SUPREME COURT OF QUEENSLAND

CITATION:	*Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors* [2013] QCA 386
PARTIES:	**HEAVY PLANT LEASING PTY LTD (RECEIVERS AND MANAGERS APPOINTED)** ACN 151 786 677 (appellant) **v** **McCONNELL DOWELL CONSTRUCTORS (AUST) PTY LTD** ACN 002 929 017 (first respondent) **ABLE ADJUDICATION PTY LTD** ACN 134 663 933 (second respondent) **PAUL HICK** (third respondent)
FILE NO/S:	Appeal No 8506 of 2013 SC No 3702 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2013
JUDGES:	Muir, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the first respondent was a sub-contractor for the provision of earthworks and the appellant was a sub-contractor to the first respondent – where the first respondent sent two documents, dated 6 and 8 March, to the appellant in response to the appellant's payment claim – where, despite failing to provide a statement as to "why the scheduled amount [was] less" in respect of "variations", there was no suggestion in the 6 March document that it was provisional – where the

adjudicator concluded that the 6 March document was the payment schedule for the purposes of the adjudication and disregarded the 8 March document – where the primary judge found that there was no proper basis for the adjudicator to find that the 6 March document constituted a payment schedule and that, in refusing to consider the contents of the 8 March document, the adjudicator committed a jurisdictional error – where the appellant contends that the 6 March document constituted a payment schedule as it met the requirements of s 18 of the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) – where the appellant submits that it was irrelevant that the 6 March document was not described internally as a "payment schedule" and that the subsequent provision of more detailed reasons did not invalidate the 6 March document as a payment schedule – where the appellant contends that the primary judge erred in considering "all of the circumstances of the case", including the content of the 8 March document and the first respondent's subjective intention, in determining whether the 6 March document was a payment schedule – whether the primary judge erred in failing to analyse whether the 6 March document was a "payment schedule" by reference to the statutory requirements in s 18 of the Act and not otherwise – whether the primary judge erred in considering the subjective intention of the first respondent and whether the 6 March document "purported" to be a payment schedule – whether the primary judge erred in finding that the 6 March document was not a payment schedule for the purposes of the Act – whether any deficiency in the 6 March document was remedied by incorporating parts of the 8 March document – whether, if the 6 March document did not constitute a valid payment schedule, the adjudicator committed a jurisdictional error rendering his determination ineffective – whether the matter should be remitted to the adjudicator for determination according to law

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – SUBCONTRACTORS' CHARGES ACT (QLD) – where the appellant served the first respondent with three notices of claim of charge – where the first respondent demanded that the notices be withdrawn on the basis of non-compliance with the *Subcontractors' Charges Act* 1974 (Qld) (the Charges Act) – where the appellant wrote to the first respondent on 20 February 2013 accepting that its notices of claim of charge were invalid and of no effect – where the letter of 20 February 2013 was not in the approved Form 5 – where the primary judge found that the failure to give notice of withdrawal of a notice of claim of charge in the approved form did not render a clear and unequivocal statement that

a notice of claim of charge was invalid ineffective – where the primary judge held that, if a notice in the approved form was a necessary prerequisite to withdrawal, there had been sufficient compliance with s 11(8) of the Charges Act – where the first respondent submits that the failure to use Form 5 meant that there could not have been substantial compliance with s 11(8) of the Charges Act – where the first respondent contends that the adjudication decision was void as, at the time the payment claim was served by the appellant, there was a valid and subsisting charge pursuant to the Charges Act and s 4 of the Act prohibits the service of a payment claim in such circumstances – whether the letter of 20 February constituted an effective withdrawal of the notices of claim of charge

Acts Interpretation Act 1954 (Qld), s 48A(2), s 49(2)
Building and Construction Industry Payments Act 2004 (Qld), s 4, s 17, s 18, s 21, s 24, s 25, s 26, s 32
Subcontractors' Charges Act 1974 (Qld), s 11(8)

Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399, cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, considered
Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor [2011] QSC 327
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, considered
McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators appointed) (Receivers and Managers appointed) & Ors [2013] QSC 223, related
Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors [2007] QSC 333, considered
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, cited
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALJR 992; [2004] HCA 32, cited
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189; [2007] HCA 35, cited
State of Queensland v Epoca Constructions Pty Ltd & Anor [2006] QSC 324, considered

COUNSEL: P J Dunning QC, with M J Smith, for the appellant
D A Savage QC, with D P O'Brien, for the first respondent
No appearance for the second respondent
No appearance for the third respondent

SOLICITORS: Ashurst Australia for the appellant
Norton Rose Fullbright for the first respondent
No appearance for the second respondent
No appearance for the third respondent

[1] **MUIR JA**: **Introduction** The central issues for determination in this appeal are:

(a) whether the three documents, or any one or more of them, sent by the first respondent to the appellant on 6 March 2013 (the 6 March document) in response to a payment claim made by the appellant pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) was a "payment schedule" for the purposes of s 18 of the Act;

(b) if the answer to (a) is no, whether a document sent by the first respondent to the appellant on 8 March 2013 (the 8 March document) was a payment schedule; and

(c) whether, if the adjudicator's finding that the 6 March document was the payment schedule for the purposes of his determination was wrong in law, the adjudicator committed a jurisdictional error which rendered his determination ineffective.

[2] The first respondent is a sub-contractor to a head contractor, Fluor Australia Pty Ltd (Fluor), in relation to construction works undertaken in the vicinity of Roma. The appellant is a sub-contractor to the first respondent. The second respondent is an authorised nominating authority under the Act. The third respondent is an adjudicator under the Act.

[3] On 25 February 2013, the appellant served on the first respondent a payment claim under a sub-contract, dated 30 November 2011, between the appellant and the first respondent (the sub-contract). On 6 March 2013, the first respondent sent the 6 March document to the appellant electronically. The 6 March document was comprised of a brief email, a one page payment certificate and a two page letter which explained some adjustments to the payment claim made in the payment certificate. On 8 March 2013, within the time allowed for a response to the payment claim, the first respondent served on the appellant a brief email attaching an 11 page letter headed "Payment Schedule for Payment Claim No. 16" accompanied by 40 pages of supporting documentation. The letter included detailed explanations of why the monies claimed in the payment claim were not owed.

[4] On 18 March 2013, the appellant lodged an application with the second respondent under s 21 of the Act for adjudication of its payment claim.

[5] The first respondent lodged and served an adjudication response under the Act on 22 March 2013 which repeated and relied on the 8 March document. It called for the third respondent to have regard to the 8 March document which was attached to the adjudication response.

[6] The adjudicator decided that the 6 March document and not the 8 March document was the payment schedule for the purposes of the adjudication. He disregarded the contents of the 8 March document and allowed the payment claim in full. Notwithstanding that the 6 March document certified that the appellant owed the first respondent in excess of $17,000,000, the adjudicator awarded the appellant $26,698,654.79.

[7] The appellant applied, by originating application, to set the adjudication decision aside for jurisdictional error. On 9 September 2013, the primary judge declared that

the adjudication decision was void and ordered that it be set aside. The appellant appealed against the primary judge's declaration and orders. The first respondent filed a notice of contention seeking to uphold the primary judge's decision on grounds other than those relied on by the primary judge.

[8] It is now convenient to address the grounds of appeal.

Ground 1 – the primary judge erred in failing to analyse whether the 6 March document was a "payment schedule" by reference to the statutory requirements in s 18 of the Act and not otherwise

The appellant's submissions

[9] The appellant's arguments may be summarised as follows. The primary judge erred in considering "all of the circumstances of the case"[1] in determining whether the 6 March document was a payment schedule rather than basing his decision on the construction of the document. In particular, the primary judge erred in having regard to the content of the 8 March document in order to determine whether the 6 March document was a payment schedule.

[10] The 6 March document fulfilled the three criteria in s 18 of the Act, as discussed in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors*,[2] in that it:

(a) states that it relates to payment claim 16;

(b) states the amount proposed to be paid as negative $17,124,956.84; and

(c) provides certain reasoning for the scheduled amount being less than the amount claimed.

[11] Despite reference to "supporting documentation", the 6 March document was an efficacious payment schedule on its face. It is irrelevant that the document was not described internally as a "payment schedule". The Act has no requirement in that regard. It is relevant that the parties agreed in cl 10.10(b)(i) of Schedule B of the sub-contract that a "payment certificate" would be treated as a payment schedule.

[12] The mere fact that the first respondent later provided more detailed reasons could not have the effect of invalidating the 6 March document as a payment schedule or cause it to fail to meet the Act's requirements.

[13] If, contrary to the appellant's contentions, it was permissible to look at "all the relevant circumstances", the 6 March document should still be accepted as the payment schedule as the document was issued:

(a) by the managing director of the first respondent;

(b) in the context of a serious contractual dispute between the parties involving disputed sums in excess of $20,000,000 and in respect of which the first respondent had sought legal advice;

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1 *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators appointed) (Receivers and Managers appointed) & Ors* [2013] QSC 223 at [48].

2 [2007] QSC 333 at [20].

(c) in the form agreed by the parties in the sub-contract to be used for a payment schedule;

(d) in terms in response to the payment claim, asserting a different amount to be paid, with some reasoning; and

(e) in the manner in which the payment schedules had been delivered previously.

[14] Proposition (e) had no evidentiary support and was not accepted by the first respondent. The first respondent also contended that proposition (a) was incorrect as the 6 March document was served by a commercial manager, not the managing director.

[15] It is now desirable to set out the relevant parts of the 6 March and 8 March documents

The 6 March document

[16] One of the documents comprising the 6 March document was a letter dated 6 March 2013 from the first respondent to the appellant which provided:

> "**ROMA HUB AND PIPELINES CONTRACT**
> **SUB-CONTRACT: SC1458 012**
> **RE: PAYMENT CLAIM No. 16**
>
> Dear Sirs,
>
> Further to the Sub-Contractor's Payment Claim No. 16 submitted to [the first respondent,] MacDow's site team on 25 February 2013 for Work completed from the 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**;
>
> Kl29 & 125 WB — Foundations – MacDow have corrected the claimed quantities for foundation works based on actual progress. Please refer to attached progress schedule.
>
> The agreed rate for extra over reinforcement over and above the specified contract allowance has not been applied, and accordingly these rates have been corrected.
>
> The calculation of the additional excavation depth has been calculated incorrectly and accordingly corrected.
>
> Type 2 Pile – Claimed in error and removed from the assessment.
>
> Pond Liner Materials – Further to the failure of the Sub-Contractor to make payment to Sub Tier Contractor and with further reference our letter LTR-MACD-HPL-K129-147 dated 13 February 2013, MacDow accordingly corrects the over claim.

	Embankment – MacDow has corrected the embankment quantity to be in accordance with the survey data submitted. Extra over Compaction – Further to the above the compaction quantity has been corrected to be inline with the survey submitted. Rippable Rock – Macdow give notice that the total monthly quantity of rippable rock is in dispute due to ambiguities within the Subcontractors re-survey that occurred after the completion of the works for both the 100ml and 135ml ponds. MacDow have passed the survey to Fluor for review. MacDow request the Sub-Contractor to provide a fully supported claim with additional data to support the survey and evidence of MacDow's acceptance i.e. duly authorities instructions and acceptance etc. Extra Over Compaction – MacDow is unable to reach commercial settlement with under the Head Contract as a direct result of the Sub-Contractors interference with the Client. The Subcontractor put valid claims under the Head Contract in jeopardy and accordingly MacDow is forced to retract all previous payments in accordance with Sub-Contract Agreement Clause 3.6.
Preliminaries	MacDow have adjusted the total claimed to date based upon the cumulative months completed since the commencement of the Works.
Variations	Further to discussion please refer to variation register.
Back Charges	Please refer to Damages schedule D – MacDow has reconciled from the commencement of the Works all cost incurred which relates to plant and materials provided to the Sub-Contractor in the performance of the Works, which forms part of the Sub-Contractor Agreement responsibility to provided and accordingly back chargeable under the Contract.

The Sub-Contractor is referred to the Sub-Contractor Agreement Article 15 and is instructed to submit all variation in accordance with Article 15 of the Sub-Contractor Agreement. MacDow advise that any variation included within the Sub-Contractor Claim without prior submission in accordance with Clause 15 will be rejected.

MacDow requests that Sub-Contractor to provide its Tax Invoice as per the attached Payment Certificate No 16.

Yours faithfully,

[signed]

Rob Harris
McConnell Dowell Constructors (Aust.) Pty Ltd

Project Manager

Encl. Payment Certificate No 16 and supporting documentation" (emphasis added)

[17] The email from an officer of the first respondent to an officer of the appellant to which the other components of the 6 March document were attached provided:

"[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 preparing 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"

[18] The remaining document, described in the email as a payment certificate, was as follows:

MACDOW ASSESSMENT OF CLAIM NO. 16

Date: 25-Feb-13

Project Name: G2NG-40-K129-Roma General Contract Civil & Earthworks

Subcontract No.: SC1458012

Period: For contract works to 25th February 2013

	Adjusted Sub-Contract Sum	Claimed to Date	Previously Certified	This Claim
Contract – Schedule A	$82,903,133.73	$30,279,504.24	$41,968,365.24	<$11,688,861.00>
Variations – Schedule B	$24,375,244.91	$3,985,877.53	$5,941,003.30	<$1,955,125.77>
Retention – Schedule C	$0.00	$0.00	$0.00	$0.00
Contra charges-Schedule D	<$189,222.10>	<$6,158,595.43>	<$4,688,985.06>	<$1,469,610.37>
Sub Total	**$107,089,156.54**	**$28,106,786.35**	**$43,220,383.48**	**<$15,113,597.13>**
Cost of Surety (Bank Guarantee)				$0.00
Net Total (excluding GST)	**$107,089,156.54**	**$28,106,786.35**	**$43,220,383.48**	**<$15,113,597.13>**
GST (10%)	$10,708,915.65	$2,810,678.63	$4,322,038.35	<$1,511,359.71>
Advanced Payment	$5,000,000.00	$5,000,000.00	$5,000,000.00	$0.00
Pay back	<$5,000,000.00>	<$2,250,000.00>	<$1,750,000.00>	<$500,000.00>
Total (Including GST)	**$117,798,072.20**	**$33,667,464.98**	**$50,792,421.82**	**<$17,124,956.84>**
			TOTAL THIS CLAIM INCLUDING GST	**<$17,124,956.84>**

HPL CLAIM NO. 16

	Adjusted Sub-Contract Sum	Claimed to Date	Previously Certified	This Claim
Contract – Schedule A	$92,496,605.87	$48,000,252.29	$41,968,365.24	$6,031,887.05
Variations – Schedule B	$31,922,965.40	$24,642,172.42	$5,941,003.30	$18,701,169.12
Retention – Schedule C	$0.00	$0.00	$0.00	$0.00
Contra charges-Schedule D	<$3,891,901.59>	<$4,060,120.05>	<$4,448,613.21>	$388,493.16
Sub Total	**$120,527,669.68**	**$68,582,304.66**	**$43,460,755.33**	**$25,121,549.32**
Costs of Surety (Bank Guarantee)				$0.00
Net Total (excluding GST)	**$120,527,669.68**	**$68,582,304.66**	**$43,460,755.33**	**$25,121,549.32**
GST (10%)	$12,052,766.97	$6,858,230.47	$4,346,075.53	$2,512,154.93
Advanced Payment	$5,000,000.00	$5,000,000.00	$5,000,000.00	$0.00
Pay back	<$5,000,000.00>	<$2,250,000.00>	<$1,750,000.00>	<$500,000.00>
Total (including GST)	**$132,580,436.65**	**$78,190,535.12**	**$51,056,830.86**	**$27,133,704.26**
		TOTAL THIS CLAIM INCLUDING GST		**$27,133,704.26**

DEDUCTION FROM CLAIMED AND ASSESSED VALUE

K129 & K125 WORKBOOK

Incorrect agreed rate applied for the additional rebar over and above the specified contract allowance	-	91,534.67		25,030,014.66
Calculation used to calculate the additional depth incorrect 0.08m not 0.8m, also progress of works adjusted as per schedule and HPL daily progress chart	-	34,075.24		24,995,939.42
Foundations – Progress of Quantity adjusted as per drawings and schedule / HPL daily progress chart	-	337,703.12		24,658,236.29
Type 2 Piles removed from scope excluding paid amount by HPL	-	24,692.50		24,633,543.79
Compaction Test – over claimed amount based on embankment / fill completed	-	29,117.70		24,604,426.09
Pond Liner Materials on account payment removed due to failure to provide proof of payment	-	1,976,843.84		22,627,582.25
Rippable rock quantity in dispute pending review. Quantity excavated in dispute included in general excavation	-	6,884,230.30		15,743,351.95
Extra over compaction requirement in dispute pending review	-	6,129,232.10		7,614,119.85
Embankment quantity corrected as per survey and summery	-	146,685.06		7,457,461.79
VARIATIONS				
Refer to Variation Register	-	20,656,294.88	-	13,188,833.09
PRELIMINARIES				
Over claimed based on months completed	-	66,660.51	-	13,255,493.61
BACK CHARGES				
Refer to Back Charges Register		-$1,858,103.52	-	15,113,597.13

The 8 March document

[19] The 8 March document was comprised of a letter of that date from the first respondent to the appellant and supporting documents. The letter was headed:

> "ROMA HUB AND PIPELINES CONTRACT
> SUB-CONTRACT: SC1458 012
> RE: PAYMENT SCHEDULE FOR PAYMENT CLAIM No. 16"

[20] The letter stated:

> "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 scheduled 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."

[21] There then followed nine or so pages of claims, assertions and explanatory observations and some 40 pages of supporting documents.

The relevant provisions of the Building and Construction Industry Payments Act *2004 (Qld)*

[22] Sections 17, 18, 21 and 24 of the Act relevantly provide:

> "**17 Payment claims**
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).
>
> (2) A payment claim—
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and
>
> (c) must state that it is made under this Act.
>
> …
>
> (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

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

18 Payment schedules

(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must state the amount of the payment, if any, that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

(4) Subsection (5) applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

…

21 Adjudication application

(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if—

(a) the respondent serves a payment schedule under division 1 but—

(i) the scheduled amount stated in the payment schedule is less than the claimed amount stated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to serve a payment schedule on the claimant under division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

…

(3) An adjudication application—

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) must be made within the following times—

(i) for an application under subsection (1)(a)(i)—within 10 business days after the claimant receives the payment schedule;

(ii) for an application under subsection (1)(a)(ii)—within 20 business days after the due date for payment;

(iii) for an application under subsection (1)(b)—within 10 business days after the end of the 5 day period referred to in subsection (2)(b); and

(d) must identify the payment claim and the payment schedule, if any, to which it relates; and

(e) must be accompanied by the application fee, if any, decided by the authorised nominating authority; and

(f) may contain the submissions relevant to the application the claimant chooses to include.

…

24 Adjudication responses

(1) Subject to subsection (3), the respondent may give the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within the later of the following to end—

(a) 5 business days after receiving a copy of the application;

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application.

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain the submissions relevant to the response the respondent chooses to include.

(3) The respondent may give the adjudication response to the adjudicator only if the respondent has served a payment schedule on the claimant within the time specified in section 18(4)(b) or 21(2)(b).

(4) The respondent can not include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant.

(5) A copy of the adjudication response must be served on the claimant."

Ground 1 - consideration

[23] If, as the parties accepted, only one payment schedule may be served in response to a payment claim, as a general proposition, whether a document is a payment schedule is to be determined by reference to the contents of the document and, in some circumstances, any accompanying or supplementary document. The fact that, as is the case here, a later document is described as a payment schedule and the earlier one is not would not normally bear on whether the earlier document is a payment schedule. The above proposition is qualified because it may be possible that the later document has some evidentiary value. Take, for example, circumstances in which there has been a course of dealing between the parties in which documents such as payment claims and payment schedules have been clearly identified in a particular way and the document alleged by the recipient to be a payment schedule lacks such identification. It may well be that the later document provided and described as a payment schedule would constitute some evidence of adherence to and continuance of the previous course of conduct.

[24] It follows from the foregoing discussion that I do not accept as correct the unqualified proposition that a document which meets the requirements of s 18 of the Act is necessarily a payment schedule. Section 18 does not so provide. It merely stipulates the matters which must be incorporated in a payment schedule. If the 6 March document had stated clearly to the effect that it was being provided in order to notify the first respondent of some disputed matters in advance of the preparation and delivery of a payment schedule, the 6 March document would not have constituted a payment schedule. It would not have been put forward as a payment schedule and the appellant would have been aware that it was not proffered by the first respondent as such. A document such as a payment schedule does not necessarily take its character only from its own form and content.

[25] The parties' arguments focussed, understandably, on whether the requirements of s 18 of the Act had been satisfied by the 6 March document. But, as the above discussion shows, compliance with such requirements was not the only relevant consideration. There was a challenge by the first respondent to the appellant's reliance on all three of the documents which comprised the 6 March document. It is not implicit in s 18 that a payment schedule must consist of only one document. It

would be surprising if the parliament had so intended. In substantial construction disputes, it is common place for documents disputing the validity of payment claims to contain schedules or appendices. Where more than one document is alleged to constitute a payment schedule, the validity or otherwise of the allegation must be tested by an analysis of the documents in question. It may be that one such document, although not part of a payment schedule, will be relevant to the assessment of whether the other documents constitute a payment schedule. Here, there was no suggestion that there were other extraneous circumstances that needed to be taken into account.

[26] I now turn to an analysis of the 6 March document. It is common ground that on 25 February 2013 the appellant served a payment claim on the first respondent. The following appeared at the foot of the first page of that document: "This is a Payment Claim made under the *Building and Construction Industry Payments Act 2004* (Qld)".

[27] The two page letter of 6 March stated, as part of its heading, "RE: PAYMENT CLAIM No. 16". It acknowledged the provision of the payment claim on 25 February, stated that "Payment Certificate No 16 together with supporting documentation" were attached and that "advice [as] to the major adjustments made to the claimed amount" was provided below.

[28] The payment certificate identified the payment claim to which it related. It stated, in effect, "the amount of the payment, if any, that the [first respondent] propose[d] to make"[3] was nil by identifying a credit balance in favour of the first respondent of $17,124,956.84.

[29] The "scheduled amount [was] less than the claimed amount".[4] The payment certificate, under the heading "DEDUCTION FROM CLAIMED AND ASSESSED VALUE" explained why the scheduled amount was less than the claimed amount in respect of all grounds of deduction, with the possible exception of "variations" and "back charges". In that regard, the payment certificate stated:

> "**VARIATIONS**
>
> Refer to Variation Register - 20,656,294.88 - 13,188,833.09
>
> …
>
> **BACK CHARGES**
>
> Refer to Back Charges Register -$1,858,103.52 - 15,113,597.13"

[30] The 6 March letter relevantly stated:

> "Variations Further to discussion please refer to variation register.
>
> Back Charges Please refer to Damages schedule D – MacDow has reconciled from the commencement of the Works all cost incurred which relates to plant and materials provided to the Sub-Contractor in the performance of the Works, which forms part of the Sub-Contractor

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3 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(2)(b).

4 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(3).

> Agreement responsibility to provided and accordingly back chargeable under the Contract."

[31] It may well be that there is a sufficient statement of "why the scheduled amount is less"[5] in the case of back charges and it is unnecessary to consider it in any detail. There was no reliance on the "Back Charges" item in submissions.

[32] The appellant criticised the primary judge's reasons insofar as it was held that the 6 March payment certificate did not "purport" to be a "payment schedule" under the Act.[6] It was submitted that there was no scope under the Act for determining whether a document is a payment schedule by reference to the author's subjective intention. It was further submitted that even if the author's subjective intention was relevant, the primary judge's finding was contrary to the express terms of cl 10.10(b)(i) of Schedule B of the sub-contract which provided, "A 'payment schedule' for the purposes of the Act is a Payment Certificate". It was said that, where parties have agreed to use their own terminology to define a "payment certificate" as a "payment schedule", it cannot be said that a document which purports to be a "payment certificate" does not purport to be a "payment schedule".

[33] The criticism of the primary judge's reasons for taking into account what the 6 March document did or did not purport to be was ill-founded for the reasons discussed above.

[34] The first respondent pointed out that, although the sub-contract provides that "[a] 'payment schedule' for the purposes of the Act is a Payment Certificate or a Final Certificate as the case may be", it is silent as to the reverse position; it says nothing about payment certificates. The point has some substance but, in my view, cl 10.10(b)(i) which provides: "A 'payment schedule' for the purposes of the Act is a Payment Certificate or a Final Certificate as the case may be" and cl 10.10(a)(iii), which provides: "A 'payment claim' for the purposes of the Act is a Sub-Contractor's Payment Claim pursuant to clause 10.1 and 10.6", are indicative of an intention to harmonise the traditional means of payment with the requirements of the Act. Although the wording of the sub-contract is insufficient to fulfil this objective, the approach taken in the sub-contract suggests that the appellant's failure to use the description "payment schedule" on the payment certificate is of less significance than may otherwise have been the case.

[35] Whatever may have been the position if the payment certificate had omitted to state "why the scheduled amount [was] less"[7] than the claimed amount in respect of some relatively minor item, the failure to provide such a statement in respect of "variations", which constituted the major part of the appellant's deductions from the claimed amounts, made the payment certificate, taken alone or together with the letter and email of 6 March, unrecognisable as a payment schedule under the Act. The 6 March document was, on its face, patently incomplete in one critical respect.

[36] The identification of a deduction of $20,656,294.88 on account of variations accompanied by a direction to "Refer to Variation Register" does not amount to a statement of "why the scheduled amount is less"[8] than the claimed amount. What

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5 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(3).

6 *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators appointed) (Receivers and Managers appointed) & Ors* [2013] QSC 223 at [50]–[52].

7 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(3).

8 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(3).

was done merely notifies the fact that a certain sum was deducted in respect of "variations", not why it was deducted. As Chesterman J observed in *Minimax*:[9]

> "… The whole purpose of [a payment schedule] 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 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."

[37] Were it not for this deficiency, it seems to me that the 6 March document may well have constituted a payment schedule. It was provided as a considered and detailed response to the payment claim. There was no suggestion in the 6 March document, putting aside the deficiency in relation to variations, that it was provisional in any way or that a further and more detailed response to the payment claim would be forthcoming.

[38] The question whether the deficiency in the 6 March document was remedied by incorporating parts of the 8 March document remains. The first respondent submitted, and I accept, that there can be no objection in principle to an obviously incomplete purported payment schedule being completed, within time, by the provision of the omitted material. In this case, however, the missing material is the "variation register". The evidence does not disclose whether any variation register existed at relevant times. Even if it existed, its content remains unknown. The information contained in the 8 March document cannot assist. Everything in or provided with the 8 March document was provided as part of a separate document intended to take effect as a payment schedule and not as part of or as a means of rectifying deficiencies in the 6 March document. Nor does the evidence show that Schedule B to the 8 March document, which is headed "Subcontractor's Payment Claim – SCHEDULE B (Variations)", is the "variation register" referred to in the 6 March letter. A claimant cannot be expected on its own initiative to compose a payment schedule for a respondent by assembling miscellaneous documents received from the respondent until the assembled materials satisfy the requirements of s 18 of the Act.

[39] This ground of appeal was not made out.

Ground 2 – the primary judge erred in taking into account considerations as to what the first respondent "purported" the 6 March document to be in determining whether that document was a "payment schedule" for the purposes of s 18 of the Act

[40] This ground has been dealt with above. The primary judge was correct in considering it relevant that the 6 March document did not purport to be a payment schedule. The subjective intention of the first respondent may not be relevant;

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[9] *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors* [2007] QSC 333 at [27].

however, the manner in which the 6 March document was described by the first respondent in that document or in any accompanying document was relevant for the reasons discussed earlier.

Ground 3 – the primary judge erred in finding that the 6 March document was not a payment schedule for the purposes of s 18 of the Act

[41] The arguments in relation to this ground have already been discussed. The primary judge did not err in this regard.

[42] The grounds raised in the first respondent's notice of contention are now addressed.

The adjudication decision was void because:

(a) at the time the payment claim the subject of the decision was served by the appellant there was a valid and subsisting charge pursuant to the *Subcontractors' Charges Act* 1974 (Qld) (the Charges Act) relating to construction work the subject of the construction contract pursuant to which the payment claim was made; and

(b) Section 4 of the Act prohibits the service of a payment claim in such circumstances

[43] The primary judge found against the first respondent on this argument. He found that there was nothing in the language of s 11(8) of the Charges Act, or the contents of the approved form, which required the conclusion 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".[10] The primary judge found that if, contrary to his view, a notice in the approved form was a necessary prerequisite to the withdrawal of a notice of claim of charge, there had been sufficient compliance with the requirements of s 11(8). His Honour held that as s 11(8) merely required notice to be given "in the approved form", substantial compliance was sufficient by virtue of s 49(2) of the *Acts Interpretation Act* 1954 (Qld).[11]

[44] The first respondent submitted that there could not have been "substantial compliance" with s 11(8) as the appropriate form, Form 5, was not used. Moreover, what was done did not meet the requirements of the form by:

(a) identifiying the contract between the employer and the contractor;

(b) stating the amount claimed;

(c) giving particulars of the claim;

(d) stating the date of the notice of claim of charge;

(e) stating the dates between which the work was carried out;

(f) stating whether the claim was wholly or partially withdrawn (and, if partially, the amount being withdrawn); and

(g) being executed by an officer of the claimant and witnessed.

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10 *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd (Administrators appointed) (Receivers and Managers appointed) & Ors* [2013] QSC 223 at [37].

11 Now *Acts Interpretation Act* 1954 (Qld), s 48A(2).

Consideration

[45] The appellant served on Fluor and the first respondent three notices of claim of charge, two of which were dated 8 February 2013 and the third of which was dated 11 February 2013, each for a different amount. On 15 February 2013, the first respondent wrote to the appellant demanding that the notices be withdrawn. It was asserted that they did not comply with the Charges Act and that they were made without grounds. Fluor wrote to the first respondent on 19 February 2013 advising that it had received the three notices of claim of charge.

[46] On 20 February 2013, the appellant wrote to the first respondent, forwarding a copy to Fluor, acknowledging receipt of the first respondent's 15 February 2013 letter. The appellant quoted the reference on the first respondent's letter. In its letter, the appellant accepted that its notices of claim of charge were invalid and of no effect.

[47] Form 5 contains provision for the information described in paragraph [44] above. The letter of 20 February 2013 was not in the approved Form 5 but there was, nevertheless, substantial compliance with the form in the circumstances. The plain import of the letter was that the three notices were accepted to be invalid and were effectively being withdrawn. The notices were clearly identified in the first respondent's 15 February letter, which was incorporated in the 20 February letter by reference. The 15 February letter also identified the head contract and the sub-contract. The two letters, between them, provided the respective addresses of the claimant and contractor. The amounts claimed in each notice of claim of charge were stated in the 15 February letter. The particulars of claim were not provided, but part of the reason for the agreed invalidity of the notices of claim of charge was that they had failed to provide any such particulars. The 20 February letter was signed by the appellant's managing director. His signature was not witnessed but, as the primary judge pointed out, in effect, the witnessing of the signature was something of a formality. No declaration was required and the witness was not required to have any particular qualification or to be a member of any particular class of persons. The fact that the 20 February letter was on the appellant's letterhead and addressed to an officer of the first respondent with whom the appellant had been dealing is a further circumstance suggesting that the failure to obtain a witness to the managing director's signature was inconsequential.

[48] Although it is unnecessary to decide the point, there is merit in the primary judge's view that a failure to give notice of withdrawal of a notice of claim of charge in the approved form does not render a clear and unequivocal statement to the superior contractor and the contractor to whom the money is payable ineffective. There is an even stronger argument that the reference to a notice of claim of charge being "withdrawn" in s 4(6) of the Act is a reference to the withdrawal of a notice of claim of charge in such a way that is effective in respect of all relevant parties regardless of whether it is in the approved form. Yet another difficulty confronting the first respondent is that s 4 of the Act applies only if a person gives a notice of claim of charge under the Charges Act.[12] On the face of it, it is implicit in those words that the notice must be valid. The parties proceeded at relevant times on an assumption or acceptance of invalidity.

[49] Accordingly, this ground was not made out.

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12 *Building and Construction Industry Payments Act* 2004 (Qld), s 4(1).

The decision was void and of no effect because if the 6 March document was the payment schedule, the third respondent was required by s 26(2)(d) of the Act to consider submissions, including relevant documentation, properly made in support of that payment schedule but failed to do so

[50] In view of the conclusion that the 6 March document was not the payment schedule, this ground does not require any further consideration.

The decision was void because the third respondent determined the question of entitlement to the variations claimed by the appellant in the payment claim:

(a) on a basis for which neither party contended;

(b) on the incorrect assumption that the first respondent implicitly accepted the claimed variations;

(c) without reference to the material before him;

(d) without assessing and determining for himself the merits of the variations claimed or value of the variations claimed.

In acting as he did, the third respondent failed to discharge his statutory function as an adjudicator, an essential pre-condition to the existence of a valid determination under the Act.

[51] It is also unnecessary to deal with this contention in any more detail in view of the finding that the adjudicator based his determination on a document which was not the payment schedule.

Conclusion

[52] The appellant argued that the fact that, pursuant to s 21 of the Act, the adjudication process can be enlivened where there has been no payment schedule is consistent with the ascertainment of whether a payment schedule exists not being a jurisdictional fact. That being so, the determination of what is the payment schedule for the purposes of s 26(2)(d) of the Act is something reserved exclusively for the adjudicator. This argument cannot be accepted.

[53] The nature of a "jurisdictional error" was the subject of the following discussion by Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Craig v South Australia*:[13]

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.

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13 (1995) 184 CLR 163 at 177–178.

> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers … *[A]n inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case.* Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern." (citations omitted and emphasis added)

[54] Later in their reasons, their Honours contrasted the position of an inferior court in relation to jurisdictional error with that of an administrative tribunal:[14]

> "The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is [a] jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions

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14 *Craig v South Australia* (1995) 184 CLR 163 at 179–180.

> and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

[55] In *Kirk v Industrial Court (NSW)*,[15] the majority summarised the discussion of jurisdictional error by the Court in *Craig*,[16] as follows:

> "The Court in *Craig* explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows.
>
> First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist' (emphasis added). Secondly, the Court pointed out that jurisdictional error 'is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*' (emphasis added). (The reference to '*theoretical* limits' should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken [into] account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case. The Court said of this last

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15 (2010) 239 CLR 531 at 573–574.

16 *Craig v South Australia* (1995) 184 CLR 163 at 176–180.

> example that 'the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern' and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes*, *R v Gray; Ex parte Marsh* and *Public Service Association (SA) v Federated Clerks' Union*." (citations omitted)

[56] Section 26(2) of the Act required the adjudicator to have regard **only** to certain matters in deciding the adjudication application. Pursuant to s 26(2)(d), one such matter was "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".

[57] The reference in s 26 of the Act to a payment schedule must be taken to be a reference to a document properly recognisable as such: one which complies with the requirements of s 18 and is thus valid.

[58] The adjudicator committed a jurisdictional error by considering and basing his decision on the 6 March document, which was not a payment schedule, and by not considering the actual payment schedule (the 8 March document) and the documentation provided by the first respondent in relation to that payment schedule.

[59] The adjudicator lacked authority to decide an adjudication application, where a payment schedule existed and was relied on by the respondent to the application, other than by reference to that payment schedule. Also, to adopt the language of the joint reasons in *Craig*, the adjudicator failed to take into account a matter or circumstance which the Act conferring jurisdiction required be taken into account. He also ignored relevant material.

[60] In so concluding, I have in mind the different approach taken to jurisdictional error in relation to superior courts on the one hand and inferior courts and tribunals on the other.[17]

[61] The appellant submitted that the appropriate course to follow in the event that the adjudicator's decision was ruled invalid was to remit the matter to the adjudicator for determination according to law. This was said to be the order which would best give effect to the purposes of the Act. The first respondent submitted that the matter should not be remitted to the adjudicator. It was submitted that *State of Queensland v Epoca Constructions Pty Ltd & Anor*[18] and *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor*,[19] upon which the appellant relied did not support the making of such an order. Rather, it was submitted that, in *Hansen Yuncken*, Philip McMurdo J doubted the availability of relief in the nature of a prerogative remedy following the amendment of the *Judicial Review Act* 1991 (Qld) to exclude, under Schedule 1, Part 2, decisions under the Act.[20] *Epoca Constructions* was decided before the *Judicial Review Act* amendments.

[62] There are obvious difficulties in the way of a remittal. Section 25(3) of the Act requires an adjudicator to decide an application:[21]

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17 *Craig v South Australia* (1995) 184 CLR 163 at 177–180.

18 [2006] QSC 324.

19 [2011] QSC 327.

20 *Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor* [2011] QSC 327 at [144].

21 *Building and Construction Industry Payments Act* 2004 (Qld), s 25(3)

> "(a) within 10 business days after the earlier of—
>
> (i) the date on which the adjudicator receives the adjudication response; or
>
> (ii) the date on which the adjudicator should have received the adjudication response; or
>
> (b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days."

[63] These requirements are consistent with the aim of the Act to provide contractors and sub-contractors with an expeditious, simple and cheap means of obtaining progress payments.

[64] Section 32 applies, inter alia, where an adjudicator does not decide an adjudication application within the time allowed by s 25(3). In that circumstance, the claimant may withdraw the application and make a new application under s 21.[22] Despite the requirements of s 21(3)(c) as to the times within which adjudication applications must be made, in accordance with s 32(3), a new adjudication application "may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under [s 32(2)]".[23]

[65] The consequence of the earlier finding of jurisdictional error is that the decision is "regarded, in law, as no decision at all".[24]

[66] Accordingly, the adjudicator failed to decide the application within the time allowed by s 25(3) and s 32(1)(b) of the Act was satisfied. The claimant was thus entitled to withdraw the application under s 32(2)(a) on the 11th business day after the date on which the adjudicator received the adjudication response. Under s 32(3) of the Act, the five business day period within which a new adjudication application had to be made ran from that date, that is the 11th business day after the date on which the adjudicator received the adjudication response. Unless the mechanism of s 32 is engaged, there is nothing in the Act which directly or indirectly relieves the adjudicator of the obligation to decide an adjudication within the times allowed by s 25(3).

[67] In the absence of more comprehensive argument on this Court's power to remit an adjudication to an adjudicator in the circumstances under consideration, I prefer to base my decision on discretionary grounds. In my view, the following matters tell against the remittal sought by the appellant. The provision of such a remedy would be contrary to the quick, cheap and simple processes envisaged by the Act. Moreover, as Macfarlan JA pointed out in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*,[25] by the time the adjudicator decided the matter after remittal, circumstances may have changed significantly from the time when the adjudicator

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22 *Building and Construction Industry Payments Act* 2004 (Qld), s 32(2).

23 *Building and Construction Industry Payments Act* 2004 (Qld), s 32(3).

24 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]; see also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614–615 [51]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at 997 [29]; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [52].

25 (2011) 81 NSWLR 716 at 738.

was considering his original determination. The payment schedule may be outdated. Other defects may have come to light. The removal of adjudicator's decisions under the Act from the scope of Judicial Review is a further indication of a legislative desire that the Act's mechanisms be quick, cheap and simple. Also any remittal order would necessarily require the adjudicator to make a decision outside the time permitted by s 25(3) unless the parties agreed to an extension of time.

[68] Accordingly, I would order that the appeal be dismissed with costs.

[69] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.

[70] **MORRISON JA:** I have read the reasons of Muir JA and agree with his Honour and the order he proposes.