SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd & Anor* [2014] QSC 170
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD** (applicant) **v** **SUN ENGINEERING (QLD) PTY LTD** (first respondent) and **AUSTRALIAN BUILDING & CONSTRUCTION DISPUTE RESOLUTION SERVICE PTY LTD** (second respondent)
FILE NO/S:	5420/14
DIVISION:	Trial Division
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	31 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	23 July 2014
JUDGE:	Daubney J
ORDER:	**There will be an order dismissing WICET's application for an interlocutory injunction. Otherwise, I will hear the parties as to the necessary orders.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where the applicant is seeking to stay an adjudicator's decision made under *BCIPA* that required it to pay monies to the respondent - where the monies are currently being held in Court – where the respondent conceded that a "prima facie" case had been shown by the applicant – where the main issue turned on the balance of convenience – where the applicant submitted that it doubted the respondents financial capacity – where the applicant submitted it should not bear the risk that the respondent would be able to repay the monies the applicant is successful in the final hearing – where the respondent submitted that as a matter of policy under *BCIPA* the adjudicated amount should be paid to it – whether the applicant should bear the risk that if it is successful in the final hearing the respondent

would be unable to repay the monies

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where an adjudicator's decision was made in favour of the respondents – where the applicant will challenge the validity of the adjudicator's decision at a further hearing – where the applicant will argue that due to jurisdictional error the adjudicator's decision is void – where the applicant submits that the payment to the respondent should be stayed until the final determination – whether as a matter of statutory policy the applicant carries the risk that monies paid under an adjudicator's decision may not be refunded if the adjudicator's decision is void

Building and Construction Industries Payments Act 2004 (Qld), ss 29-31

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, followed
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
Chase Oyster Bar Py Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
J J McDonald & Sons Engineering Pty Ltd v Gall [2005] QSC 305, cited
Kingston Building (Australia) v Dial D Pty Ltd [2013] NSWSC 2010, cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1, considered
Live Earth Resource Management Pty Ltd v Live Earth LLC (2007) 73 IPR 289; [2007] FCA 1034, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, followed
R J Neller Building Pty Ltd v Ainsworth [2009] Qd R 390; [2008] QCA 397, followed
State of Queensland v Epoca Constructions Pty Ltd & Anor [2006] QSC 324, cited

COUNSEL: J C Bond QC with M H Hindman for the applicant
P Dunning QC with G D Beacham for the first respondent
No appearance for the second respondent

SOLICITORS: McCullough Robertson lawyers for the applicant
Holding Redlich for the first respondent
No appearance for the second respondent

[1] The applicant ("WICET") and the first respondent ("Sun") are parties to a contract for the construction of a rail retrieval facility, an overland conveyer, and a

substation, as part of the Wiggins Island Coal Export Terminal project. It is a construction contact which is governed by the provisions of the *Building and Construction Industries Payments Act* 2004 (Qld) ("*BCIPA*").

[2] On 3 July 2014 Sun obtained an adjudicator's decision under s 26 *BCIPA*. That decision required payment by WICET to Sun of $17,660,610.35 for work performed by Sun under the contract. WICET paid Sun an amount which WICET had accepted in its payment schedule[1] was due and payable to Sun, namely $4,710,955.19. The remaining amount (plus an amount for interest and the adjudicator's fees) has been paid into Court by WICET, in return for an undertaking by Sun not to enforce the adjudicator's decision until the determination of the present interlocutory application.

[3] Sections 29 to 31 of *BCIPA* provide that, in default of payment of an adjudicated amount by the 'relevant date'[2] a claimant (in this case Sun) may request the relevant nominating authority (here, the second respondent) to issue an adjudication certificate, and that certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction.[3]

[4] As is conventional in disputes of this nature, the second respondent has advised that it will abide the order of the Court, and on the basis that no party sought to call its conduct into question, did not seek to be heard.

[5] WICET contends that it should not have to pay the whole adjudicated amount to Sun because the adjudicator's decision is void for jurisdictional error on the part of the adjudicator. By an originating application filed on 11 July 2014, WICET seeks, relevantly, a declaration that the adjudicator's decision dated 3 July 2014 is void. The final hearing of that originating application has been set down for 14 and 15 August 2014.

[6] Sun does not accept that the adjudicator's decision was void for jurisdictional error, and was not prepared to wait until the resolution of the originating application for payment of the adjudicated amount. It was, however, prepared to preserve the status quo for a short period, to enable the present application by WICET for an interlocutory injunction to be heard. Accordingly, on 11 July 2014 the parties consented to orders by which, upon WICET giving the usual undertaking as to damages and undertaking to pay $13,671,016.81 into Court, interim injunctions were ordered and directions made to permit the present application for an interlocutory injunction to be heard. WICET complied with its undertaking to pay those monies into Court on 11 July 2014.

[7] Both parties were content to approach the present interlocutory argument on the basis of the conventional principles applicable to the grant of interlocutory injunctions. There was no issue that those are the principles affirmed by the High Court in *Australian Broadcasting Corporation v O'Neill*,[4] namely that there are two main inquiries:

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1 Served under *Building and Construction Industry Payment Act* 2004 (Qld) ("BCIPA"), s 18.
2 *BCIPA*, s 29(2).
3 *BCIPA*, s 31(1).
4 (2006) 227 CLR 57.

(a) Whether the applicant has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that, at the trial of the action, the applicant will be held entitled to relief, and

(b) The balance of convenience, i.e. whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.

[8] In *Live Earth Resource Management Pty Ltd v Live Earth LLC*,[5] Stone J made the following further observations with respect to the first inquiry:

> "12 In *O'Neill* Gummow and Hayne JJ (with whom Gleeson CJ and Crennan J in their separate joint judgment agreed) quoted this comment and, at 478, added the following explanation:
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> '*By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at the trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial.'*
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> 13 Their Honours also referred to the additional comment in *Beecham* to the effect that the strength of the prima facie case required depends on the nature of the rights asserted by the applicant for relief and the practical consequences likely to flow from the order the applicant seeks. This latter comment illustrates that the two enquiries referred to by the Court in *Beecham* are interlinked so that the weight of considerations in regard to one may well affect the other."

[9] Whilst disagreeing with the strength of the case sought to be mounted by WICET, counsel for Sun nevertheless appropriately conceded that WICET had shown a "prima facie case". The real issue before me turned on the balance of convenience.

[10] Counsel for WICET, however, spent some time explaining the basis for the "prima facie case", with a view to persuading me that the strength of WICET's case is such as to overwhelmingly influence the balance of convenience.

[11] WICET's argument is that the adjudicator's decision was, in significant part at least, infected by jurisdictional error, that the infection renders the decision void and consequently Sun has no entitlement to payment of any part of the adjudicated amount.[6]

[12] In summary, WICET argued that the jurisdictional error can be demonstrated in several aspects of the adjudicator's decision:

(a) A significant part of Sun's payment claim related to an extension of time claim. WICET argued before the adjudicator that Sun's extension of time claims were made outside the strict timeframes allowed for such claims under cl 35.5 of the relevant conditions of contract. Sun, however, argued that, by previous conduct in accepting late extension of time claims, WICET had

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5 (2007) 73 IPR 289.

6 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394 per Muir JA at [71] – [76].

waived compliance with the time limits in cl 35.5 or was estopped from relying on those time limits. The adjudicator's decision relevantly stated:

"**EOTs and Delay Costs**

64. In its adjudication application, the claimant contends it is entitled to a further extension of time (EOT) of 116 days pursuant to clause 35 of the contract and a further $13,449,395.63 in resulting costs resulting pursuant to clause 36. In support of this contention, the claimant has referred me to its report W6-CLAIM-DELAY001 included with its payment claim.

65. According to the respondent, any cost claim that is alleged to arise from delay or disruption must be claimed in accordance with clause 36; if the claimant fails to satisfy clause 36 it has no entitlement to claim such amounts under the contract or at all. The respondent then goes on to say that I have no jurisdiction to make an award for the claimant in the absence of a contractual entitlement.

66. The parties have presented comprehensive submissions on the operation and corollary of both clauses 35 and 36 as they apply to the circumstances of this adjudication.

67. I have carefully considered the parties' respective submissions on my jurisdiction to determine matters of delay and/or disruption (e.g. under the heading '*A preliminary comment about jurisdictional error*' at section 5 of the adjudication response) when making this decision.

68. Although I have considered all of the parties' submissions, I have set out my findings in respect of the main contentions concerning clause 35.5 in the same order as sections 9 to 15 of the adjudication response, using the same numbers, but with abbreviated or edited headings (e.g. I have framed some as questions).

9 – The time bar

69. I agree with the respondent that the wording in the contract means that the claimant's notice(s) should have been issued within 28 days of the delay event first occurring and that entitlement to EOT will only accrue if the notice period is strictly complied with.

10 – Is the contract varied and the respondent estopped from enforcement?

70. I do not agree with the claimant that paragraphs 29 to 55 of Mr Fedrick's declaration and supporting correspondence evidence that the claimant did not submit its claim for EOT 39 within 28 days after the delays occurred, because the claimant's submission dated 17 January 2013, was within 28 days of the cause of delay (i.e. Principal's Representative letter dated 20 December 2012).

71. However, in respect of claim 41, because paragraph 9 of the claimant's EOT claim dated 17 May 2013 refers to defects identified between 28 March and 6 April 2013, I find this claim was submitted more than 28 days after the delay occurred. The Principal's Representative subsequently granted an 8 day extension of time.

72. I am therefore persuaded that the parties have set aside the requirements for strict compliance with the 28 day period for submitting EOT claims."

The adjudicator further said:

"14 – No estoppel or waiver in relation to time bars?

80. The parties' respective submissions on this matter are similar to that at item 10 above. In its detailed submissions for this item, the respondent refers me to the statutory declaration of Mr Brennan Westworth, which, in turn, refers me to copies of a meeting agenda and 'power point' presentation given during the meeting. I have read these documents carefully. They include extracts from clause 33.2 and 35.5(B)(1) and deal with whether delays are on the critical path, revised construction programs (including commentary on logic links and lags) and the like. There is no specific mention of, or reference to, the time bars.

81. I therefore find that due to their conduct (e.g. see item 10 above), the parties stopped/have waived their rights from relying on the strict time frames for submitting EOT claims."

WICET's argument is that these reasons reveal a failure to consider material submissions put to the adjudicator by WICET, that the reasons reveal irrational error, and that the reasons are so inadequate as to reveal that the adjudicator did not perform the task required of him by statute.

It was correct that, on two previous occasions, WICET had approved extension of time claims by Sun, even though they were out of time. Despite this, WICET contended that cl 35.5 of the construction contract conferred a specific and explicit power which gave the principal's representative an absolute discretion to extend time unilaterally, whether or not Sun had complied with the relevant time limits. It was contended by WICET that in the face of such an express discretion, it could not be said that conduct authorised by that discretionary power could not found the waiver or estoppel contended for by Sun. WICET argues that the adjudicator's reasons simply do not deal with that central argument. As a consequence, WICET argues that, even though the adjudicator said that he had considered all of the parties' submissions, it is impossible for that statement to be correct because he clearly did not consider WICET's argument concerning cl 35.5.

WICET further argues that the adjudicator's conclusion is so unreasonable as to be regarded as irrational or perverse in the jurisdictional sense, and further that the reasons are so inadequate as to justify a conclusion that the adjudicator did not perform the adjudication task required of him under the statute, by which he is required, inter alia, to consider all submissions properly made.[7]

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7 Section 26(2)(d).

(b) Another significant part of Sun's payment claim concerned an extension of time of 81 days as a consequence of delayed access to a particular tunnel. WICET's argument is that, despite the adjudicator, in his reasons, specifically rejecting Sun's methodology for calculating this claim and, on WICET's argument, making a finding of fact which precluded satisfaction that a condition precedent to an entitlement to claim for an extension of time under cl 35.5 of the relevant contract existed, the adjudicator "applied some other undisclosed methodology to the facts and concluded that Sun would have been entitled to more than the 81 days it claimed". WICET says that the adjudicator used that undisclosed analysis to justify allowing the claim, referring in that regard to the following passage of the adjudicator's decision:

> "[156] Notwithstanding, based on the detailed information which has been included in the parties' respective submissions, on balance I find it likely that the delayed access to the [relevant tunnel] has resulted in a delay to the claimant's ability to progress the works. I am therefore not convinced that the respondent was correct to reject this claim and not award any days EOT. In the absence of sufficient information to enable by own detailed calculation, I conducted my own outline assessment based on the submissions which resulted in a period greater than the claimed days. Therefore, in the absence of an alternative from the respondent (other than 0 days, which I find is not correct), I determine that for [the relevant extension of time claim], the claimant is entitled to 81 days."

The complaint by WICET is, in essence, that the adjudicator did not disclose his own methodology and did not seek submissions on this matter. This amounts to a denial of natural justice, which has the effect of rendering the decision void.

[13] In its submissions before me, WICET developed arguments in relation to other discreet aspects of the adjudicator's decision, contending that they displayed examples of a failure to perform the statutory task of adjudication because of inadequate reasoning and by the adjudicator making what amounted to default assessments in place of a genuine valuation exercise.

[14] As I have already noted, there was no real issue before me that WICET's arguments were sufficient to satisfy the first inquiry, namely to demonstrate that it has a "prima facie case". Without in any way pre-judging the issues which are to be determined at the final hearing on 14 and 15 August 2014, it is also appropriate to make the preliminary observation that the arguments relied on by WICET to seek to impugn the adjudicator's decision could not in any sense be described as "weak". On the contrary, WICET appears to have a good arguable case.

[15] The real point of difference between the parties on the present application concerned an assessment of where the balance of convenience lies.

[16] In terms of factual considerations, WICET pointed to evidence by its General Manager Project Delivery that, whilst the total contract sum was $69,330,590 (excluding GST), WICET has so far paid $76,110,231.84 (excluding GST) to Sun and only 92 per cent of the work is complete. This general manager also deposed to his belief that Sun has already been overpaid some $3,000,000 (liquidated damages

yet to be deducted), and that payment of the balance of the adjudicated amount would mean that Sun would have been overpaid by some $15,000,000.

[17] WICET's General Manager Project Delivery also referred to searches of publicly available information, and expressed doubt as to Sun's capacity to repay the adjudicated amount to WICET.

[18] Sun relied on an affidavit by its Chief Financial Officer in which he deposes to his familiarity with Sun's financial position and generally describes the nature of its business and operations. He says that Sun is a profitable company, with "significant cash reserves even without having received the adjudicated amount". Sun's Chief Financial Officer said:

> "If Sun is paid the adjudicated amount, and the Applicant succeeds on the [originating application] then Sun will repay the adjudicated amount, and will be comfortably financially capable of doing so."

[19] Counsel for WICET argued the following matters as relevant to the balance of convenience:

(a) The sum in issue is large – more than $12,000,000;

(b) This Court ought not find the evidence of the Sun's Chief Financial Officer persuasive;

(c) There is no evidence that Sun will suffer any harm from being held out of the money pending the final hearing of the originating application. The amount paid into Court included further amounts to take account of interest and the adjudicator's fees. With those amounts secured, no potential for further harm to Sun exists;

(d) WICET has a strong argument for having the adjudicator's decision declared void and, in those circumstances, should not be required to bear a risk that Sun would be unable to repay the money;

(e) WICET has given the usual undertaking as to damages;

(f) The originating application is proceeding to an expeditious determination.

[20] The arguments advanced by counsel for Sun can be summarised as follows:

(a) Sun is, on the evidence, a profitable company with significant cash reserves. There is no basis for a concern based on Sun's financial position;

(b) Sun is in the position of having an adjudicator's decision in its favour;

(c) It is not correct to say that payment into Court removes or ameliorates any prejudice to Sun. Sun is still deprived of the ability to use the adjudicated amount.

[21] Sun's principal contention in argument, and the matter which was most significantly opposed by counsel for WICET, was that a significant element for consideration in assessing the balance of convenience is that, as a matter of policy under the *BCIPA*, the adjudicated amount ought be paid to Sun. Argument on this point turned on statements of principle made by Keane JA, with whom Fraser JA and Fryberg J

agreed in *R J Neller Building Pty Ltd v Ainsworth*.[8] In that case, the respondent, which had performed building work for the applicant, obtained an adjudicator's decision consequent upon an adjudication under *BCIPA*. The respondent then filed an adjudication certificate as a judgment in the District Court, pursuant to s 31 of *BCIPA*. On the basis of that judgment, the respondent obtained an enforcement warrant against the applicant's property. The applicant applied to the District Court for a stay of the warrant, pending determination of a proceeding in the District Court for an order setting aside the adjudication and for damages for breach of the building contract. The primary judge dismissed the application for a stay. The applicant then applied for leave to appeal. One of the arguments advanced by the applicant in support of the stay was that there was a risk that the action for damages for defective work may be rendered nugatory by the possible inability of the respondent builder to meet a judgment in the applicant's favour. In dealing with that argument, Keane JA said:

> "[39] It is evidently the intention of the BCIP Act, and, in particular, s 31 and s 100 to which reference has been made, that the process of adjudication established under that Act should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract, where those parties operate in a commercial, as opposed to a domestic, context. This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined.
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> [40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. **Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner**.
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> [41] The mere existence of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.

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8 [2009] 1 Qd R 390.

> [42] While addressing considerations relevant to the exercise of the discretion to order a stay, one may also mention the consideration that the adjudication of Neller's claim resulted in a favourable outcome for Neller. **While this adjudication is provisional, and, indeed, may ultimately be held to be devoid of legal effect, it is not irrelevant that an independent and expert arbiter has assessed the merits of the building dispute between the parties and concluded that the merits of that dispute lie very much in Neller's favour**. This is a consideration which tends to lessen the weight to be accorded to the concern that Ainsworth might be deprived of the fruits of ultimate vindication by the refusal of a stay" (emphasis added).

[22] Counsel for WICET argued that even in the face of the evidence from Sun's Chief Financial Officer, there was doubt as to Sun's financial capacity and that in a case such as the present where the adjudicator's decision may be void, WICET should not be required to bear the risk that Sun would be unable to repay the money. This is precisely the risk to which Keane JA was adverting and is, on the authority of *R J Neller*, the risk which, as a matter of legislative policy, has, prima facie at least, been assigned to WICET.

[23] Counsel for WICET submitted that there was room to doubt the application of this legislative policy in a case such as the present, where it is sought to have the adjudicator's decision declared void on the basis of jurisdictional error. It was argued that *R J Neller* was decided at a time when it had not yet been determined, or at least appreciated, that it was invalid for State legislation to remove from the Supreme Court the supervisory power to grant relief in the nature of *certiorari* on account of jurisdictional error.[9] WICET contended that once it is determined that there is a prima facie case of jurisdictional error, the policy of *BCIPA* in relation to valid adjudicators' decisions can no longer be relevant to the exercise of the discretion. Alternatively, the discretion "waxes and wanes with the strength of the prima facie case" in the sense that the stronger the prima facie case, the less relevant the policy. Central to WICET's argument was the proposition that the policy described by Keane JA could only apply to "valid" adjudicators' decisions. It was argued that it could not possibly be intended to be the policy of the *BCIPA* that the risk is so passed in relation to decisions which are void and liable to be quashed.

[24] For the following reasons, however, I do not accept the premise on which WICET's argument is based.

[25] *BCIPA* provided, and still provides at section 31(4), that while a respondent may commence proceedings to have a judgment based on an adjudication certificate set aside, it could not, inter alia, challenge the adjudicator's decision in those proceedings. It was initially accepted, however, that an adjudicator's decision was a decision "made under an enactment", and therefore subject to judicial review under the *Judicial Review Act* 1991 (Qld). In support of that conclusion it is sufficient to refer to *J J McDonald & Sons Engineering Pty Ltd v Gall*[10] and *State of Queensland v Epoca Constructions Pty Ltd & Anor*.[11] This avenue of challenge was effectively removed by amendments to the *Judicial Review Act* 1991 (Qld) in 2007 through the

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9 *R J Neller Building Pty Ltd v Ainsworth* was decided prior to the judgment of the High Court in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531.

10 [2005] QSC 305.

11 [2006] QSC 324.

Justice and Other Legislation Amendment Act 2007. These amendments had the effect of declaring that the *Judicial Review Act* 1991 (Qld) did not apply to decisions made under *BCIPA*.

[26] The question as to whether relief in the nature of certiorari was available against an adjudicator's decision was considered by the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*.[12] The court held that such relief did not lie for non-jurisdictional error of law by the adjudicator. Hodgson JA, with whom Mason P and Giles JA agreed, went on to say, at 52:

> "However, it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, **it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable**. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari" (emphasis added).

[27] His Honour then identified the "basic and essential requirements" under the legislation as including the existence of a construction contract, the service of a payment claim, the making of an adjudication application, the reference of the application to an adjudicator, and the written determination by the adjudicator of the application by determining the amount of the progress payment, the date the payment is due and the rate of interest payable.

[28] After discussing whether exact compliance with other, more detailed requirements in the legislation would render an adjudicator's decision void, Hodgson JA said:

> "If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination."[13]

[29] Following the judgment of the High Court in *Kirk v Industrial Court of New South Wales*[14] and of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,[15] the Court of Appeal in Queensland held in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*[16] that it is not within the constitutional power of the State to exclude the power of the Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error and judicial decision-making, and that an adjudicator's decision under *BCIPA* is an administrative decision over which the Supreme Court has supervisory jurisdiction which is not affected by the legislative exclusion of the application of the *Judicial Review Act* 1991 (Qld) to decisions made under *BCIPA*.

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12 (2004) 61 NSWLR 421.
13 Ibid at [55].
14 (2010) 239 CLR 531.
15 (2010) 78 NSWLR 393.
16 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

[30] In discussing the impact which those authorities had on the propositions derived from *Brodyn's* case, Chesterman JA said:

> "[32] The result, it seems to me, is that ***Brodyn*** **remains authority for its first proposition: that adjudications which do not comply with the essential statutory requirements are void and the court may, when non-compliance has been demonstrated, make declarations and/or grant injunctions to prevent a void adjudication being acted on**. The second proposition reversed by *Chase Oyster Bar*, which in turn decided that the court has jurisdiction to grant prerogative relief with respect to adjudications affected by error on the face of the record or jurisdictional error cannot be applied in Queensland, at least without additional analysis, because of the complication, not present in New South Wales, afforded by s 18(2) and the inclusion of the *Payments Act* in the Schedule. What does s 18(2) of the *JR Act* mean for the *Payments Act*, and is its meaning affected by *Kirk*?
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> [33] The conclusion, which I think now should be accepted, that adjudication decisions under the *Payments Act* are not reviewable under the *JR Act* does not mean that the court's supervisory jurisdiction over adjudicators has been removed. That opinion is dictated by *Kirk*. If the effect of s 18(2) of the *JR Act* were to prohibit the exercise by the Supreme Court of its jurisdiction to grant prerogative relief the section would be unconstitutional and of no effect. The High Court said (580-581):
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> 'The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. ... To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. ... it would remove from the relevant State Supreme Court one of its defining characteristics. ... Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.'
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> [34] But s 18(2) is not in terms privative. As Basten JA pointed out in *Chase Oyster Bar*, [89] a constraint on the court's jurisdiction will require express language, or at least a clear and unambiguous implication. His Honour referred to *Owners of The Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 and *Kirk*. In the latter case the existence of the constitutional prohibition led the Court to construe the privative enactment so that it did not deprive the Supreme Court of supervisory jurisdiction over jurisdictional error.
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> [35] Section 18(2) does not purport to destroy the court's pre-existing jurisdiction to control the unlawful exercise of power by inferior courts and tribunals. *Kirk* suggests it should not be read that way. *Kirk* also decided that an enactment which purported to deprive the

court of all supervisory jurisdiction would be invalid. Section 18(2) says only that the *JR Act* cannot be used as a means of exercising supervisory power. Section s 10 would seem to recognise the continued existence of the pre-statutory jurisdiction. It provides that rights conferred by the *JR Act* are in an addition to any other rights the person has to seek review of administrative decisions. Likewise s 41, in Part 5 of the *JR Act*, does not purport to abolish or remove the court's pre-existing jurisdiction to supervise inferior tribunals and decision makers. It regulates the manner in which the court is to undertake such a review and alters the nature of the relief that might be granted. But if the Act does not apply, s 41 does not apply so one is left with the pre-statutory jurisdiction of the Supreme Court described in *Kirk* (at 580). Fryberg J came to the same conclusion in *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279 at [13].

...

[37] **The situation appears thus to be that an adjudication decision may be impugned on the basis described in *Brodyn*, that essential statutory pre-conditions have not been complied with, and by application for a prerogative writ on the grounds of error of law on the face of the record or jurisdictional error or, presumably, any other ground recognised by pre *JR Act* jurisprudence**" (emphasis added).[17]

[31] White JA also made the following observations (omitting references and citations):

"[78] In these proceedings Northbuild sought and continues to seek declaratory and injunctive relief. Although the legislature clearly seeks a 'fast track' investigation into an entitlement, on an interim basis, to a progress payment, there is nothing in the language of the *Payments Act* in the nature of a privative clause attempting to exclude the supervisory role of the Supreme Court and s 31(4)(a) does not do so. It is a reference only to proceedings to have a judgment based on an adjudication certificate set aside and that must be in respect of an adjudication reached in conformity with the *Payments Act*. After *Kirk v Industrial Court (NSW)*, the exclusion of Pt 3 Div 2 from the *Judicial Review Act* is limited to review of decisions not infected by jurisdictional error. Even before *Kirk* (and *Craig*) longstanding authority demonstrates that a prohibition against challenging an administrative decision would be interpreted to mean a decision not infected by jurisdictional error.

[79] The 'only' matters which an adjudicator may consider in reaching a decision are the provisions of the *Payments Act*, the terms of the construction contract, the payment claim and response and all submissions properly made so that if the adjudicator departed from that list and considered, for example, what he regarded as a "fair thing" he would have made a decision without authority and, if he truly disregarded a claimant's submissions, his decision would not be one envisaged by the *Payments Act*.

[80] **Accepting the criticisms which have been levelled at *Brodyn* on the question of the availability of prerogative review for**

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17 Ibid at [32] – [35], [37].

> **jurisdictional error, Hodgson JA's observation that an adjudicator's purported decision would be void if it did not meet the statutory conditions essential for a valid decision are unexceptional**. So, too, where the necessary level of procedural fairness had not been accorded to a party. By quoting extensively from and relying on passages in *Brodyn* the primary Judge did not fall into error, since he considered whether the adjudicator had performed the task assigned to him by s 26 which did not require, in this case, any articulation of the distinction between adherence to "basic requirements" and jurisdictional error" (emphasis added).[18]

[32] In short, even before *Kirk's* case, a party disappointed by an adjudication decision could pursue relief based on contentions that the adjudicator's decision was void. That was the situation when the Court of Appeal decided *R J Neller*. The fact that, since 2010, it has been clarified that jurisdictional error can found a contention that an adjudicator's decision is void, in my view, does not detract from the strength and applicability of the observations made by Keane JA in *R J Neller* concerning the relevant legislative policy underlying *BCIPA*. If an adjudicator's decision, pursuant to which money has been paid by a contractor to a builder, is subsequently adjudged to be void (on whatever basis), the risk that the builder might not be able to refund those monies after a successful action by the contractor to have the decision declared void is the risk which, as Keane JA said, the legislature has prima facie assigned to the contractor.

[33] For completeness, I also note that as recently as December 2013, it has been accepted that the policy explained by Keane JA in *R J Neller* remains relevant to considerations under the equivalent New South Wales legislation. In *Kingston Building (Australia) v Dial D Pty Ltd*,[19] McDougall J said:

> "35 Even if this were a case of potential insolvency on the part of Kingston (and I stress that the application has not been made on that basis), one would need to bear in mind the operation of the *Security of Payment Act*, as succinctly explained by Keane JA in *R J Neller Building Pty Limited v Ainsworth* [2009] 1 Qd R 390 at [40]. His Honour observed that, as a matter of policy, the legislature has assigned the risk of insolvency to the principal, rather than to the builder, in the first instance.
>
> 36 I mention that observation because it draws attention to what seems to me to be a most important consideration: the policy of the *Security of Payment Act* that those who undertake construction work or supply related goods and services be paid promptly.
>
> 37 In effect, the application for a stay asks the Court to subjugate the clear policy of the Act to the interest of the proprietor, in circumstances where it is not suggested that giving effect to the policy of the Act would create in effect a very dangerous interim loan to the builder."

[34] When one otherwise considers the arguments advanced in the present case concerning the balance of convenience, the arguments come down to this. Sun has a prima facie entitlement to be paid the money. WICET has the right to challenge the validity of the adjudicator's decision, and may well be regarded, for present

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18 Ibid at [78] – [80].

19 [2013] NSWSC 2010.

purposes, as having strong grounds for contending that the adjudicator's decision is void. But, as a matter of policy, WICET carries the risk that monies paid over pursuant to the adjudicator's decision may not ultimately be refunded by Sun if the adjudicator's decision is ultimately adjudged to be void.

[35] No question arises in the present case as to whether damages are an adequate remedy for Sun. The simple position is that Sun has an entitlement to be paid the money.

[36] The quantum of the amount to be paid to Sun is large, but that is a function of the fact that this is a very big contract in which the contract sums themselves are very large. There is nothing in *BCIPA* to suggest that the allocation of risk, as identified in *R J Neller*, is affected by the quantum of the sum to be paid under an adjudication.

[37] It is also correct that the final hearing of WICET's application will be held in the near future, but that, in my view, does not provide a compelling reason for holding Sun out of its present entitlement to receive payment under the adjudicator's decision.

[38] In short, even if one accepts for the purposes of the present application that WICET has a good arguable case for seeking to have the adjudicator's decision declared void, I am not persuaded that this tips the balance of convenience in favour of the grant of the interlocutory injunction sought by WICET. Sun has a present entitlement to be paid those monies. In the absence of payment, it is entitled to have the adjudicator's decision registered as a judgment, and to seek enforcement of that judgment. The risk that Sun might not be able to repay that money if the adjudicator's decision is subsequently declared void is a risk which the legislature has cast on WICET. Beyond this risk, WICET has not identified any overwhelming basis for restraining the payment of the adjudicated amount.

[39] Accordingly I would refuse WICET's application for interlocutory injunctive relief.

[40] There will be an order dismissing WICET's application for an interlocutory injunction. Otherwise, I will hear the parties as to the necessary orders.