SUPREME COURT OF QUEENSLAND

CITATION:	*McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors* [2013] QSC 293
PARTIES:	**MCNAB DEVELOPMENTS (QLD) PTY LTD** **ACN 118 748 548** **(applicant)** **v** **MAK CONSTRUCTION SERVICES PTY LTD** **ACN 136 996 891** **(first respondent)** **ADJUDICATE TODAY PTY LTD** **ACN 109 605 021** **(second respondent)** **HELEN DURHAM** **(third respondent)**
FILE NO:	BS5200 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	25 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2013
JUDGE:	Mullins J
ORDER:	**1. Originating application is dismissed.** **2. Any submission on costs on behalf of the first respondent is to be filed and served on or before 1 November 2013 and any submission on costs on behalf of the applicant is to be filed and served on or before 8 November 2013.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS, REMUNERATION, STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant entered into a subcontract with the respondent to carry out concreting and formwork services – where the applicant terminated the subcontract – where the first respondent served a payment claim on the applicant pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) – where the reference date identified in the payment claim was after the termination date of the subcontract – where the applicant served a payment schedule – where the payment claim was referred to adjudication – whether

identification of patently incorrect reference date deprived adjudicator of jurisdiction – where the adjudicator decided on the amount of the progress payment to be paid by the applicant – where the applicant applied to set aside the decision – whether there was jurisdictional error – whether the adjudicator assessed the claim on the merits – whether the adjudicator identified the source of the legal entitlement of the claimed amounts that were allowed by the adjudicator

Building and Construction Industry Payments Act 2004, s 10, s 12, s 13, s 17, s 24, s 26

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346, considered
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, considered
John Goss Projects Pty Ltd v Leighton Contractors (2006) 66 NSWLR 707; [2006] NSWSC 798, considered
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, considered
Pacific General Securities Ltd v Soliman and Sons Pty Ltd (2006) 196 FLR 388; [2006] NSWSC 13, considered
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2012] QCA 276, considered
Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd [2012] 2 Qd R 90; [2011] QSC 67, considered

COUNSEL: K E Downes QC for the applicant
D A Savage QC and D P O'Brien for the first respondent

SOLICITORS: Holding Redlich for the applicant
Connolly Suthers Lawyers for the first respondent

[1] The applicant (McNab) applies for a declaration that the adjudication decision (the decision) made by the third respondent (the adjudicator) pursuant to the *Building and Construction Industry Payments Act* 2004 (the Act) in respect of the payment claim made by the first respondent (MAK) is void.

[2] By subcontract made on 23 January 2012 McNab engaged MAK to carry out concreting and formwork services for the project at James Cook University for the lump sum tendered price with a date for practical completion of 8 October 2012. On 12 December 2012 McNab issued MAK a direction to rectify alleged defects. On 17 December 2012 McNab took responsibility for defective work under the subcontract out of the hands of MAK. On 15 March 2013 McNab issued a show cause letter to MAK to which MAK responded on 25 March 2013.

[3] McNab claims to have terminated the subcontract on 27 March 2013. MAK served a payment claim under the Act on 28 March 2013 that showed a reference date of the same date for a sum of $853,952.97, including GST. McNab then served a payment schedule in response that was in effect for nil. MAK made an adjudication application dated 30 April 2013 that was served on McNab on 2 May 2013. The adjudication response was served on MAK and delivered to the adjudicator on 9

May 2013. In addition to the submissions in the adjudication response, it incorporated a statutory declaration from Mr Garufi who was the project manager for McNab for the project from 24 November 2012 until practical completion of the project was achieved on 15 February 2013 and has continued as project manager while the project was in the defects liability period, statutory declarations from former project managers for the project Mr Cave and Mr Godbold, and a statutory declaration from Mr Michael McNab who is the managing director of McNab. McNab and MAK respectively provided further submissions requested by the adjudicator on 29 and 30 May 2013 on the issue of whether clauses 24(j) and 25 of the subcontract together constitute a penalty provision. The decision was made on 30 May 2013 and determined that the sum of $241,441.20, including GST, was payable by McNab to MAK. The application for declaratory relief was filed on 7 June 2013.

Issues

[4] The main issues to be determined are:

(a) the effect of the reference date identified in the payment claim being after the date that the applicant claimed to have terminated the subcontract;
(b) whether the adjudicator assessed the claim on the merits; and
(c) whether the adjudicator identified the source of the legal entitlement of the claimed amounts that were allowed by the adjudicator.

The relevant law

[5] Under s 26(1) of the Act the adjudicator's role is to decide the amount of the progress payment to be paid under the relevant contract. Under s 26(2) of the Act, the matters that an adjudicator can consider in deciding an adjudication application are prescribed:

> "In deciding an adjudication application, the adjudicator is to consider the following matters only-
>
> (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority Act 1991*, part 4A;
> (b) the provisions of the construction contract from which the application arose;
> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates."

[6] Muir JA explained the purpose of the Act and the role of adjudicators in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at [46] to [51] (*Intero Hospitality*), concluding at [51]:

> "It is apparent from the foregoing that the Act is intended to provide a mechanism by which claims for payment under construction

> contracts can be decided quickly, on an interim basis and by which payment can be enforced even though a dispute in respect of the right to payment is being litigated or is subject to an alternative dispute resolution process. It is apparent also that in making determinations under the Act adjudicators will often lack the evidence upon which and the time within which to make fully informed considered determinations. That does not matter in the scheme of things, as adjudicators' determinations do not finally determine parties' contractual rights. That is left to the courts or to alternative dispute resolution processes agreed upon by the parties."

[7] McNab must show jurisdictional error, in order to successfully attack the decision on this application: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [6], [78] and [80] (*Northbuild*). There is a helpful analysis by Philippides J of recent authorities highlighting the distinction between jurisdictional and non-jurisdictional error in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QCA 276 at [95] to [103] and it was noted at [103]:

> "Where no jurisdictional error is shown to have been made by the adjudicator in proceeding to determine the adjudication application on the basis that the payment claim concerned a construction contract, the adjudicator's determination as to the extent and value of the 'construction work' or 'related goods and services' the subject of the payment claim does not, in my view, concern a matter of jurisdictional fact."

[8] In order to discharge the role of the adjudicator, there must be, at a minimum, determination of whether the construction work the subject of the claim has been performed and of its value: *Pacific General Securities Ltd v Soliman and Sons Pty Ltd* (2006) 196 FLR 388 at [82] and [86]. Brereton J in that case also expressed the view at [86] that "for an adjudicator to determine a progress payment at the amount claimed simply because he or she rejects the relevance of the respondent's material is such a failure to address the tasks set by the Act as to render the determination void."

[9] The adjudicator must be satisfied as to the contractual entitlement for the payment that is allowed, as the progress payment must relate to construction work (or the supply of related goods and services) under the construction contract: ss 12 and 13 of the Act. As was observed by Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 at [56] (*BM Alliance*):

> "The legislation requires the source of an entitlement to be paid to be found. In failing to consider and find the source of the entitlement, the adjudicator failed to take into account a matter he was required to take into account and thereby fell into jurisdictional error. Another way of characterising the jurisdictional error is to say that in finding that an entitlement to be paid existed simply because BGC incurred costs before the reference date, the adjudicator misconceived the nature of the functions he was performing or misapprehended the limits on his functions or powers."

The identified reference date

[10] At the conclusion of oral submissions Ms Downes of Queen's Counsel indicated that McNab no longer pressed the argument in relation to the reference date and the termination of contract point. On reflection, however, I was unsure as to the extent of the abandonment of this issue. As a matter of prudence, I will deal with the arguments that were advanced.

[11] The right to make a payment claim under the Act depends on there being a reference date (as defined in schedule 2 to the Act) under the subcontract for which a progress payment has not yet been made: ss 12 and 17 of the Act. The right to receive a progress payment under s 12 of the Act is a statutory right based on the existence of a construction contract (as defined in the Act), even if there is not a contractual right to seek a progress payment on a monthly basis: *Northbuild* at [54] to [55].

[12] The subcontract specified that MAK must give a progress claim to McNab in writing on or before the date specified in item 14 of the schedule which was "25th of the month or next working day." It is apparent from the terms of the payment claim that it relates to works carried out up to 19 December 2012. The adjudicator acknowledged in paragraph 19 of the decision that the claim was for the value of work carried out to 25 March 2013 (which was before the date that McNab claimed to have terminated the subcontract). The adjudicator found at paragraphs 15 to 17 of the decision that under the subcontract MAK was limited to making one payment claim for each month; if its claim was not made within a particular month, its contractual right to make a claim for that month was lost, but that was subject to the statutory right to make a claim under s 12 of the Act "from each reference date;" and this gave MAK the right to make the statutory claim at any time after the date permitted under the subcontract, subject to the limitations in s 17(4) of the Act.

[13] The adjudicator did not need to resolve the issue of whether the subcontract was properly terminated when McNab purported to do so, as the adjudicator proceeded at paragraph 19 of the decision on the basis that, if the subcontract had been terminated, MAK had an accrued contractual right before the termination of the subcontract to make a progress claim for the value of work carried out up to 25 March 2013 and for the value of work carried out up to 25 April 2013 and that it had exercised its statutory right to do so (despite having forfeited its right to make a claim under the subcontract for the value of the work carried out up to 25 March 2013) in making the subject payment claim that showed the reference date of 28 March 2013.

[14] MAK seeks to support the correctness of the adjudicator's conclusion that the payment claim was entitled to be made by MAK, on the basis that the relevant "reference date" under the subcontract was 25 March 2013 and there was therefore a "reference date" that had accrued under the subcontract prior to the purported termination. It is submitted the Act provided for a payment claim to be made, despite the fact that the payment claim showed the reference date incorrectly as 28 March 2013.

[15] McNab disputes that MAK can rely on a different reference date from that claimed in the payment claim and submits there was no jurisdiction for the adjudicator to proceed with the adjudication application, as the payment claim was not valid. McNab relies on the approach that was taken in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at [42], [55] and [56] (*Watton Construction*).

[16] The adjudicator in paragraph 10 of the decision distinguished the facts of *Walton Construction* from the subject application on the basis that in this application all accrued reference dates had not been used at the time the subcontract was purportedly terminated and one of them forms a proper foundation for the payment claim.

[17] For the adjudicator to have jurisdiction to make the decision, there must be a valid payment claim. MAK was not claiming for any works undertaken after the purported termination date of 27 March 2013 (or for any works undertaken after the reference date of 25 March 2013). The position is distinguishable from *Walton Construction* where there was no accrued reference date for works done prior to any termination of the subcontract to support the payment claim. McNab's argument proceeds on the basis that what is obviously an incorrect identification of the reference date displaces the substance of the claim relating to works that could be the subject of a progress claim made in respect of the true reference date that had accrued prior to the termination of the subcontract.

[18] The nomination of a patently incorrect reference date in the payment claim that otherwise related to an outstanding reference date in respect of which MAK had not previously made a payment claim did not deprive the adjudicator of jurisdiction to decide the adjudication application based on that payment claim.

Clauses 24 and 25 of the subcontract

[19] One of the bases on which McNab rejected many of the items in the payment claim was that the variation had not been claimed in accordance with clauses 24 and 25 of the subcontract. MAK had not asserted in its submissions that clause 24(j) in combination with clause 25 of the subcontract operated as a penalty, but as that was contemplated by the adjudicator, the adjudicator obtained submissions from the parties on that issue. As the adjudicator dealt with this issue at paragraphs 26 to 35 of the decision and the parties made submissions on this application directed specifically to this topic, I will also address it as a separate topic. The adjudicator's approach to clauses 24 and 25 of the subcontract has relevance for the primary submissions on whether the adjudicator addressed the merits of the claim and identified the source of legal entitlement to the claimed amounts.

[20] Clause 24 of the subcontract regulated variations. It empowered McNab to direct MAK to carry out variations and obliged MAK to carry out the variations that it was required to do so. It dealt with the manner of pricing variations. The method of claiming for payment for the variations was covered by subclauses (h), (i) and (j):

> "(h) The subcontract sum may only be adjusted by a variation amount approved by the contractor and the adjustment is to be included by the subcontractor in his next progress claim after carrying out the work the subject of the variation.
>
> (i) The subcontractor cannot claim for a variation if the cost of the work is less than the amount identified in Item 19 of the schedule. In addition, the subcontractor cannot aggregate any variation claims, so that each variation must be claimed separately.
>
> (j) The subcontractor shall notify the contractor of all variation claims in accordance with clause 25 as a prerequisite to any

entitlement to be paid under the subcontract or at general law for performing the variation to the works."

[21] Clause 24(j) links the variation claim that is made under the provisions of clause 24 to the precondition for payment set out in clause 25 which is notification of claims:

> "25. Notification of claims
>
> (a) The contractor shall not be liable upon any claim, action, demand or proceeding by the subcontractor, whether under the subcontract or at general law or in respect of or arising out of:
>
> (i) a breach of contract;
>
> (ii) a direction from the contractor (including a direction to perform a variation);
>
> (iii) an adjustment to the subcontract sum;
>
> (iv) or otherwise;
>
> unless within 7 days (or a lesser time where required under the head contract) after the first date upon which the subcontractor could have been aware of the breach, direction or entitlement to bring the claim, action, demand or proceeding the subcontractor has given to the contractor the prescribed notice.
>
> (b) For the purposes of this Clause, a prescribed notice is a notice in writing which includes full particulars of:
>
> (i) the breach, direction or circumstances on which the claim, action, demand or proceeding is based;
>
> (ii) the clause of the subcontract or other basis for the claim, action, demand or proceeding; and
>
> (iii) the quantum of the claim, action, demand or proceeding and the method of calculation."

[22] The adjudicator noted at paragraph 27 of the decision that MAK did not address the question of non-compliance with clauses 24 and 25 of the subcontract in the adjudication application and that McNab submitted that it was not open to the adjudicator to find in the absence of evidence or submission from MAK that those clauses should not be strictly enforced. The adjudicator then stated at paragraph 27:

> "However, in circumstances where the respondent relies on those clauses to deny the claimant payment for work carried out which it would otherwise be entitled to, it seems to me that it is for the respondent to establish actual non-compliance and to establish that the clauses have the effect the respondent says they have."

[23] The adjudicator's construction of clause 24(j) of the subcontract is set out at paragraph 28 of the decision:

> "Despite being expressed as a precondition to the entitlement to be paid, the substantive effect of clause 24(j) is to deny the respondent payment for work it has either carried out at the direction of the respondent, or remains obliged to carry out, if it fails to provide a prescribed notice within 7 days of receiving such a direction. It therefore appears to me to be a penalty provision, which is enforceable only to the extent that the respondent has suffered damage as a result of the claimant's failure to give the required notice, and not to deny the claimant the whole of the amount otherwise payable."

[24] The adjudicator concluded at paragraph 31 of the decision:

> "The end result is that I am not satisfied that clause 24(j) 'is not a penalty clause because it is part of the circumscription or the definition of the entitlement'."

[25] The adjudicator does not definitively conclude that clause 24(j) is a penalty clause, but proceeds on the basis that McNab could not satisfy the adjudicator that it was not and therefore does not give effect to the preconditions in clauses 24(j) and 25 of the subcontract: paragraph 35 of the decision.

[26] McNab argues that the adjudicator erred in a number of respects: in placing the onus on McNab to show that clauses 24 and 25 should be given effect, when it was for MAK to demonstrate the entitlement to be paid, and in failing to give effect to the clauses of the subcontract which were critical to MAK's contractual entitlement to be paid for variations. McNab argues that if no effect is given to clauses 24 and 25, there is no contractual entitlement of MAK to receive payment for the variations, relying on *BM Alliance*.

[27] MAK does not seek to uphold the adjudicator's conclusion that clauses 24(j) and 25 of the subcontract amount to a penalty or, as it was expressed, that McNab did not prove that clauses 24(j) and 25 did not amount to a penalty. MAK contends that a fair reading of the decision in relation to clauses 24 and 25 of the subcontract must result in the conclusion that the adjudicator has wrongly concluded that those provisions should be given no effect as they amount to a penalty or rejected McNab's submissions on the construction of clauses 24 and 25, but in either case that is an error of law in applying the terms of the subcontract that falls short of jurisdictional error: *BM Alliance* at [7].

[28] Clauses 24 and 25 of the subcontract set up preconditions for payment for variations. As the regime under the Act for determining interim progress payments to subcontractors is based on the existence of the subcontract, as modified by the rights conferred under the Act, effect is given to such contractual preconditions for payment of variations in applying the regime under the Act: *John Goss Projects Pty Ltd v Leighton Contractors* (2006) 66 NSWLR 707 at [82].

[29] The adjudicator was bound to apply the terms of the subcontract in assessing MAK's payment claim. That required the adjudicator to determine the legal effect of the relevant terms of the subcontract. The adjudicator has made an error in deciding what that legal effect should be, and the question is whether that should be characterised as a mere error of law or jurisdictional error. McNab's argument that equates the adjudicator's error of law to a failure to identify the contractual entitlement for payment of variations is not supported by *BM Alliance. BM Alliance* was concerned with a claim for termination costs that was claimable under a provision of the contract, but where the right to claim those costs had not accrued at the reference date for the progress claim. In contrast, in this matter the issue of compliance with clauses 24 and 25 has arisen where there is a variation claimed for extra materials or works that fall within the meaning of "construction work" in s 10 of the Act and the subcontract provides for variations to the scope of the works during the construction.

Was the claim assessed on the merits?

[30] McNab's primary submission, as developed in the oral submissions, is that the adjudicator failed to assess the claim on the merits. This submission requires a detailed analysis of the relevant claim, competing submissions and evidence, and the adjudicator's disposal of the claim. It is not irrelevant to observe at the outset that the adjudicator's decision comprising 102 paragraphs suggests that the adjudicator endeavoured to undertake the task imposed by s 26(2) of the Act, subject to the constraints that necessarily apply to that process, as identified in *Intero Hospitality* at [51].

[31] The first example relied on by McNab to support the argument that there was no assessment on the merits was the allowance by the adjudicator of $53,817.50 (before GST) for extra materials. For each component of the extra materials, the payment claim identified a specific aspect or the site of the work (such as which wall), the nature of the claim (such as extra concreting) and the amount claimed. The payment schedule made a general response in rejecting these claims to the effect that the information provided was "seriously deficient" and it was not possible for McNab to assess these claims due to lack of the particulars required under clause 24 of the subcontract and the claims had not been notified in accordance with clause 25 of the subcontract.

[32] The submissions of MAK incorporated in the adjudication application responded at paragraph 67 that:

> "McNab claim in their correspondence of 15 April 2013 that there is not sufficient information to assess this claim. MAK was provided, pre-tender, with drawings numbered S102(b) and S103(a) (annexure 'Z') and these were then revised on a number of occasions by McNab (see drawings at annexure 'OO')."

[33] The adjudication response pointed out that annexure OO contained a series of drawings issued throughout the project and MAK had failed to explain the relevance of the drawings to the claims for extra works. Paragraph 55 of Mr Garufi's statutory declaration dealt briefly with their claim in general terms and not by reference to any of the specified sites or drawings.

[34] The adjudicator set out her conclusion in allowing the claim for extra materials in full at paragraphs 59 and 60 of the decision:

> "59. There is no doubt that the claim for extra materials etc is expressed in extremely short form and contains no quantities or rates. The respondent alleges that it was accordingly unable to assess the claim, but it has failed to satisfy me that is so. The respondent goes on to assert that the claim is not substantiated in any respect but that is not surprising in circumstances where neither the status of the works as variation works, nor the value of those works, were put in issue.
>
> 60. There being no dispute about the status of the works as variation works or their value, and no other reason why they should not be paid for, I allow the full amount claimed in respect of them."

[35] The approach of the adjudicator was to treat it as implicit in McNab's reliance on clauses 24 and 25 in relation to this claim that McNab recognised that the claims were variations with no dispute as to the method of valuing the variations. A

misinterpretation by the adjudicator of the effect of McNab's submissions is not jurisdictional error.

[36] This was a category of claims in respect of which both parties kept their material and submissions to the minimum. It was, however, based on changes in drawings that were identified in the material. The analysis of this claim for extra works in the decision indicates recourse by the adjudicator to those materials and submissions. That is reflected in the accurate conclusion by the adjudicator about the lack of assistance gleaned from Mr Garufi's statutory declaration. In the context of what was before the adjudicator and the interpretation of what was in issue as a result, the decision does not fall short of being an assessment on the merits.

[37] The second example relied on for showing there was no assessment on the merits was in respect of MAK's claim in the payment claim for $24,349.50 (before GST) for works described in 16 day dockets. The adjudicator dealt with this claim in paragraphs 43 to 53 of the decision.

[38] The adjudicator allowed $21,980 (before GST) for the day docket claims, after excluding three day dockets (1760, 3101 and 3033) which made claims for works that the adjudicator found were either included in the subcontract scope of works or used rates that were not supported by reference to other documents.

[39] McNab had rejected the claim for unpaid day dockets in the payment schedule. It relied on the fact that it did not have copies of day dockets 1770, 1771, 1782 and 1786 and 3110.

[40] MAK attached copies of these signed day dockets (except for 1786) to the adjudication application. According to the payment claim, MAK claimed that the work carried out under day docket 1786 was work directed by McNab and detailed that day docket 1786 was for $4,160 for "4x8 hours" for "overtime for Sunday work refer to email".

[41] The fact that day docket 1786 was not physically provided to McNab or the adjudicator did not prevent the assessment of the claim, when the payment claim detailed the content of day docket 1786.

[42] The approach of the adjudicator at paragraph 44 of the decision was to infer from McNab's response to the claim based on unpaid day dockets that they were exceeded by amounts owed by MAK to McNab that there was no issue as to the fact that they were variations or as to their value. Again, a misinterpretation by the adjudicator of the effect of McNab's submissions is not jurisdictional error.

[43] For the third example of a failure to assess the claim on the merits, McNab pointed to the adjudicator's allowance of MAK's claim for extra works not included in the original drawings to the extent of $61,550. The adjudicator dealt with this claim at paragraphs 37 to 42 of the decision. The one item that was rejected was for water curing that MAK had conceded in the adjudication application.

[44] In the payment schedule, McNab rejected most of the claims either on the basis that the items were provided for in MAK's scope of works or, if it were a variation, it had not been claimed in accordance with clauses 24 and 25 of the subcontract. The point was also made in the payment schedule in respect of some of the items that

MAK needed to provide marked-up drawings or documentation showing where the additional works were required in order for McNab to further assess the claim.

[45] MAK in the adjudication application explained that it did not obtain revised drawings from McNab until February 2013 and referred to those in providing greater details to support the claim for the extra works made in the payment claim by a comparison between the drawings that were provided to MAK pre-contract and the subsequent revised drawings.

[46] In paragraph 139 of the adjudication response, McNab expressly relied on Mr Garufi's statutory declaration, but as the adjudicator observed in paragraph 41 of the decision that did not take the matter further than the response in the payment schedule, apart from raising an alleged arrangement that had been reached between McNab and MAK on 19 September 2012 that the adjudicator ruled in paragraph 41 of the decision she was precluded from considering as it was not raised in the payment schedule (and that part of the decision is not impugned): see s 24(4) of the Act.

[47] Because of the adjudicator's approach to the submission based on clauses 24 and 25 of the subcontract, the adjudicator at paragraph 40 of the decision interpreted McNab's submissions as leaving the only issue to be resolved in relation to the claims for extra works as to whether the subject works formed part of the original scope of works.

[48] The adjudicator may have been in error about the effect of clauses 24 and 25 of the subcontract or the interpretation of McNab's submissions which falls sort of being jurisdictional error. The process the adjudicator otherwise applied to assessing the claim that is evident from the decision precludes a finding that there was a failure to assess on the merits.

[49] The fourth example relied on by McNab to assert the adjudicator failed to assess the claim on the merits is the adjudicator's approach to McNab's claim for backcharges, as set out in paragraph 77 of the decision. The adjudicator dealt with the backcharges in paragraphs 73 to 92 of the decision.

[50] One of the responses of McNab to the payment claims was to rely on backcharges as particularised in payment schedule 9 dated 15 April 2013 incorporated in the payment schedule. MAK responded in detail in the adjudication application to the alleged defects that were the subject of McNab's backcharges.

[51] The adjudicator numbered the backcharges in the order in which they appeared in the schedule included in the payment schedule and referred to them in paragraph 73 of the decision as numbered from B1 to B34. The adjudicator at paragraph 75 of the decision refers to the backcharges in terms that there were 30 that could be described as the "smallest" backcharges and the remaining four were the "largest" backcharges.

[52] At paragraph 76 the adjudicator noted that in the adjudication response McNab addressed only the three largest backcharges. In relation to the 30 smallest backcharges, the adjudicator concluded at paragraph 77 of the decision:

> "Although the respondent does not anywhere expressly state that it no longer presses the other backcharges, I allow nil for them because I cannot be expected to address the adequacy of the claimant's

> 'defence' to these claims without the benefit of submissions from the respondent as to do otherwise would effectively require me to make the respondent's case for it."

[53] McNab submits there was no warrant in the Act for the adjudicator to ignore the backcharges in the payment schedule.

[54] It is submitted on behalf of MAK that paragraph 77 of the decision has to be considered in the context in which it was made. Although McNab had claimed backcharges in the payment schedule, the descriptions of the backcharges were brief, lacked detail and, in many instances, relied on alleged oral agreements or emails. This is illustrated by the first backcharge of $2,487.50 where the description in the payment schedule alleges "rectification of three pad footings under CC3 columns to the lecture theatre that were poured at the incorrect height" and refers to a discussion between Mr Cave and Mr Kilkelly on 19 September 2012. Although a statutory declaration from Mr Cave formed part of the adjudication response, reference was made by Mr Cave in general terms to the meeting on 19 September 2012, without descending to any detail in respect of the first backcharge or any of the items that are the subject of the backcharges. (As an aside, McNab sought support for its argument that there was a failure to assess the backcharges on the merits by reference to the adjudicator's failure to refer statutory declarations of Mr Godbold and Mr Cave. That submission assumes that there was evidence in those statutory declarations that was relevant for the assessment that was being undertaken by the adjudicator in respect of the backcharges which is not borne out by their contents.)

[55] Annexure "N" to the adjudication application set out in detail MAK's answer to each item in McNab's backcharges. Those specific matters raised by MAK in relation to each backcharge were not addressed in the adjudication response. It was not a case of the adjudicator ignoring the backcharges in the payment schedule, but a case of the adjudicator being without McNab's responses to the detail in the adjudication application. For example, in relation to the first backcharge MAK's answer in Annexure "N" was that it had poured the concrete at 50mm cover to the steel and that it was McNab's responsibility to inspect all reinforcement to ensure it was set out at the correct height, before they ordered the concrete and any heights that were given to MAK were given by McNab foremen. Mr Garufi was not the project manager at the time of these works and merely attaches the schedule of backcharges to his statutory declaration with a cost summary of rectification works "Attachment SG-17" that has not shown how it relates to the schedule of backcharges in the payment schedule. MAK therefore submits that in that context the adjudicator in paragraph 77 of the decision was saying in effect "in light of the material before her and the failure of McNab to respond to the matters raised by MAK, she was not satisfied that McNab was entitled to the claimed backcharges."

[56] McNab bore the onus of proving the backcharges. The adjudicator did not fail to assess the merits of the claim for backcharges in light of the course of the evidence, particularly McNab's failure to respond to MAK's detailed submissions in the adjudication application.

[57] The last example relied on by McNab to assert failure by the adjudicator to assess the merits of the claim is the adjudicator's rejection of McNab's claim to deduct liquidated damages. This was covered at paragraphs 93 to 98 of the decision.

[58] In the payment schedule McNab made a claim for liquidated damages under clause 28(j) of the subcontract on the basis that MAK had failed to bring the subcontract works to practical completion by the date for practical completion specified in the subcontract of 8 October 2012. The rate for liquidated damages was specified in the schedule to the subcontract as $3,000 per day. McNab claimed for 82 days from 9 October 2012 to 30 January 2013, although the amount actually claimed for liquidated damages in the payment schedule was a little less at $222,000.

[59] MAK claimed in its adjudication application that the delays were caused by McNab's unsatisfactory management of the project that resulted in delays of 31 weeks and exhibited examples of emails as evidence supporting its assertion that the delays were due to McNab. MAK did not, however, seek an extension of time for completion under clause 29 of the subcontract.

[60] The adjudicator noted in paragraph 95 of the decision that in its adjudication response McNab maintained that the date for practical completion was 8 October 2012 "and effectively asserts that it is for the claimant to prove otherwise." The adjudicator then referred to paragraphs 60 to 69 of McNab's submissions dealing with the adjudicator's obligation to assess MAK's claims in which McNab concluded at paragraph 69 that MAK "has wholly failed to provide sufficient supporting material to allow the Adjudicator to determine value the claim in accordance with the Claimant's claimed amount." The adjudicator expressed the view that those arguments "apply equally" to the deductions that McNab claims to be entitled to make and therefore the adjudicator did not accept that the date for practical completion was 8 October 2012.

[61] The adjudicator added at paragraph 96 of the decision:

> "Although the claimant's response to the respondent's claim for liquidated damages is perhaps best described as weak, where the respondent seeks to deduct a very substantial sum from amounts otherwise due to the claimant, it is incumbent on the respondent to satisfy me that it is entitled to do so. In this case, the respondent 'maintains that the Date for Practical Completion under the Subcontract is 8 October 2012' but appears to do so on the grounds that the claimant has not applied for any extension of time and is, in any case, precluded from doing so as a result of it's non-compliance with the relevant notice provisions. As far as I can tell, the respondent does not anywhere in fact assert that the claimant is responsible for the whole of any delay that occurred, and makes no attempt at all to establish this, as it might, for example, by establishing that it was not responsible for ordering the steel or, if it was, that it did not fall to order the steel in time or, if it did, that the absence of steel was not an operative cause of delay at the relevant time."

[62] Clause 29 of the subcontract regulated delay and extension of time and set out the preconditions that had to be satisfied before MAK was entitled to an extension of time for practical completion. Clause 29(d) provided:

> "The subcontractor's strict compliance with the provisions of this clause is a precondition to any right of the subcontractor to an [extension of time]."

[63] Without evidence that there had been an extension of time under clause 29 of the subcontract, there was nothing before the adjudicator to alter the specified date for practical completion under the subcontract of 8 October 2012. Although the adjudicator expressed the decision in terms that it was for McNab to prove that the date for practical completion remained 8 October 2012, what the adjudicator did in substance was misconstrue the effect of clause 29 of the subcontract. The adjudicator determined the claim for liquidated damages on the basis of this interpretation of the subcontract. It appears the adjudicator was in error, but that is not a jurisdictional error: *BM Alliance* at [8]. The adjudicator otherwise rejected McNab's submissions which it is apparent from the decision were considered. It does not amount to a failure to assess on the merits because the adjudicator does not accept one party's submissions.

[64] On the basis of the particular examples that were the focus of McNab's submissions on this application, McNab does not show that the adjudicator failed to assess the claim on the merits, when the decision is reviewed robustly, as is appropriate for the circumstances in which the decision was made. It is appropriate to repeat the observations made by Applegarth J in *John Holland Pty Limited v TAC Pacific Pty Limited* [2010] 1 Qd R 302 at [66]:

> "However, in circumstances in which adjudicators are required to determine complex legal issues quickly, the detection of flaws in reasoning or poorly expressed reasons in an adjudication decision do not compel the conclusion that the adjudicator did not attempt to understand and apply the contract. Adjudicators provide their determinations in a 'somewhat pressure cooker environment'. In some instances the adjudicator 'cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided on a full curial hearing'." (*footnotes omitted*)

Was the source of the legal entitlement of the claimed amounts allowed by the adjudicator identified?

[65] McNab relies on the approach in *BM Alliance* to submit for a conclusion in this case that the adjudicator made a jurisdictional error by not identifying the source of the legal entitlement to the claimed amounts that were allowed in the decision.

[66] As set out in paragraph [29] above, the statements made in *BM Alliance* should not be applied literally to this case. The Act confers on a subcontractor the right to use its regime for an interim progress payment for construction work. To the extent that MAK is claiming amounts for variations, those are construction work for the purpose of the Act and the subcontract remains the source of the legal entitlement for those claims made in the payment claim in conjunction with operation of the Act.

Other matter

[67] One of the components of the progress payment that was allowed was MAK's claim for "balance of previous claims". This was addressed in paragraphs 61 to 65 of the decision. Both parties made written submissions only in relation to this aspect of the decision.

[68] To the extent that there is substance in McNab's complaint that the adjudicator reversed the onus of proof, that does not amount to jurisdictional error.

Orders

[69] Even though the adjudicator appears to have made errors in the construction of the subcontract, misinterpreting McNab's submissions or by reversing the onus of proof, they are not jurisdictional errors that enable McNab to obtain the declaratory relief it seeks.

[70] Although Ms Downes requested that counsel makes submissions on the terms of formal orders when the reasons were published, that is unnecessary when the only order that can be made to reflect McNab's failure to establish jurisdictional error is the dismissal of the application. I will therefore order that the originating application is dismissed.

[71] In the normal course costs should follow the event. I will, however, defer making the costs order until the parties have an opportunity to consider these reasons and make any submissions on costs, if either party wishes to urge an order other than that the applicant pay the first respondent's costs of the originating application to be assessed. It seems appropriate to dispose of the question of costs on the papers. The second order that I will make is that "Any submission on costs on behalf of the first respondent is to be filed and served on or before 1 November 2013 and any submission on costs on behalf of the applicant is to be filed and served on or before 8 November 2013."