. It referenced the matter as:

> "Roma Hub and Pipelines Contract
>
> Sub-contract: SC1458 012
>
> Re: Payment Schedule for Payment Claim No. 16"

and commenced as follows:

> "Dear Sirs,
>
> MacDow refers to its letter dated 6 March 2013 provided under the Sub-Contract with respect to Payment Claim No. 16.
>
> Further to MacDow's letter, MacDow provides this payment schedule under section 18(1) of the *Building and Construction Industry Payments Act* 2004 (Qld) (Act) with respect to the Sub-Contractor's Payment Claim No. 16 seeking payment for $27,133,704.26 (inclusive of GST) submitted to MacDow's site team on 25 February 2013 for Work claimed to have been completed up to and including 25 February 2013 (Payment Claim).
>
> A reference to the Payment Claim as a 'payment claim' is not an admission by MacDow that the claim is a valid payment claim under the Act.
>
> The schedule amount for the Payment Claim is $Nil, as the Payment Claim has been assessed as a negative amount of $20,987,233.91 (inclusive of GST), being the amount stated on the enclosed payment certificate of negative $17,124,956.84 (inclusive of GST) and negative $3,862,277.07 (inclusive of GST) for amounts claimed by the Sub-Contractor's subcontractors and suppliers as detailed below.
>
> Below are the reasons why the scheduled amount is less than the claimed amount and, where relevant, if that amount is less because MacDow is withholding payment, MacDow's reasons for withholding payment."

Thereafter, detailed submissions were made as to the respective amounts.

[48] Whilst *Minimax* supports a conclusion that an informal response to a payment claim can be a payment schedule, if it meets the requirements of the Payments Act, it is not authority for a proposition that the first correspondence sent by a party following receipt of a payment claim is its payment schedule. Whether that response is the payment schedule will depend upon all of the circumstances of the case. *Minimax* is also not authority for the proposition that a document which does not purport to be a payment schedule must be considered to be a payment schedule if it was delivered within the statutory timeframe.

[49] The first respondent contended significance was to be attached to the reference in the 6 March document to the "payment certificate", as Part B of the schedule to the subcontract provides that a payment schedule for the purposes of the Payments Act is a payment certificate. However, that provision allows a party to contend that the payment schedule delivered by it is a payment certificate under the contract. The provision does not mean every payment certificate must be the party's payment schedule in respect of a payment claim.

[50] In the present case, the letter dated 6 March 2013 did not purport to be a payment schedule. It sought to deliver the payment certificate pursuant to the subcontract with some accompanying observations. By contrast, the letter dated 8 March 2013 was expressly identified as a payment schedule and by its contents expressly sought to deal with the very issues required by a payment schedule. That document was also served within the required statutory time period.

[51] The document dated 6 March 2013 contained reference to schedules not annexed to, or otherwise delivered with, that document. Further, it failed to determine the extent of the claim without regard to those schedules. That being so, there was no basis upon which the third respondent could properly determine the adjudication by that document. Further, it did not purport to be the payment schedule.

[52] In circumstances where the document on its face was incomplete and did not purport to be a payment schedule, and there was served, two days thereafter, a document titled "payment schedule", there was no proper basis for the adjudicator to find that the document dated 6 March 2013 was the payment schedule. The third respondent's conclusion that it constituted the payment schedule was an error. A consequence of that error was that the third respondent refused to consider the contents of the document dated 8 March 2013. The refusal to consider the document dated 8 March 2013, as part of the adjudication process, constituted jurisdictional error.[14] The adjudication decision is properly to be set aside.

*Ground 4*

[53] As this ground was an alternative to Ground 3 it is unnecessary to consider it further.

*Ground 5*

[54] The conclusion in respect of Ground 3 renders it unnecessary to consider this remaining ground. Had it been necessary to do so, I would not have been satisfied this ground established jurisdictional error on the part of the third respondent.

[55] The third respondent dealt with the variations in a way which was practical and in accord with his obligations as an adjudicator. The principles of natural justice do not require the adjudicator to canvas every aspect of the decision making process prior to reaching a concluded decision. Those principles require a decision maker to give a party a fair and reasonable opportunity to address matters to be the subject of consideration by the decision maker. There is no basis to conclude the third respondent failed to afford the applicant that opportunity.

**Conclusion**

[56] The applicant has established the adjudication decision is infected by jurisdiction error. It is properly to be set aside.

[57] I shall hear the parties as to the form of orders, and costs.

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[14] *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd and Consolidated Contracting Company Australia Pty Ltd & Anor* [2011] QSC 292 at [118]-[123].