SUPREME COURT OF QUEENSLAND

CITATION:	*Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80
PARTIES:	**NORTHBUILD CONSTRUCTION SUNSHINE COAST PTY LTD ACN 112 429 302** (Applicant) **v** **BEYFIELD PTY LTD trading as EAST COAST MECHANICAL SERVICES** ACN 055 838 438 (First Respondent) **ADJUDICATE TODAY PTY LTD** ACN 109 605 021 (Second Respondent) **DAMIAN MICHAEL** (Third Respondent)
FILE NO/S:	BS 7900 of 2013
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2014
JUDGE:	Philip McMurdo J
ORDER:	**It will be ordered that:** **1. the adjudication decision made by the third respondent dated 9 August 2013 is declared to be of no effect;** **2. the first respondent pay to the applicant the sum of $348,825.43.**
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, as head contractor, entered into a construction contract with the first respondent, as subcontractor – where

the first respondent made a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) – where the payment claim was referred to an adjudicator – where the adjudicator ordered the applicant to pay the first respondent – where the applicant seeks judicial review of the adjudicator's decision - where the applicant contends that the adjudicator's decision was affected by jurisdictional error – whether the adjudicator misinterpreted the contract – whether misinterpretation of the contract amounts to a jurisdictional error.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the applicant, as head contractor, entered into a construction contract with the first respondent, as subcontractor – where the first respondent made a payment claim pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) – where the payment claim was referred to an adjudicator – where the adjudicator ordered the applicant to pay the first respondent – where the applicant seeks judicial review of the adjudicator's decision - where the applicant contends that the adjudicator denied the applicant natural justice – whether the adjudicator reached its decision on grounds not advanced by the parties – whether the adjudicator should have afforded the parties the opportunity to present further submissions.

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 18, s 21, s 25(4), s 26(2), s 26(3)

Andrews v Australia and New Zealand Banking Group Limited (2012) 247 CLR 205
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2013] QCA 394
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393
Clyde Bergemann Senior Thermal Pty Ltd v Barley Power Services Pty Ltd [2011] NSWSC 1039
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2011) 63 NSWLR 385
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531
Musico v Davenport [2003] NSWSC 977
Northbuild Construction Pty Ltd v Central Interior Lining Pty Ltd [2012] 1 Qd R 525
Spankie v James Trowse Constructions Pty Ltd (No. 2)

[2010] QSC 166
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2008] NSWSC 399
Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd [2012] 2 Qd R 90
Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168
Watpac Construction (Qld) Pty Ltd v KLM Group Ltd [2013] QSC 236

COUNSEL: M T Labone for the applicant

P Dunning QC, with M Hindman, for the first respondent

No appearance for the second and third respondents

SOLICITORS: BCCS Law for the applicant

CBP Lawyers for the first respondent

[1] This is a challenge to an adjudication decision dated 9 August 2013, whereby the applicant ("Northbuild") was required to pay to the first respondent ("Beyfield") a total of $333,382.51.

[2] Northbuild was the head contractor for a construction project on Thursday Island. Beyfield was one of its subcontractors.

[3] Beyfield made an adjudication application to the second respondent as an authorised nominating authority under s 21 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"). It referred that application to the third respondent who became the adjudicator. The second and third respondents have taken no active part in this proceeding.

[4] The adjudicator's decision is challenged on many bases. It is said that he exceeded his jurisdiction, failed to consider the matters which he was required to consider under s 26(2) of the Act, denied Northbuild natural justice and failed to give sufficient reasons for his decision.

[5] Northbuild's case challenges the adjudicator's decision in respect of three distinct components of Beyfield's claim. The first is Beyfield's claim for so-called "delay costs", for which the adjudicator allowed Beyfield an amount of $288,379.90. The second is for a variation described as VO28, for which the adjudicator awarded $8,192. The third is for the variation described as VO29, for which he awarded $1,683. Northbuild also challenges the adjudicator's conclusion to refuse it a set-off.

Delay costs

[6] The subcontract relevantly provided as follows:

> "19. EXTENSION OF TIME
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> (a) The Subcontractor will be entitled to an EOT as assessed by the Builder if:

(i) the Subcontractor is or will be delayed in reaching Substantial Completion by the Completion Date by a Qualifying Cause; and

(ii) the Subcontractor gives the Builder a written claim for an EOT evidencing the facts of the cause and of the delay to the Works within 7 Days of when the Subcontractor ought reasonably have become aware of the delay occurring.

(b) If the Subcontractor does not strictly comply with the requirements set out in clause 19(a), the Subcontractor will not be entitled to claim, or be granted, an EOT.

(c) Within 14 Days of receiving the Subcontractor's written claim for an EOT, the Builder must give a direction as to the EOT assessed, either:

(i) granting the claim for an EOT in full;

(ii) granting part of the claim for an EOT giving reasons why the claim is partly rejected; or

(iii) rejecting the claim giving reasons why the claim is rejected in full.

(d) Notwithstanding paragraph (c) the Builder may for its own benefit only and in its sole and absolute discretion, at any time for any reason, direct an EOT. The Subcontractor is not entitled to any delay costs in connection with an EOT directed under this clause 19(d).

(e) For every day the subject of an EOT, which has been claimed by the Subcontractor and assessed by the Builder in accordance with this clause 19, the Subcontractor may make a claim for delay costs under clause 32 for those costs reasonably and necessarily incurred by the delay. The Subcontractor is not entitled to make a Claim in connection with any such delay other than under clause 32.

32. NOTIFICATION OF CLAIMS

(a) Notwithstanding any other provision of this Subcontract, the Builder will not be liable upon any Claim (other than a claim for a progress payment under clause 21) by the Subcontractor in respect of any matter arising out of or in connection with this Subcontract, the subject matter of this Subcontract or

otherwise, including but not limited to, variations and claims for any form of loss or damages unless:

(i) a notice of claim, together with full particulars thereof is lodged in writing with the Builder not later than the time specified in this Subcontract, or if no time is stated, 10 Business Days after the date the Subcontractor becomes aware or should have become aware of the occurrence of the events or circumstances on which the Claim is based; and

(ii) the notice outlines the legal basis of the Claim and full details of the likely quantum.

(b) If the Subcontractor does not give the Builder the notice in accordance with clause 32(a), the Subcontractor shall not be entitled to the Claim and the Builder will be released for all time from the Claim.

(c) Within 10 Business Days of receipt of a notice of claim under clause 32(a) the Builder shall assess the notice of claim and notify the Subcontractor in writing of the decision on the claim.

(d) Unless the Subcontractor within a further 10 Business Days of such notification gives a notice of dispute under clause 33 which includes such a decision, the decision will be final and binding on the parties and will not be subject to review."

[7] It is common ground that the effect of these provisions was to entitle Beyfield to delay costs if and when it claimed an "EOT", and that EOT was "assessed by [Northbuild]". Beyfield could then pursue that entitlement by a claim for those costs under cl 32.

[8] It is also common ground that any progress payment to be awarded by the adjudicator had to be for an amount or amounts to which Beyfield was entitled to be paid as at the "reference date", which was 24 May 2013. That is because s 12 of the Act provides that "from each reference date under a construction contract, a person is entitled to a progress payment …".

[9] In his reasons, the adjudicator found that Beyfield claimed an EOT on 28 May 2013. It did so in a letter dated 24 May 2013 but the adjudicator had evidence from Northbuild that the letter was not served until 28 May, as is conceded in an affidavit of Beyfield's Mr Beil.[1]

[10] Northbuild submitted to the adjudicator and in this hearing that there could have been no entitlement to any payment for delay prior to at least the service of the

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1 Affidavit filed 24 January 2014, paragraph 5.

notice seeking an EOT. As the relevant notice was served after the reference date, Northbuild argued, Beyfield could not have been entitled to anything for delay costs as at the reference date and the adjudicator had no jurisdiction to allow a component for delay costs.

[11] The adjudicator reasoned that because the relevant period or periods of delay all predated the reference date of 24 May 2013, he could include a component for delay costs. That reasoning is contained in the following passages from his decision:

> "76. … The Respondent further submitted that the EOT claims were made on 28 May 2013, being after the reference date of 24 May 2013 and, therefore, there is no entitlement to any EOT or to delay costs as at the reference date. Therefore, the Respondent's position is that there is no entitlement to a progress payment in respect of those claims. I do not agree.
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> …
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> 86. It is common ground that the reference date of the payment claim was 24 May 2013. The Respondent submitted that the EOT claims were made on 28 May 2013, being after the reference date of 24 May 2013 and there is no entitlement to any EOT or delay costs as at the reference date.
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> 87. If I accept the Respondent's proposition that the EOT and delay costs claims were made after the reference date of 24 May 2013, it does not matter for the purpose of this adjudication. The Respondent has not persuaded me that any of the days constituting the EOT and delay costs surpass the reference date. This is fundamental to the calculation of the claim for delay costs.
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> 88. The days claimed for the EOT in the Claimant's letter of 24 May 2013 do not appear to go beyond 22 May 2013 and the same can be said for the claim for delay costs."

[12] This reasoning was incorrect. Unambiguously, cl 19 entitled Beyfield to delay costs only upon an extension of time being granted under that clause. Until an EOT was granted, a claim could not be made for delay costs under cl 32. The fact that there had been relevant periods of delay did not entitle Beyfield to a payment unless and until it claimed an EOT which was granted by Northbuild. That had not occurred, on the adjudicator's reasoning, by the reference date.

[13] Northbuild says that this error was a jurisdictional error, in that the adjudicator misconceived his jurisdiction by awarding delay costs to which there was no contractual entitlement.

[14] Beyfield appears to accept that there was no entitlement to delay costs if there had not been a relevant claim or claims for an EOT prior to the reference date. It therefore accepts that if the adjudicator's reasoning was as I have described it, the adjudicator was in error. But Beyfield says that this was not a jurisdictional error. Further, Beyfield argues that the adjudicator's reasoning was not as I have described it, and that his conclusion about delay costs was not erroneous, because there were

relevant claims made for an EOT which predated the reference date and entitled Beyfield to the delay costs which were awarded by the adjudicator.

[15] It is convenient to deal first with the second of those submissions. Beyfield submits that the claim for an EOT which was served on 28 May 2013 was merely a compilation of earlier EOT claims, which were attached to the payment claim. These so-called earlier EOT claims were within the material submitted by Beyfield to the adjudicator. They were referred to in the adjudicator's reasons.

[16] At paragraph [76] of his reasons, the adjudicator noted that:

> 76. "The EOT register provided for fourteen separate delay notices which occurred during the project and also included a summary of the EOT notices which were previously provided to [Northbuild] under separate correspondence."

At paragraph [91], the adjudicator noted that Beyfield relied upon a certain expert's report "for the fourteen claims for EOTs prior to the claim made on or about 24 May 2013 for 228 days". At paragraph [93], he concluded:

> 93. "… on balance that [Beyfield] is entitled to the delay costs claimed in the payment claim arising from the days claimed as part of the overall EOT on or about 24 May 2013."

[17] Beyfield's argument emphasises those parts of the adjudicator's reasons. It suggests that they demonstrate that the adjudicator reasoned that those 14 notices were effective under cl 19 to create a contractual entitlement to delay costs by the reference date. That analysis of the adjudicator's reasons cannot be accepted. The adjudicator was well aware of the reliance by Beyfield upon those notices, as well as the notice which had been served on 28 May 2013. But even in the passages upon which Beyfield relies, it appears that the adjudicator was nevertheless considering "the claim made on or about 24 May 2013 for 228 days" being "the overall EOT [claimed] on or about 24 May 2013". And that impression is confirmed by reference to another part of the adjudicator's reasons, which is his consideration of the relevance of an earlier decision by another adjudicator, Mr Uher.

[18] In a decision dated 15 May 2013, Mr Uher had decided that Northbuild should pay to Beyfield an amount of $156,345.38 (including GST). Beyfield had claimed an amount of $610,579.46. That claim had included a component of $468,447.30 for what was described as a "Notice of Claim" purportedly made pursuant to cl 32(a) of the subcontract. Mr Uher described this component as a claim "for additional costs incurred by [Beyfield] as a result of delays to the Project allegedly caused by [Northbuild]".

[19] Mr Uher wrote about this component:

> "20. The Payment Claim does not say under what clause or clauses of the Contract Conditions [Beyfield] has made this claim but the letter dated 20 March 2013 [from Beyfield] refers to the Notice of Claim being made under Clause 32(a) of the Contract Conditions. That letter alleges that [Northbuild] has failed to serve on [Beyfield] a notice of probable causes of delay under Clause 17(a) of the Contract Conditions, which prevented [Beyfield] from complying

> with Clause 19 of the Contract Conditions. [Beyfield] contends that [Northbuild] has waived the requirements of Clause 19 and is now prevented from relying upon them."

(Clause 17(a) of the subcontract required each party to promptly notify the other in writing of "anything which will probably cause delay to the work".)

[20] Mr Uher found that Beyfield had not made "any EOT claims".[2] And he said that it was for Northbuild, and not an adjudicator, to "assess and grant EOTs".[3] He held that since Beyfield had not made any EOT claims, Northbuild had not been obliged to issue any notices under cl 19.[4] He concluded that as Beyfield had not "complied with the EOT mechanism in Clause 19 of the Contract Conditions to make out an entitlement to a claim for delay costs under Clause 32", this particular component of the claim had no merit and must fail.[5]

[21] In its Payment Schedule dated 21 June 2013,[6] Northbuild contended that the present claim for delay costs was in substance the same as that which had been rejected by Mr Uher. It was contended that Mr Uher's decision had created an issue estoppel which prevented Beyfield from claiming delay costs.

[22] That contention for an issue estoppel was addressed by Beyfield in its adjudication application. Beyfield there argued that there was no issue estoppel, because Mr Uher had decided only that, as at the earlier reference date which was relevant for his decision, Beyfield had not made any claims for extensions of time in accordance with the contract.[7]

[23] In its adjudication response (at least on one view) Northbuild pressed its argument for an issue estoppel, asserting that "the EOT claims have previously been determined and rejected in adjudication by Mr Thomas Uher".[8]

[24] Therefore the adjudicator here felt it necessary to consider whether Mr Uher's decision gave rise to an issue estoppel. The adjudicator reasoned as follows in relation to the Uher decision:

> "82. It was the Claimant's position that Uher had not allowed the delay claim, as it were, because the Claimant had not made any claim for EOTs in accordance with the Contract. However, the Claimant did claim an EOT after Uher's decision was published. I accept that Uher considered that delay costs were not recoverable in the absence of an EOT claim made under clause 19 of the Contract. The delay costs claim in the payment claim were for the value of $352,920.42 and as expressed as a delay claim based on the Claimant's EOT claim dated 24 May 2013.
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> 83. The Claimant has taken me to the decisions of *Abel Point Marina (Whitsundays) Pty Ltd v O'Brien & Anor* [2007]

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2 His decision, paragraph 43.
3 Ibid 43.
4 Ibid 45.
5 Ibid 46.
6 Served under s 18 of the Act.
7 Adjudication application, paragraph 72.
8 Adjudication response, paragraph 3.9.

> QSC 91 and *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd* [2010] QSC 159. I respectfully agree with those decisions of the Court and accept the Claimant's construction that is to be placed on them that apply to the present circumstances. This is that Uher only decided that the Claimant was not entitled to make a claim for delay costs in the absence of a claim for an EOT under the Contract.
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> 84. The decision of Uher that held that the Claimant was not entitled to make a claim for delay costs in the absence of a claim for an EOT under the Contract was a different issue from the present claim before me arising from the payment claim and the adjudication application. The Claimant claimed an EOT and has made a claim for delay costs arising from a number of days arising from the EOT. …
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> 85. I do not consider that the findings of Uher operate as an issue estoppel with respect to the Claimant's present claim for its EOT of 24 May 2013 followed by its claim for delay costs."

[25] The adjudicator correctly noted that Mr Uher had not allowed the delay claim because in Mr Uher's view, Beyfield had not made any claim for an EOT under cl 19. The adjudicator here did not express any contrary view. In particular, the adjudicator did not hold that the earlier notices upon which Beyfield now relies were claims for extensions of time made under cl 19. Rather, it was the adjudicator's view that no claims had been made under cl 19 prior to Mr Uher's decision which was important in the adjudicator's rejection of an argument for an issue estoppel. He reasoned that the issue in this adjudication was different, because it involved a claim for delay costs based upon a notice which had been given after Mr Uher's decision, namely that which was served on 28 May 2013.

[26] Therefore it is clear that the adjudicator did not uphold Beyfield's delay costs claim upon the basis that it had been the subject of notices given under cl 19 prior to the reference date. Rather, it is clear that that claim was upheld upon the erroneous view that although no notice had been given under cl 19 prior to the reference date, it could be awarded delay costs because the relevant periods of delay preceded that date.

[27] The question then is whether this was a jurisdictional error. It is insufficient for Northbuild to demonstrate an error of law by the adjudicator. It must establish that the error was about the adjudicator's jurisdiction and had the consequence that his decision was not within that jurisdiction and therefore should be given no effect under the Act.[9]

[28] In *Kirk v Industrial Court of New South Wales*, the majority said that it was not possible "to attempt to mark the metes and bounds of jurisdictional error".[10] In this case, as in many others where a challenge is made to an adjudication under the Act,

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

10 (2010) 239 CLR 531 at 573 [71].

the argument for a jurisdictional error arises where an adjudicator has awarded an amount to which the claimant was not contractually entitled.

[29] To determine an application, an adjudicator must identify the relevant terms of the contract upon which the claim is made and then apply the facts, as he or she finds them to be, to those terms upon their proper interpretation. The identification of the terms and the interpretation of those terms are thereby questions which the adjudicator must answer in the exercise of his jurisdiction. It follows that an error in the identification of the terms or in their interpretation will not be a jurisdictional error: *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*;[11] *Clyde Bergemann Senior Thermal Pty Ltd v Barley Power Services Pty Ltd*;[12] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*.[13]

[30] However, where it appears that an adjudicator is not meaning to apply the contract, as he or she interprets it, but is instead allowing the claim upon some other basis, the position is different, because the adjudicator is thereby misunderstanding the scope of the adjudicator's jurisdiction. An example is the allowance for termination costs in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*,[14] which Applegarth J held was the result of a jurisdictional error, a conclusion which the parties accepted on the arguing of the appeal.[15] The error as to termination costs in that case has some resemblance to the error about delay costs in the present case. That contract was terminated with effect after the reference date. And the entitlement to be paid termination costs depended upon the delivery of a claim, after termination, under a certain clause of that contract.[16] The adjudicator there accepted an argument that the claimant was entitled to these costs because they were incurred before the reference date. The claimant had advanced its case in reliance upon a certain provision of the contract, which in truth did not provide a basis for a contractual entitlement as at the reference date, at least because no notice claiming those costs had been made under that clause by the reference date. Applegarth J held that the adjudicator's reasons did not identify any source of contractual entitlement, other than the clause upon which the claimant relied and it was not to the point that the claimant submitted to the court that it could have advanced its claim upon some other provision of the contract which was not considered by the adjudicator. Applegarth J concluded that the adjudicator there had not interpreted the contract and that the adjudicator's reasons did not suggest that he regarded the entitlement as one sourced in the provision upon which the claimant then relied. Instead, his Honour said, the adjudicator's reasons indicated "that he concluded that there was an entitlement simply because the costs had been incurred before the reference date".[17] Therefore that adjudication did not involve a purported application of the contract.

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11 (2011) 63 NSWLR 385 at 399 [52] per Hodgson JA.

12 [2011] NSWSC 1039 at [44] per McDougall J.

13 [2012] QSC 346 at [8] per Applegarth J, whose reasons on this point were not criticised on appeal: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394; see also *Watpac Construction (Qld) Pty Ltd v KLM Group Ltd* [2013] QSC 236 at [21] to [24].

14 [2012] QSC 346.

15 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394 at [49]. Rather, the question on that appeal was whether the jurisdictional error in awarding this component of the claim infected the entire decision such that it was to be given no effect.

16 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 at [39].

17 [2012] QSC 346 at 55.

[31] The present case has some similarity with that case because this adjudicator concluded that delay costs could be awarded because the delays and the consequent costs had occurred by the reference date. But what must be presently considered is the reasoning of this adjudicator. In holding that it was sufficient that the delays were incurred prior to the reference date, was he interpreting, albeit incorrectly, cl 19 of the contract? Or was the effect of his reasoning that there was a right to delay costs quite apart from the contract?

[32] The characterisation of the adjudicator's reasoning is affected by other conclusions of the adjudicator about cl 19. He held that the fact that the subcontractor did not make a written claim for an EOT within the period of seven days specified in cl 19(a)(i) did not matter because Northbuild's reliance upon that fact would make this a "pay when paid provision within the meaning of s 16 of the Act"[18] and "tantamount to contracting out of the Act under s 99".[19] Secondly, he concluded that the same time specification in cl 19 was a penalty and thereby unenforceable, upholding a submission by Beyfield to that effect which it had asserted supported by *Andrews v Australia and New Zealand Banking Group Limited*.[20] Having held that this was a penalty, the adjudicator wrote that that conclusion (together with some other submissions of Beyfield) established that "the claimant's claims cannot be time barred and its *entitlement under the contract* is unaffected in the circumstances".[21]

[33] That last-mentioned reference to the contract fortifies my view that the adjudicator was meaning to apply the contract. The better view of his reasoning is that he considered that cl 19 entitled the subcontractor to delay costs, notwithstanding the absence of a claim for an EOT within the period of seven days specified in the clause or by the reference date. In his view, cl 19 operated to give the subcontractor a relevant entitlement once a notice, namely that served on 28 May 2013, was given as long as the delay in question had predated the reference date.

[34] Therefore I am not persuaded that his error was a jurisdictional error. But rather it was an error in the interpretation of the contract which was a task within his jurisdiction.

[35] Northbuild then challenges the adjudicator's conclusion as to delay costs upon another ground, which is that Northbuild was denied natural justice. It argues that the adjudicator reached his conclusion upon a ground which had not been argued so that the adjudicator was obliged to give the parties notice so that they could address the point. There is a substantial denial of natural justice where an adjudicator decides a dispute on the basis for which neither party has contended, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.[22] A substantial denial of natural justice which the Act requires to be given will invalidate an adjudicator's decision such that it could be declared void.[23]

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18 Adjudicator's decision, paragraph 89.

19 Ibid.

20 (2012) 247 CLR 205 at 216 [6].

21 Adjudicator's decision, paragraph 90.

22 *Musico v Davenport* [2003] NSWSC 977; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at 313 [32]; *Spankie v James Trowse Constructions Pty Ltd* (No. 2) [2010] QSC 166 at [10]; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90 at [60].

23 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 441-442.

[36] An essential link in the adjudicator's chain of reasoning was that any period of delay predated the reference date. The notion that this circumstance, of itself, could create an entitlement to a payment, as at the reference date, was not suggested by either party's submissions which were made to the adjudicator or by the payment claim or the payment response. And it was not a point which should have been anticipated by Northbuild.

[37] In one way it could be said that Northbuild did make submissions which were relevant on this point, because it did submit (correctly) that there was no entitlement for delay costs absent the step or steps specified in cl 19 being taken by the reference date. That submission was rejected, but on the basis of a point which Northbuild, not unreasonably, had not addressed. The adjudicator was bound to seek submissions on the point, as he was permitted to do by s 25(4) of the Act. He thereby denied Northbuild natural justice, by denying it an opportunity to persuade him of the incorrectness of his reasoning on this essential point.

[38] It is unnecessary for Northbuild to demonstrate that it would have succeeded in persuading the adjudicator. It is sufficient in this context that there is "something to be put that might well persuade the adjudicator to change his or her mind".[24] In my view, there is a real prospect that the adjudicator would have been persuaded by a submission which specifically addressed this point of the relevance or otherwise of the delays preceding the reference date.

[39] It follows that the adjudicator's decision on the delay costs was made in breach of the requirement for natural justice to be provided. At least for this reason then, the adjudicator's decision should not be given effect.

[40] It is therefore unnecessary to consider other arguments which challenged the decision as to delay costs, but I will say something about them. It was suggested that the adjudicator did not genuinely attempt to consider matters specified in s 26(2) of the Act because, it is said, he merely adopted the case for Beyfield in certain respects. In particular, it is said that the adjudicator simply adopted Beyfield's submissions as to the time requirements in cl 19 being a penalty, without carrying out "an active process of intellectual engagement in relation to the issue".[25] Northbuild developed that argument by extensive submissions as to the error or errors in the adjudicator's reasoning on this "penalty" point. Those criticisms of the adjudicator's reasoning have force. But I am not persuaded that the adjudicator failed to consider the matters specified in s 26(2), and in particular the Payment Schedule and the submissions presented by Northbuild to him. Nor am I persuaded by the argument that the adjudicator's reasoning was insufficient to comply with the requirement for reasons which is specified in s 26(3) of the Act.

VO28

[41] This was a claim for a variation in an amount of $8,192, for which Northbuild submitted that no payment was due. It contended that Beyfield had failed to comply with the contractual requirements for a variation claim. About that submission, the adjudicator remarked that Northbuild's "propositions do appear to have some weight when considered in the context of the contractual terms …".[26]

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24 *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [45].

25 Applicant's submissions, paragraph 90.

26 Adjudicator's decision, paragraph 28.

[42] The adjudicator concluded as follows:[27]

> "36. The crux of the issue is whether the Claimant is entitled to the valuation for this variation in circumstances where it is agreeable that the works associated with this variation were carried out by the Claimant and in circumstances where there was delay in the Claimant not providing necessary information to the Respondent to allow it to claim this variation with the Principal under the Head Contract. The matters of 'pay when paid' provisions within the meaning of the Act and the no contracting out of the Act defined as that term in the Act was addressed earlier in this decision in the context of the Head Contract, but was not specific to the particular variations. I do not consider that this is an occasion to consider those provisions of the act and I take this matter no further.
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> 37. I accept, based on the information presented in this adjudication, that the Claimant did carry out the work that is the subject of this variation and I find that the Claimant is not deprived of its entitlement to payment under the Act as a result of the Respondent's contention that a term or condition of the Contract or Head Contract was not satisfied. I find in arriving at that view that the Contract and the Head Contract cannot engage contractual mechanisms determining what is due under the Contract, independently of calculations referrable to the work performed, when I am charged with the statutory task of deciding the value of the Claimant's entitlement to a progress payment for work performed.
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> 38. I therefore decide that the Claimant is entitled to the amount claimed for this variation."

This reasoning is not entirely clear, but it appears to be to the effect that the adjudicator considered that Beyfield's claim was inconsistent with the contract but that nevertheless the claim was to be allowed.

[43] Clause 20 of the subcontract dealt with variations. The works were not to be varied except in accordance with a written direction from the head contractor: cl 20(a). The price for a variation was to be as agreed or if not agreed, as determined by the head contractor: cl 20(d). If the subcontractor disputed the price of a variation, it could refer the dispute to dispute resolution under cl 33 of the subcontract within 10 business days. As Northbuild submitted to the adjudicator, Beyfield had not been given any written instructions to carry out the relevant work and nor had it requested that this work be treated as a variation, prior to Beyfield presenting this VO28 after the reference date.

[44] The adjudicator did not hold that in some way the requirements of cl 20 had been satisfied by the reference date. Nor did he identify any other provision of the contract which entitled Beyfield to this amount. Rather, he appears to have

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[27] Adjudicator's decision, paragraph 36 – 38.

concluded that Beyfield was entitled to payment notwithstanding the contract. In my conclusion, that was a jurisdictional error, for reasons which should appear in the above discussion in relation to delay costs. Northbuild has thereby established a further ground for the invalidity of this decision.

[45] It is unnecessary to consider the alternative arguments in relation to VO28. However, there is force in the contention that the adjudicator denied natural justice by failing to give Northbuild an opportunity to address the proposition that, outside the terms of the contract, there was an entitlement to payment under the Act for this variation.

VO29

[46] This was submitted by Beyfield on 28 May 2013. It was undisputed that Beyfield had completed this work. But Northbuild argued that the work had been undertaken without any written instruction and again relied upon cl 20.

[47] The adjudicator stated that having accepted, "as a matter of fact", that the work had been done by Beyfield, Northbuild had "resiled from its prior position" by adopting the view of the superintendent, who was administering the head contract, about this variation. The adjudicator said that Northbuild had "taken no issue with the nature of this variation as a variation"[28] and that Northbuild had appeared "to accept that some amount is due and payable to the claimant".[29]

[48] As to the quantification of the claim, the adjudicator said that Northbuild must show "some reason why the claim is excessive, and not simply rely upon a statement that the amounts claimed are excessive".[30] He allowed the amount claimed, which was for $1,683.

[49] Northbuild now complains that the adjudicator misunderstood its case. In its adjudication response, Northbuild had said that VO29 should be valued at nil. It did not accept that some amount was due to Beyfield as at the reference date. Consequently, says Northbuild, the adjudicator did not discharge his obligation, under s 26(2)(d) of the Act, to consider all submissions which had been made to him.

[50] Northbuild is critical of the adjudicator's comment that it had "resiled from its prior position". But in context, this was a reference to the tension, as the adjudicator saw it, between Northbuild's acceptance that the work had been done and its later position, in reliance upon the superintendent's view, that for a number of reasons (generally dealing with quantum and the quality of the work),[31] the performance of the work should be disputed. I see no fair basis for complaint by Northbuild about that comment by the adjudicator.

[51] However the adjudicator appears to have erred in relation to VO29 as he did in respect of VO28. It is appropriate to read his reasons on this component with those on VO28, because his error in relation to VO28 can be seen as affecting his reasoning on VO29. Again he considered that he had power to approve a payment under the Act absent a contractual entitlement to that payment as at the reference

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28 Adjudicator's decision, paragraph 44.
29 Ibid.
30 Ibid 45.
31 Ibid 41.

date. Again Northbuild has demonstrated that there is a jurisdictional error affecting the decision.

[52] I was not persuaded by the other criticisms of the adjudicator's reasoning on VO29. It does not seem to me that the adjudicator failed to consider the submissions of Northbuild: rather he wrongly failed to accept them insofar as the effect of cl 20 was concerned. Nor was I persuaded by Northbuild's argument that it was denied natural justice by the comment that Northbuild had resiled from its prior position.

The set-off argument

[53] A further criticism of the decision was in respect of the adjudicator's reasons for concluding that Northbuild was not entitled to set-off an amount which it claimed to be owed by Beyfield in respect of transport provided by Northbuild, where (it argued) the subcontract required that transport to be provided by Beyfield. Clause 21(h)(iv) of the subcontract and (j) permitted the head contractor to deduct money that was owed to it from a payment to the subcontractor.

[54] The adjudicator reasoned as follows. He accepted Beyfield's submission, which was claimed to be supported by the judgment of McDougall J in *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd*,[32] that such a right of set-off must be exercised reasonably. He then concluded that it would be unreasonable for Northbuild to rely upon this set-off in the circumstance, as Beyfield alleged and which he accepted, that Beyfield had deducted $237,720 from its tender price (as against the $150,994.39 which Northbuild claimed as a set-off) upon the basis that Northbuild would be responsible for the cost of any sea freight. He concluded that Northbuild was not entitled to set off any amount for sea freight "on the basis that [Northbuild] has not acted reasonably in the circumstances of the set-off where an amount for sea freight was reflected in the reduction of the tender price".[33]

[55] I accept Northbuild's argument here that *Watpac v Austin Corp* provided no basis for Beyfield's submission to the adjudicator, and his conclusion, that the entitlement to a set-off was constrained by a requirement to act reasonably. But I do not accept that the adjudicator failed to consider the submissions of the parties or the terms of the contract. Rather, at its highest, Northbuild's argument goes no further than to demonstrate a likely error by the adjudicator. This "set-off" point provides no basis for holding that the decision was invalid.

Conclusion

[56] The adjudicator's decision was affected by jurisdictional error and by a failure to provide natural justice. The originating application seeks a declaration that the decision is void and for an order for repayment of the adjudicated amount which Northbuild has paid to Beyfield. There is no submission by Beyfield as to the appropriate orders if Northbuild has established that the adjudication resulted from a jurisdictional error or was affected by a denial of natural justice.

[57] It will be declared that the adjudication decision made by the third respondent and dated 9 August 2013 is of no effect.

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32 [2010] NSWSC 168.

33 Adjudicator's decision, paragraph 70.

[58] There should also be an order for repayment of the adjudicated amount with interest calculated at the rate used for default judgments, from the date of payment (21 August 2013) to the date of this judgment. That interest amounts to $15,442.92. It will be ordered that the first respondent pay to the applicant the sum of $348,825.43.