SUPREME COURT OF QUEENSLAND

CITATION:	*McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd & Ors* [2014] QCA 232
PARTIES:	**McNAB DEVELOPMENTS (QLD) PTY LTD** ACN 118 748 548 (appellant) **v** **MAK CONSTRUCTION SERVICES PTY LTD** ACN 136 996 891 (first respondent) **ADJUDICATE TODAY PTY LIMITED** ACN 109 605 021 (second respondent) **HELEN DURHAM** (third respondent)
FILE NO/S:	Appeal No 10458 of 2013 SC No 5200 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2014
JUDGES:	Gotterson and Morrison JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellant to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PAYMENTS – where the appellant was a contractor and the first respondent was a subcontractor for a building project – where the first respondent served a payment claim on the appellant totalling $853,952.97 – where the appellant contended that the subcontract had been terminated due to the first respondent's default – where the first respondent sought adjudication of its claim under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the adjudication was heard by the third respondent – where

the third respondent decided that the appellant owed the first respondent $241,441.20 – where the appellant claimed a right to liquidated damages under the subcontract – where the appellant's right to liquidated damages depended on the date for practical completion – where the applicant filed an application to the Supreme Court seeking to void the adjudication or set it aside on a range of grounds – where the primary judge dismissed the application – where the appellant contends that the third respondent decided on a basis which the parties had not addressed – whether there was a denial of natural justice – whether the third respondent acted unreasonably

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – where the respondent did not notify the appellant of variation claims in accordance with the prescribed notice form – whether progress payments are permissible under common law or contract

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PAYMENTS – where the third respondent allowed a claim by the first respondent with respect to 15 day dockets – where the appellants allege that the third respondent did not engage in a proper evaluation of each claim – whether the third respondent committed jurisdictional error with respect to the day dockets

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PAYMENTS – where the appellant undertook rectification for defective works – where the appellant issued backcharges – where the third respondent omitted to consider one of the backcharges – whether the validity of the determination overall has been impugned

Building and Construction Industry Payments Act 2004 (Qld), s 13, s 26, s 28, s 29

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] EWCA Civ 1, cited
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421; [2004] NSWCA 394, distinguished
Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor [2006] NSWSC 1, distinguished
David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No 2) [2010] QSC 166, cited
Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd [2007] NSWCA 32, cited

Hitachi Ltd v O'Donnell Griffin Pty Ltd [2008] QSC 135, cited
James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd [2011] QSC 145, cited
John Holland Pty Ltd v Roads and Traffic Authority of NSW [2006] NSWSC 1202, cited
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323; [2001] HCA 30, cited
Musico v Davenport [2003] NSWSC 977, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Queensland Bulk Water Supply Authority t/a Seqwater v McDonald Keen Group Pty Ltd (in liq) & Anor [2010] 2 Qd R 322; [2010] QCA 7, cited

COUNSEL: K E Downes QC, with S B Hooper, for the appellant
D A Savage QC, with D P O'Brien QC, for the first respondent
No appearance for the second respondent
No appearance for the third respondent

SOLICITORS: Holding Redlich for the appellant
Connolly Suthers for the first respondent
No appearance for the second respondent
No appearance for the third respondent

[1] **GOTTERSON JA:** McNab Developments (Qld) Pty Ltd ("McNab") and MAK Construction Services Pty Ltd ("MAK") executed a formal instrument of agreement between them dated 23 January 2012.[1] This agreement regulated the order of precedence for interpretative purposes between some ten contractual documents which also became binding between those two parties at that time. These documents concerned concrete works to be carried out by MAK as subcontractor to McNab as contractor ("the subcontract works"). These works were integral to a construction project which McNab had contracted to undertake for James Cook University at the Specialist Teaching and Student Services Precinct within the Townsville campus.

[2] Of the ten documents, those relevant for present purposes are a Scope of Works[2] and a document titled "Subcontract".[3] The Scope of Works document included a number of conditions of subcontract to apply to the carrying out of the contract works, particularly Condition 2.11 headed "Payment"[4] and Condition 2.13 headed "Daywork".[5] The Subcontract document set out the general conditions of subcontract, notably Clause 28 headed "Contractors work schedule and subcontractor's programme",[6]

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1 AB47.
2 AB48-67.
3 AB72-105.
4 AB59.
5 AB60.
6 AB84-85.

Clause 29 headed "Delay and extension of time",[7] and Clause 31 headed "Payment".[8] A Schedule to this document[9] nominated a lump sum contract price for the subcontract works of $692,905 (ex GST), liquidated damages of $3,000 per day for subcontractor-caused delays; and a date for practical completion of the subcontract works as 8 October 2012.

[3] On 28 March 2013, MAK served by email a payment claim, Payment Claim 116,[10] on McNab. The total amount thereby claimed was $853,952.97 (inclusive of GST) for "Concrete/Formwork during the period 6 February 2012 to 19 December 2012". It stated that the claim was made under the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"). The document tabled the many components of this progress claim grouped into a range of topics which may be summarized as follows:

Contract Works and Variations	$153,080.49
Delays	$531,096.28
Extra Works	$ 83,792.50
Unpaid Day Dockets	$ 26,784.45
Additional Materials	$ 59,199.25

The amount for Contract Works and Variations included an amount of $34,908.26 for retention. The payment claim also contained a table of amounts which remained unpaid on other progress claims that had earlier been made in February, July, November and December 2012. The total of the unpaid amounts was $27,917.45.

[4] McNab wrote a letter to MAK on 15 April 2013[11] in which it challenged the validity of the payment claim as a whole. The challenge arose out of a termination of the subcontract for default on MAK's part which McNab contended that it had effected pursuant to clause 53(a)(B) of the subcontract and which it had notified by delivery of a letter to MAK dated 27 March 2013.[12] Without prejudice to that challenge, McNab set out its response to components of Payment Claim 116 in the letter. It also attached to the letter a schedule of some 16 pages headed "Detailed Subcontract Payment Schedule"[13] which, broadly described, was McNab's reconciliation of the subcontract works as varied with MAK's performance of them, crediting itself for deleted works, cost of rectifying defective work and liquidated damages. Another attachment was a single page document headed "Summary Subcontract Payment Schedule".[14]

[5] McNab proposed that the letter and its attachments be considered as a payment schedule for the purposes of BCIPA and the subcontract.[15] In correspondence it was referred to as Payment Schedule 9. The letter concluded with the following statement as to the indebtedness between McNab and MAK as seen by McNab:

> "In relation to the figures contained within payment schedule 9 dated 15 April 2013, the new total payable amount for the original subcontract works and variation works is $776,320.88 (excluding GST) from which McNab certifies an amount of $449,842.00 (excluding GST)

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7 AB85.
8 AB86-87.
9 AB103-4.
10 AB111-120.
11 AB121-136.
12 AB138-9.
13 AB141-156.
14 AB140.
15 AB122.

> is to be deducted for backcharges and liquidated damages resulting in a new adjusted subcontract value of $304,044.50 (excluding GST).
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> To date McNab has paid [MAK] a total of $670,457.00 (excluding GST) which results in the outstanding amount of $366,412.50 (excluding GST) owing to McNab."[16]

[6] MAK sought an adjudication of its claim under the provisions of BCIPA. It did so by an application dated 30 April 2013 with attachments including its written submission for the adjudication.[17] The application was served on McNab on 2 May 2013.

[7] On 6 May 2013, the Authorised Nominating Authority, Adjudicate Today Pty Ltd, nominated Ms Helen Durham as adjudicator for the requested adjudication. In these reasons, it is convenient to refer to the nominor as "ANA" and to Ms Durham as "the Adjudicator".

[8] McNab responded to the adjudication application with written submissions dated 9 May 2013.[18] Its material before the Adjudicator was supplemented by statutory declarations of Mr S J Garufi,[19] Mr S R Godbold,[20] Mr N R Cave[21] and Mr M McNab,[22] all sworn on 9 May 2013.

[9] On 30 May 2013, the Adjudicator published a decision ("the Adjudication Decision") with reasons.[23] The decision was that:

(i) The amount of the progress payment to be made by McNab under Payment Claim 116 was $241,441.20;
(ii) The date on which the payment became due is 15 April 2013;
(iii) Interest is payable at the rate prescribed under s 59(3) of the *Civil Proceedings Act* 2011 (Qld) for a money order debt; and
(iv) McNab and MAK are liable to pay 80 per cent and 20 per cent respectively of the adjudication fees.

[10] McNab filed an originating application in the Supreme Court of Queensland on 7 June 2013.[24] The respondents to the application are MAK as first respondent, the ANA as second respondent and the Adjudicator as third respondent. By these proceedings, McNab sought, either pursuant to s 128 of the *Supreme Court Act* 1995 (Qld) or, alternatively, the Supreme Court's inherent jurisdiction, a declaration that the Adjudication Decision is void or liable to be set aside on a range of grounds. Auxiliary relief that the Adjudication Decision be set aside or, alternatively, permanently stayed, and that MAK pay its costs was also sought.

[11] The originating application was heard on 9 August 2013. Both McNab and MAK were represented by counsel at the hearing. In accordance with principle, neither the ANA nor the Adjudicator participated in the hearing. The application was dismissed by order made on 25 October 2013 with provision for the parties to make submissions on costs.

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16 AB135.
17 AB157-317. Written submissions at AB161-179.
18 AB369-406.
19 AB407-502.
20 AB503-517.
21 AB518-526.
22 AB527-529.
23 AB540-559.
24 AB561-3.

[12] McNab filed a notice of appeal to this Court on 5 November 2013.[25] That document was superseded by an amended notice of application for which leave to file was granted at the hearing of the appeal. The orders sought by McNab on appeal reflect the relief it sought by way of the originating application together with additional orders that MAK pay it $268,427.55 being the total amount paid by McNab in compliance with the Adjudication Decision, and that MAK pay its costs at first instance and on appeal.

The judgment at first instance

[13] The learned primary judge approached the matter on the footing that in order to impugn the legal validity of the Adjudication Decision, it was necessary for McNab to demonstrate jurisdictional error on the part of the Adjudicator.[26] Her Honour did so in reliance upon the decision of this Court in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*.[27] That approach is not challenged in this appeal.

[14] Her Honour referred[28] to the view expressed by Brereton J in *Pacific General Securities Ltd v Soliman and Sons Pty Ltd*[29] that in order to discharge the role of the adjudicator, there must be, at a minimum, determination of whether the construction work the subject of the claim has been performed and of its value. Reference was also made[30] to the observations of Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*[31] that an adjudicator who fails to consider and find the source of an entitlement found to be payable, falls into jurisdictional error by reason of failing to take into account a matter that he or she is statutorily required to take into account.[32]

[15] McNab contended for jurisdictional error on the part of the Adjudicator in respect of a number of topics. Those topics, as they are relevant to this appeal, are:

(i) The Adjudicator's disallowance of McNab's claim to deduct liquidated damages of $222,000;[33]

(ii) The Adjudicator's allowance of claims for certain extra works, additional materials, unpaid day dockets and unpaid progress claims for which McNab disputed liability to pay on the basis that MAK had not claimed payment for them in accordance with contractual provision, particularly clauses 24(j) and 25 of the subcontract;

(iii) The Adjudicator's allowance of claims for certain unpaid progress claims and unpaid day dockets in respect of which McNab contended that the Adjudicator had failed to determine that there was a legal basis upon which McNab was liable to pay for them; and

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25 AB631-636.

26 Reasons [7].

27 [2011] QCA 22; [2012] 1 Qd R 525 at [7], [37], [71]-[72], [78]: see also *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QCA 276; [2013] 2 Qd R 75 at [77], [95]-[103].

28 Reasons [8].

29 [2006] NSWSC 13; (2006) 196 FLR 388 at [82], [86].

30 Reasons [9].

31 [2012] QSC 346 at [56].

32 These observations were not challenged on appeal at [2013] QCA 394.

33 This amount was described in the letter in Payment Schedule 9 as for 82 days within the period from 9 October 2012 to 30 January 2013 inclusive at $3,000 (ex GST) per day. In the detailed schedule in Payment Schedule 9, the period in which the 82 days fell was described as being from 9 October 2012 to 11 February 2013. In any event, no explanation was given for why the amount claimed was $222,000 and neither $246,000 nor $270,600.

(iv) The Adjudicator's disallowance of McNab's claim to set-off backcharges for rectification of defective work which it contended MAK had carried out.

[16] Her Honour expressed the following conclusion with respect to McNab's overall contention:

> "Even though the adjudicator appears to have made errors in the construction of the subcontract, misinterpreting McNab's submissions or by reversing the onus of proof, they are not jurisdictional errors that enable McNab to obtain the declaratory relief it seeks."[34]

On the basis of this conclusion she ordered that the originating application be dismissed.

[17] It is unnecessary to detail the arguments presented to the learned primary judge on each of these topics or her Honour's decisions on them given that, with one exception, the arguments advanced on appeal are those that were advanced at first instance. The exception arises in the context of the fourth ground of appeal.

Grounds of appeal

[18] The amended notice of appeal lists some six grounds of appeal. Grounds 1 and 2 concern the disallowance of the claim to deduct liquidated damages. Ground 3 is not pursued.[35] Ground 4 relates to the allowed claims which McNab submits were not made in conformity with the contractual provisions and as to which it challenges the Adjudicator's finding that MAK was entitled to payment for them "either under the contract or at common law".[36] Ground 5 concerns the allowance of the claims for which McNab submits the Adjudicator did not determine a legal basis on which it was liable to pay for them. Ground 6 relates to the backcharges which, in broad terms, McNab contends the Adjudicator failed to consider. I note at this point that one of the backcharges, identified by the Adjudicator as B 31 for $11,727, gives rise to a separate issue which is considered in the course of these reasons.

[19] I propose to discuss the grounds of appeal in the order in which they are set out in the amended notice of appeal and addressed in the appellant's outline of argument, notwithstanding that they were not dealt with in that order by the appellant's counsel in oral submissions. A number of these grounds of appeal are set out at some length in the amended notice of appeal. It is sufficient to summarise them in the course of discussion.

Liquidated damages claim

[20] McNab signalled exercise of the right to claim liquidated damages under clause 28(j) of the subcontract in the letter which formed part of Payment Schedule 9. That clause provided:

> "If the subcontractor fails to bring the subcontract works to practical completion by the date for practical completion, the subcontractor must pay the contractor liquidated damages at the amount specified in Item 9 of the Schedule until the date of practical completion as determined by the contractor."[37]

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34 Reasons [69].

35 Appellant's outline of argument paragraph 19.

36 Adjudication Decision [35]; AB547.

37 AB84.

[21] MAK's response to this claim in its adjudication application was to the effect that any delays in achieving practical completion were due to project mismanagement by McNab, principally in not ordering steel in time and not having the site ready for MAK.[38]

[22] McNab's adjudication response again referenced its entitlement to liquidated damages to clause 28(j). It did so on the footing that the date for practical completion was 8 October 2012; that MAK did not achieve practical completion; that McNab took outstanding rectification work under the subcontract out of MAK's hands on 17 December 2012; and that it completed that rectification work on 30 January 2013.[39] It claimed an entitlement to liquidated damages at the contractual rate of $3,000 per day for which it had charged only 82 days.[40]

[23] The Adjudicator reasoned that the claim for liquidated damages failed on the following basis:

> "96. Although the claimant's response to the respondent's claim for liquidated damages is perhaps best described as weak, where the respondent seeks to deduct a very substantial sum from amounts otherwise due to the claimant, it is incumbent on the respondent to satisfy me that it is entitled to do so. In this case, the respondent 'maintains that the Date for Practical Completion under the Subcontract is 8 October 2012' but appears to do so on the grounds that the claimant has not applied for any extension of time and is, in any case, precluded from doing so as a result of it's (sic) non-compliance with the relevant notice provisions. As far as I can tell, the respondent does not anywhere in fact assert that the claimant is responsible for the whole of any delay that occurred, and makes no attempt at all to establish this, as it might, for example, by establishing that it was not responsible for ordering the steel or, if it was, that it did not fail to order the steel in time or, if it did, that the absence of steel was not an operative cause of delay at the relevant time.
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> 97. The inevitable result of this approach is that I have no basis for concluding, as the respondent implies that I should, that the original date for practical completion provides a proper foundation for the calculation of liquidated damages, and this is fatal to the respondent's claim to deduct liquidated damages."[41]

[24] The learned primary judge held, correctly in my view, that the Adjudicator had erred in failing to conclude that 8 October 2012 was the then operative date for practical completion. Her Honour referred to the requirement for strict compliance

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38 At paragraph 26; AB171. This response was not referenced to condition 2.11 in the Scope of Works document or clause 28(k) of the subcontract, both of which may have had relevance to the liquidated damages claim in that they provide that liquidated damages will apply in so far as the subcontractor is deemed responsible for delaying the overall project.

39 At paragraphs 109-113; AB392-3.

40 *Ibid* at paragraph 114; AB393.

41 AB557-558.

by MAK with clause 29 as a precondition to a right to an extension of time for completion: clause 29(d). She then observed:

> "Without evidence that there had been an extension of time under clause 29 of the subcontract, there was nothing before the adjudicator to alter the specified date for practical completion under the subcontract of 8 October 2012. Although the adjudicator expressed the decision in terms that it was for McNab to prove that the date for practical completion remained 8 October 2012, what the adjudicator did in substance was misconstrue the effect of clause 29 of the subcontract. …"[42]

[25] Her Honour then stated that while the Adjudicator appeared to have so erred, the error was not a jurisdictional one. For this categorisation she relied on the observations[43] of Applegarth J in *BM Alliance* at [8][44] that an adjudicator who misconstrues or misapplies a relevant contractual provision, and as a result, does not correctly decide the amount of the progress payment, if any, to be paid to the claimant does not, for that reason alone, make a jurisdictional error. Her Honour's statement is not challenged on appeal.[45] By Grounds 1 and 2 McNab seeks to rely on other alleged errors in order to establish jurisdictional error on the part of the Adjudicator.

Ground 1 – Denial of natural justice

[26] This ground of appeal contends that the adjudication miscarried because the Adjudicator failed to accord McNab natural justice before finding against it that there was no basis for concluding that the original date for practical completion provided a proper foundation for the calculation of liquidated damages. That, McNab notes, was not a finding for which MAK had contended in its adjudication application.

[27] In developing this ground, McNab referred to its claim as one made expressly in reliance upon clause 28(j); to MAK's response to the claim as set out in the adjudication application; and to its repeated reliance upon that clause in its adjudication response. McNab also noted that in the adjudication proceedings there was no issue that MAK had not sought extensions of time and that MAK had not contended that 8 October 2012 was not the date for practical completion. Further, McNab proposed that the contractor-caused delays to which MAK referred in the adjudication application, if established, would have entitled it to an extension of time for practical completion under clause 29.

[28] Against that background, McNab submitted that in order to afford natural justice to it, the Adjudicator was obliged to inform it that she intended to decide that 8 October 2012 ought not be accepted by her as the prevailing date for practical completion in absence of an assertion from McNab that MAK was responsible for the whole of the 82 days delay. McNab's case is that it should have been given the opportunity to address that construction of the contract and process of reasoning before the Adjudicator acted upon it.[46]

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42 Reasons [63]. These observations are not challenged in this appeal.

43 These observations were not challenged on appeal at [2013] QCA 394.

44 Citing per Hodgson JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* [2005] NSWCA 228; (2005) 63 NSWLR 385 at [52].

45 Tr1-38 LL18-21.

46 Appellant's outline of argument paragraphs 11, 12.

[29] MAK accepts as uncontroversial that, as a matter of principle, a denial of natural justice is a jurisdictional error which can invalidate an adjudicator's decision under BCIPA.[47] In *Brodyn Pty Ltd v Davenport*[48] which concerned an adjudicator's determination under the New South Wales analogue of the BCIPA, Hodgson JA (with whom Mason P and Giles JA agreed) held that a substantial denial of natural justice will render a purported determination void, not merely voidable.[49]

[30] In *John Holland Pty Ltd v TAC Pacific Pty Ltd*,[50] Applegarth J applied several judgments of the Supreme Court of New South Wales, including *Musico v Davenport*,[51] which had held that a denial of natural justice will occur when an adjudicator decides a dispute on a 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. That it was appropriate for his Honour to have done so in the BCIPA context was implicitly endorsed by McMurdo J in *David & Gai Spankie & Northern Investment Holdings Pty Ltd v James Trowse Constructions Pty Ltd & Ors (No. 2)*.[52] In that case an adjudicator found against a claim for liquidated damages upon an interpretation of a contractual provision which he had adopted without seeking submissions from the parties. McMurdo J held[53] that on that account, the adjudicator had not accorded natural justice with the consequences that an essential condition for a valid determination was not satisfied and therefore the adjudication was of no effect.

[31] The live issue here is not as to principle but as to whether the Adjudicator did in fact decide the claim to liquidated damages on a basis which the parties had not addressed. I preface consideration of this issue with the following observation.

[32] It was integral to McNab's submissions in both the adjudication and these proceedings that, on its proper construction, clause 28(j) operated to entitle McNab to liquidated damages once MAK had not completed the subcontract works by 8 October 2010. That is to say, liability to pay liquidated damages arose on MAK's part whether the non-completion by that date was caused by it or not.[54] This construction of the clause informed McNab's statement in its adjudication submissions that MAK had sought to reverse the onus of proof in relation to the cause of delays to the project, adding that it was not for McNab to establish the reasons for MAK having failed to reach practical completion by the date for practical completion.[55]

[33] By contrast, the submissions of MAK in the adjudication bespeak an interpretation of the clause that would require MAK itself to have caused the non-completion of the subcontract works by the date for practical completion in order for it to be liable under the clause.[56]

[34] The Adjudicator appreciated the difference in the approaches to interpretation. Her references at paragraph 96 to McNab not having attributed cause for delay to MAK

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47 First respondent's outline of argument paragraph 13.
48 [2004] NSWCA 394; (2004) 61 NSWLR 421.
49 At [57].
50 [2009] QSC 205; [2010] 1 Qd R 302.
51 [2003] NSWSC 977.
52 [2010] QSC 166 at [10], [11].
53 *Ibid* at [17].
54 Tr1-31 L3-1-33 L24.
55 At paragraph 119; AB393.
56 At paragraphs 30-33; AB171.

and not having negatived the causes for delay which MAK had attributed to it, reveal her appreciation of the difference and a preference for the interpretation for which MAK had submitted. I read the Adjudicator's conclusion expressed in paragraph 97 of the Adjudication Decision not to accept 8 October 2010 as providing a proper foundation for the calculation of liquidated damages, as reflecting not merely a lack of satisfaction on her part, informed by her misconstruction of clause 29, that that date rather than another date was the prevailing date for practical completion. To my mind, importantly, the conclusion reflects the Adjudicator's view that that date was not a proper foundation because McNab had not established that clause 28(j) had been triggered against MAK by delay caused by it. In the end, it was that view which led the Adjudicator to disallow the claim for liquidated damages.

[35] In summary, the parties did address clause 28(j). They did make submissions which reflected their respective arguments as to how the clause operated. The Adjudicator preferred a view of that which accorded with MAK's submissions and, on the basis of that view, she concluded that McNab had not established its claim. In these circumstances, I am not persuaded that McNab has established a failure to accord natural justice to it which invalidated the adjudication. Accordingly, this ground of appeal cannot succeed.

[36] I would add that within the more limited context of the operation of clause 29, McNab did in fact make submissions in its adjudication response that compliance with the procedure for notification of a delay by MAK was a precondition to an entitlement to an extension of time for practical completion, citing clauses 29(b) and (d).[57] Within this context there was no denial of natural justice.

Ground 2 – Unreasonableness

[37] This ground of appeal contends that the Adjudicator's decision with respect to liquidated damages was so unreasonable that no reasonable adjudicator could have made it. This ground seeks to invoke the proposition advanced tentatively by P Lyons J in *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor*[58] that "[it] may be correct to say that a decision which displays an extreme degree of unreasonableness akin to that described in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,[59] is not a decision for the purposes of s 26 of the [BCIPA]".

[38] I would hesitate to adopt the proposition as necessarily correct. As the High Court recently affirmed in *Minister for Immigration and Citizenship v Li*,[60] the concept of "*Wednesbury* unreasonableness" has unique application to the exercise of a discretionary power given by statute. The exercise of administrative discretion is distinctly different from, and not analogous with, the adjudicative function under the BCIPA. Furthermore, to the extent that the proposition might be thought to convey that such a decision is void for jurisdictional error, there is the additional consideration that in *Kirk v Industrial Court of New South Wales*,[61] *Wednesbury*-like unreasonableness was not identified as a species of jurisdictional error.

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57 At paragraphs 117-118; AB393.

58 [2009] QSC 165 at [32]; cited by Applegarth J in *John Holland* at [21].

59 [1948] 1 KB 223.

60 [2013] HCA 18; (2013) 249 CLR 332 per French CJ at [22], Hayne, Kiefel and Bell JJ at [63], [64] and Gageler J at [106].

61 [2010] HCA 1; (2010) 239 CLR 531 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [72].

[39] It is, however, unnecessary to decide whether the proposition is correct or not. The Adjudicator's reasons for deciding to reject the liquidated damages claim defy description as unreasonable in a *Wednesbury* sense. It was reasonably and rationally open to the Adjudicator to prefer the interpretation of clause 28(j) which she evidently did and to disallow the claim on the footing that McNab had not established MAK-caused delay triggering the clause. This ground of appeal also cannot succeed.

Claims and clauses 24(j) and 25

[40] The Adjudicator noted that a recurring reason given by McNab for not paying many items of extra works, extra materials, unpaid day dockets and the balances of previous progress claims was that the claims for them had not been made in accordance with clauses 24(j) and 25 of the subcontract.[62]

[41] Clause 24(j) required MAK to notify McNab of all variation claims in accordance with clause 25 "as a prerequisite to any entitlement to be paid under the subcontract or at general law for performing variations to the works". Clause 25, in turn, excluded McNab from liability upon any claim whether under the subcontract or at general law arising out of, *inter alia*, a direction from the contractor (including a direction to perform a variation) unless within seven days of first becoming aware of the direction, MAK had given to McNab "the prescribed notice", namely, a written notice containing the particulars set out in clause 25(b).

[42] The Adjudicator proceeded on the footing that it was for McNab to establish actual non-compliance by MAK with these provisions.[63] As well, she was concerned that either provision may have been unenforceable under the penalties doctrine and sought further submissions on the point. After considering those submissions, the Adjudicator was not satisfied that clause 24(j) was not a "penalty clause" on the basis that McNab had submitted, namely, that it was part of the circumscription or definition of the entitlement to be paid for variations under clause 24.[64] Nor was she satisfied that, notwithstanding the doctrine, clause 25 was to be strictly enforced to exclude McNab from the liability to pay for work it had directed MAK to undertake.[65]

[43] By way of justification for allowance of these claims, the Adjudicator concluded:

> "35. But for clauses 24(j) and 25, which I am not satisfied have the effect the respondent says they have, the claimant retains the entitlement to be paid for variations works that arises either under the contract or at common law."[66]

Ground 4 – contract or at common law

[44] This ground of appeal is based upon the conclusionary statement to which I have just referred. McNab derives from it an inference that the Adjudicator must have based the allowance of these claims, at least in part, on the existence of an entitlement at common law on the part of MAK to payment for them. It was ventured that the perceived entitlement might have been a right to payment on

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62 Adjudication Decision [26]; AB545.
63 *Ibid* at [28]; AB546.
64 *Ibid* at [31]; AB547.
65 *Ibid* at [34]; AB547.
66 AB547.

a quantum meruit basis.[67] MAK accepts that it is well established that an adjudicator under the BCIPA cannot award amounts on a quantum meruit basis.[68]

[45] The submission for McNab is that by incorrectly reasoning that the BCIPA permits certification of progress payments on a basis of an entitlement at common law, the Adjudicator misapplied the statute and in consequence exceeded her authority by allowing claims on that basis. To have done so, it was submitted, was to commit a jurisdictional error of the kind referred to by McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*.[69]

[46] The difficulty in application here of the principles encapsulated in McNab's submission is that the reasons of the Adjudicator do not support the inference for which McNab contends. It is tolerably clear from the Adjudicator's reasons that she considered that MAK had a contractually-based entitlement to payment for these items of claim. Her reference to the common law did not signal reliance by her on the common law as an independent source of entitlement for payment. In context, she was referring to the doctrine of penalties which, notwithstanding its origins in equity, has long been adopted at common law.[70] In her view, McNab had not persuaded that the doctrine did not operate to neutralise any exclusion of liability by operation of clauses 24(j) and 25. Whether the Adjudicator erred in this regard is not relevant for present purposes. Such an error would not have been a jurisdictional one. From another perspective, the reference to the common law may be read as having merely the additional benign connotation of confirmation, at a level of practical justice, of a right to payment which the Adjudicator had already held existed under the subcontract. For these reasons this ground of appeal has not been made out.

Allowance of Day Docket claim

[47] The Adjudicator allowed an amount of $21,980 (ex GST) in respect of a total amount of $24,349.50 (ex GST) claimed by MAK for day dockets. The claim consisted of some 15 day dockets, each identified by a four digit number. The disallowed day dockets were:

1760	$600 (ex GST)
3101	$390 (ex GST)
3033	$1,379.50 (ex GST)

McNab's submissions focused on five of the day dockets that were allowed,[71] namely:

1770	$1,170 (ex GST)
1771	$260 (ex GST)
1782	$1,820 (ex GST)
1786	$4,160 (ex GST)
3110	$520 (ex GST)

[48] The material before the Adjudicator relevant to those five day dockets included the following in the adjudication application: a single-page schedule headed "Unpaid

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67 Appellant's outline of argument paragraphs 22, 23.

68 First respondent's outline of argument paragraph 22.

69 [2001] HCA 30; (2001) 206 CLR 323 at [82].

70 See *Andrews v ANZ Banking Group Ltd* [2012] HCA 30; (2012) 247 CLR 205 per French CJ, Gummow, Crennan, Kiefel and Bell JJ at [56]-[61].

71 Appellant's outline of argument paragraph 36.

Day Dockets"[72] which listed the 15 dockets describing briefly the work concerned, the hours worked where appropriate and the amount claimed for each; McNab's Payment Schedule 9 response to each day docket;[73] and MAK's submissions concerning them[74] to which was annexured a copy of each day docket signed by a McNab representative, with the exception of 1786.[75] The remainder of the relevant material before the Adjudicator comprised McNab's adjudication submissions.

[49] The response by McNab in Payment Schedule 9 to each of the five day dockets was that it was a "new claim" and that MAK would have needed to provide the docket and any further information "as per clause 24" in order for McNab to have assessed or assess it. MAK's submission referred to the annexured day docket in each case except 1786, and stated that there had been a course of dealing established between the parties "whereby variations not provided in strict accordance with the terms of the subcontract had been approved and paid by McNab".

[50] Addressing all of the unpaid day dockets in its submissions, McNab stated as follows:

> "160 lt is the Respondent's primary position that the claims for unpaid day dockets should be rejected in their entirety on the grounds that:
>
> (a) in accordance with the agreement reached on 19 September 2012 (as set out in the declaration of Mr Cave), the Claimant abandoned its claims for variations which were outstanding as at that date; and
>
> (b) the Claimant has failed to establish the pre-condition to entitlement to payment under clauses 24 and 25 of the Subcontract and there has been no waiver by the Respondent of strict compliance with the terms of the Subcontract.
>
> 161 The Respondent notes that the overall reconciliation of the Subcontract sum (which includes the Respondent's back charges as outlined above) results in an amount payable by the Claimant to the Respondent."[76]

[51] In an apparent reference to paragraph 161, in paragraph 44 of the Adjudication Decision the Adjudicator stated that McNab's assertion that overall it was owed money by MAK was, in effect, a distraction. She added:

> "…because the only issue here is what is presently payable. In determining what is presently payable, I will, of course, give full consideration to any deductions the respondent claims to be entitled to make. However, that is no reason not to consider the merits of each of the individual 'day docket' claims."[77]

[52] As to other issues, the Adjudicator invoked her reasoning with respect to clauses 24(j) and 25 to deprecate McNab's reliance in paragraph 160(b) of its submissions

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72 AB116.
73 AB130-132.
74 AB174-177.
75 AB303-305, 319.
76 AB401-402.
77 AB549.

upon non-compliance with them as a basis for rejecting these claims.[78] As to the response in Payment Schedule 9 concerning the need for further information (which was summarised in subparagraph 49(c) of the Adjudication Decision), the Adjudicator stated:

> "50. Neither party addresses the complaint set out in sub-paragraph (c) above but I am not satisfied that the respondent required further documentation from the claimant in order to be able to assess these claims as there is nothing in the respondent's materials to supports that claim."[79]

[53] In response to an argument that the Adjudicator had fallen into jurisdictional error by failing to enquire into whether the work the subject of each of the five day dockets had been carried out and its value, the learned primary judge made the following observations:

> "The approach of the adjudicator at paragraph 44 of the decision was to infer from McNab's response to the claim based on unpaid day dockets that they were exceeded by amounts owed by MAK to McNab that there was no issue as to the fact that they were variations or as to their value. Again, a misinterpretation by the adjudicator of the effect of McNab's submissions is not jurisdictional error."[80]

Ground 5 – Day Dockets

[54] On appeal, McNab reasserts that the Adjudicator committed jurisdictional error in respect of these day dockets. This ground of appeal proposes that she "did not engage in an active process of intellectual engagement when determining [MAK's] entitlement to the amounts claimed and the value of each claim." It is argued that such an engagement did not occur because the Adjudicator regarded McNab's response in paragraph 161 of its submissions as dispensing with any need for her to determine MAK's entitlement to payment for each day docket and its value.

[55] The factual basis for this argument is immediately confronted by strong indications to the contrary. First, the Adjudicator, (at paragraph 44 of the Adjudication Decision), put McNab's paragraph 161 overall reconciliation submission to one side as a distraction. Secondly, in the same paragraph she signalled an understanding on her part that it was her role to consider the merits of each of the individual day dockets. Thirdly, that three of them were subsequently disallowed is indicative of her having performed that role in respect of each day docket.

[56] Besides, the documentary material before the Adjudicator was, in my view, sufficient for her to have been satisfied for the purposes of the adjudication that the work was done and of its value. For four of the day dockets concerned, she had a copy of the numbered day docket signed by a McNab representative which described the work in a way which corroborated the description of it in the one-page schedule in the adjudication application. For 1786, MAK stated in the schedule that the claim was for "Overtime for Sunday work refer to email".[81] In its submission, it further stated that that work was "directed by McNab".[82] In the case of each of the

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78 Reasons [47], [48]; AB549.
79 AB550.
80 Reasons [42]; AB610.
81 AB116.
82 AB175.

five day dockets, the claim was for labour and the hours worked and hourly rate charged were stated in the one-page schedule. In neither its response nor its submission did McNab assert that the work described in the four signed day dockets was not work done by MAK at its direction or that it had not directed MAK to carry out Sunday work. Nor was there any challenge to the hours or the hourly rate claimed in each instance.

[57] In these circumstances, it was fairly open to the Adjudicator to have reasoned in respect of each day docket that MAK did the work to which the day docket related at McNab's direction and that MAK was contractually entitled to payment of the amount claimed for the work. I am unpersuaded that this process of reasoning was infected by legal error let alone legal error of a kind that may have constituted jurisdictional error. For these reasons, this ground of appeal fails.

Disallowed backcharges for defective work

[58] Under clause 31(b) of the subcontract, the amount payable to MAK in respect of each progress claim is McNab's assessment of some seven components. One of these, which is numbered (vii), is "where any part of the subcontract works is defective, the estimated cost of remedying the defective work". As noted, in the Detailed Subcontract Payment Schedule in Payment Schedule 9, McNab listed many backcharges for rectification work done by it. For each backcharge there was a description of the work which it had done and a brief explanation of why it was done, generally referenced to the work carried out by MAK which it claimed had been defective and required rectification. Payment Schedule 9 is premised on the footing that the backcharges were a component which it was entitled to take into account in assessing Payment Claim 116.

[59] In the Detailed Subcontract Payment Schedule, the backcharges were all designated by the number 10003 and were undated. MAK responded to the backcharges claim both within the body of its adjudication submissions[83] and by way of an annexure to them. Annexure N[84] was compiled by MAK. It listed many of the backcharge items in tabular form in the first column. The second column was a summary of McNab's reason for each of the listed backcharges and the third column was MAK's account of what happened and why it said it was not liable for the backcharge.

[60] In its adjudication submissions, McNab made a detailed response with respect to several of the major backcharges only. Otherwise, it relied upon its Detailed Subcontract Payment Schedule.

[61] For convenience, the Adjudicator numbered the backcharges from B1 to B34 in the order in which they appeared in McNab's schedule. She dealt separately with the three largest of them, B29, B30 and B33 in the Adjudication Decision. They were the items to which McNab had responded in detail in its adjudication submissions. Together they accounted for over 80 per cent of the total amount claimed for backcharges. In respect of B29, the Adjudicator allowed $32,545 but nothing for each of B30 and B33. She explained her approach to the other backcharges in the following terms:

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83 AB163-167.

84 AB227-236.

> "75. The respondent address (sic) the 30 smallest 'backcharges' in a table set out at Annexure N of the adjudication application and addresses the 3 of the 4 largest 'backcharges elsewhere in its submissions. However, I cannot find any submissions in respect of B31, which is the second backcharge for works allegedly rectified by the respondent in the sum of $11,727.
>
> 76. In the adjudication response, the respondent also addresses the three largest 'backcharges' only.
>
> 77. Although the respondent does not anywhere expressly state that it no longer presses the other backcharges, I allow nil for them because I cannot be expected to address the adequacy of the claimant's 'defence' to these claims without the benefit of submissions from the respondent as to do otherwise would effectively require me to make the respondent's case for it."[85]

[62] Before the learned primary judge, McNab submitted that the Adjudicator had committed jurisdictional error by failing to consider on their merits the backcharges, with the exceptions of B29, B30 and B33. Her Honour rejected the submission. The following paragraphs from the reasons for judgment clearly disclose why she did so:

> "[54] It is submitted on behalf of MAK that paragraph 77 of the decision has to be considered in the context in which it was made. Although McNab had claimed backcharges in the payment schedule, the descriptions of the backcharges were brief, lacked detail and, in many instances, relied on alleged oral agreements or emails. This is illustrated by the first backcharge of $2,487.50 where the description in the payment schedule alleges 'rectification of three pad footings under CC3 columns to the lecture theatre that were poured at the incorrect height' and refers to a discussion between Mr Cave and Mr Kilkelly on 19 September 2012. Although a statutory declaration from Mr Cave formed part of the adjudication response, reference was made by Mr Cave in general terms to the meeting on 19 September 2012, without descending to any detail in respect of the first backcharge or any of the items that are the subject of the backcharges. (As an aside, McNab sought support for its argument that there was a failure to assess the backcharges on the merits by reference to the adjudicator's failure to refer statutory declarations of Mr Godbold and Mr Cave. That submission assumes that there was evidence in those statutory declarations that was relevant for the assessment that was being undertaken by the adjudicator in respect of the backcharges which is not borne out by their contents.)
>
> [55] Annexure 'N' to the adjudication application set out in detail MAK' s answer to each item in McNab's backcharges.

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85 AB554.

> Those specific matters raised by MAK in relation to each backcharge were not addressed in the adjudication response. It was not a case of the adjudicator ignoring the backcharges in the payment schedule, but a case of the adjudicator being without McNab's responses to the detail in the adjudication application. For example, in relation to the first backcharge MAK's answer in Annexure 'N' was that it had poured the concrete at 50mm cover to the steel and that it was McNab's responsibility to inspect all reinforcement to ensure it was set out at the correct height, before they ordered the concrete and any heights that were given to MAK were given by McNab foremen. Mr Garufi was not the project manager at the time of these works and merely attaches the schedule of backcharges to his statutory declaration with a cost summary of rectification works 'Attachment SG-17' that has not shown how it relates to the schedule of backcharges in the payment schedule. MAK therefore submits that in that context the adjudicator in paragraph 77 of the decision was saying in effect 'in light of the material before her and the failure of McNab to respond to the matters raised by MAK, she was not satisfied that McNab was entitled to the claimed backcharges.'
>
> [56] McNab bore the onus of proving the backcharges. The adjudicator did not fail to assess the merits of the claim for backcharges in light of the course of the evidence, particularly McNab's failure to respond to MAK's detailed submissions in the adjudication application."[86]

Ground 6 – backcharges

[63] In advancing this ground of appeal, McNab submits that the Adjudicator assumed incorrectly that it was obliged to reply to MAK's submissions. It is said for McNab that the Adjudicator erred in declining to deal with the backcharges, other than B29, B30 and B33, on the basis of that assumption. Her role, it is argued, was to consider all backcharges even if the detail in Payment Schedule 9 about them was "brief lacking in detail and relied upon oral agreements and emails".[87]

[64] To my mind, it is evident that the Adjudicator did not disallow these backcharges on a basis of a failure on the part of McNab to discharge an obligation to reply to MAK's submissions with respect to them. The basis of the disallowance clearly was that the Adjudicator could not be satisfied that McNab had established an entitlement to them. She was unable to be so satisfied in the face of the quite scant detail given by McNab about them in Payment Schedule 9, MAK's more detailed response to them raising disputes of fact concerning each backcharge, and McNab's mere reliance thereafter of the information in the payment schedule without any further detail. What underpinned the disallowance was an inability on the Adjudicator's part to resolve the factual disputes. McNab required a resolution of them in its favour in order to discharge fully its onus of establishing a justifiable basis for its having deducted the backcharges pursuant to clause 31(b)(vii) in the process of assessing Payment Claim 116.

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86 AB612.

87 Appellant's outline of submissions paragraph 46.

[65] I therefore reject McNab's submission. In my view, the learned primary judge's summation of the situation at paragraph 56 of her reasons is both appropriate and correct.

Backcharge 31

[66] I hasten to say that I except B31 from the preceding analysis. As the Adjudicator noted at paragraph 75 of the Adjudication Decision, MAK made no submissions in respect of it. The material before the Adjudicator concerning it comprised the information at page 11 of the Detailed Subcontract Payments Schedule.[88] That information referred to an attached Appendix B. That attachment, which appears not to have formed part of the adjudication application, was also attachment SG-15 to Mr Garufi's statutory declaration.[89] It detailed the work subject of the backcharge as being related to patching/rending walls to the TEAL room and as having four components which amounted in total to $11,727 (ex GST).[90]

[67] Absent any submission by MAK concerning this backcharge, no factual dispute was raised in respect of it. Thus the Adjudicator's reasoning for declining to find that McNab had discharged its onus in respect of the other disputed backcharges was inapplicable to this backcharge. Absent any factual dispute, the way was clear for the Adjudicator to have proceeded to determine the B31 backcharge claim on its merits.

[68] By virtue of s 13(1)(a) BCIPA, the amount of a progress payment to which a subcontractor is entitled under the Act is the amount calculated under the subcontract. Section 29(1) thereof requires the adjudicator to decide the amount of the progress payment, if any, to be paid by the contractor to the subcontractor. Here, in the process of deciding the amount of Payment Claim 116, if any, to be paid to MAK, the Adjudicator omitted to consider whether, on the material before her and having regard to the provisions of clause 31(b) of the subcontract, backcharge B31 was to be allowed. This omission gives rise to a question whether, by reason of it, the legal validity of the Adjudication Determination overall has been impugned. The Act itself does not address the legal consequence, if any, of such an omission.

[69] Considerable assistance with this question is to be gained from the observations of Palmer J of the Supreme Court of New South Wales in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd Anor*.[91] Factually, that case differed from the present. There, the contractor had failed to deliver a payment schedule in time and, as a consequence, it was precluded from making submissions to the adjudicator. Speaking beyond those factual circumstances and more generally, his Honour said:

> "[56] It is now established, I think, that an adjudication determination is void if the adjudicator fails to address in good faith the matters required by s 22(2): see *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at paras 31 and 49 per Brereton J and the authorities there discussed. Section 22(2) makes no distinction in this regard between, on the one hand, an

88 AB151.
89 See paragraph 56 thereof; AB417.
90 AB446.
91 [2006] NSWSC 1.

> adjudication in which the respondent has served timeously a payment schedule and has made submissions in support of the schedule and, on the other hand, an adjudication in which the respondent has been precluded from making submissions by s 20(2A).
>
> [57] Where both claimant and respondent participate in an adjudication and issues are joined in the parties' submissions, the failure by an adjudicator to mention in the reasons for determination a critical issue (as distinct from a subsidiary or non-determinative issue) may give rise to the inference that the adjudicator has overlooked it and that he or she has therefore failed to give consideration to the parties' submissions as required by s 22(2)(c) and (d). Even so, the adjudicator's oversight might not be fatal to the validity of the determination: what must appear is that the adjudicator's oversight results from a failure overall to address in good faith the issues raised by the parties.
>
> [58] In some cases, it may be possible to say that the issue overlooked was of such major consequence and so much to the forefront of the parties' submissions that no adjudicator attempting to address the issues in good faith could conceivably have regarded it as requiring no specific examination in the reasons for determination. In other cases, the issue overlooked, although major, may be one of a large number of issues debated by the parties. If the adjudicator has dealt carefully in the reasons with most of those issues, it might well be a possibility that he or she has erroneously, but in good faith, omitted to deal with another major issue because he or she did not believe it to be determinative of the result. Error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity of the adjudication determination. The Court must have regard to the way in which the adjudication was conducted and to the extent and content overall of the adjudicator's reasons: the Court should not be too ready to infer lack of good faith from the adjudicator's omission to deal with an issue when error alone is a possible explanation."[92]

[70] The observations advanced by Palmer J in paragraph 57 that for an adjudicator's oversight to be fatal to the validity of the determination, it must appear that the oversight resulted from a failure to address in good faith the issues raised by the parties, finds support not only in *Holmwood* at [46]-[48], but also in *Brodyn* at [56] and *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*[93] at [49]. I would adopt it as a sound basis on which to answer the question here.

[71] The circumstances in which the Adjudicator made the omission were that B31 was a backcharge item for $11,727 among a total amount for backcharges of $227,842.[94]

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92 At [56]-[58].

93 [2005] NSWCA 142.

94 Adjudication Decision paragraph 73.

That amount was a component of a number of set-offs claimed by McNab against Payment Claim 116 for $853,952.97. In total, the set-offs exceeded that amount. The Adjudicator determined the three largest backcharges. They were the ones on which detailed submissions had been received from both sides. The adjudicator declined to determine the others. Her reason for so doing was that factual issues had been raised by MAK concerning them which McNab had not addressed in its adjudication submissions.

[72] It is true that McNab had not referred in any detail to B31 in its adjudication submissions. What the Adjudicator appears to have overlooked is that MAK had not referred to B31 in any part of its adjudication application in a way which raised any factual issue concerning it. Her omission to deal with B31 is attributable to this oversight. It was an oversight which was mechanistic in nature, relating to a comparatively minor claim item. There is no basis at all for inferring a lack of good faith on her part in the omission.

[73] For these reasons, I am unpersuaded that this ground of appeal has been established.

Disposition

[74] As all grounds of appeal have failed, this appeal must be dismissed. It is appropriate that McNab pay MAK's costs of the appeal on the standard basis.

Orders

[75] I would propose the following orders:
1. Appeal dismissed.
2. Appellant to pay the respondent's costs of the appeal on the standard basis.

[76] **MORRISON JA:** I have had the advantage of reading the reasons prepared by each of Gotterson JA and Jackson J. As with Jackson J, I agree with the reasons of Gotterson JA except for the point, identified in the reasons of Jackson J, which concerns the adjudicator's error in failing to consider a claim for $11,727, being a claim for a backcharge item B31. In respect of that matter I agree with the reasons of Jackson J but wish to add some further comments.

[77] In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*,[95] Palmer J set out his reasons for concluding that "it is now established, I think, that an adjudication determination is void if the adjudicator fails to address in good faith the matters required by s 22(2)", there referring to the New South Wales analogue of s 26(2) of the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"). The relevant passages are set out in paragraph [69] of the reasons of Gotterson JA.

[78] Since that time there have been a number of decisions where that approach has been adopted. They include, in New South Wales, *Baseline Constructions Pty Ltd v Classic Group Painting Services Pty Ltd*.[96] In Queensland they include: *Hitachi Limited v O'Donnell Griffin Pty Ltd*;[97] *Walton Construction (Qld) Pty Ltd v Salce*;[98] *J Hutchison Pty Ltd v Galform Pty Ltd*;[99] and *John Holland Pty Ltd v TAC Pacific Pty Ltd*.[100]

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95 [2006] NSWSC 1 ("*Brookhollow*").
96 [2006] NSW SC 397, per Einstein J at [35] and [43].
97 [2008] QSC 135.
98 [2008] QSC 235.
99 [2008] QSC 205.
100 [2010] 1 Qd R 302 at [18]–[21].

[79] However, reservations have been expressed as to the applicability of that approach to decisions of adjudicators under legislation such as BCIPA. In *John Holland Pty Ltd v RTA of New South Wales*,[101] Gzell J reviewed the decisions from *Brodyn Pty Ltd t/as Time Coast and Quality v Davenport & Ors*,[102] *Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd*,[103] *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty* Ltd,[104] and *Brookhollow*. At [43] Gzell J said:

> "McDougall J pointed out in *John Goss Projects v Leighton Contractors* [2006] NSWSC 798 at [57], by reference to *Holmwood*, that the content of the concept of good faith is unsettled and it is preferable to deal with most applications on the basis of a denial of natural justice:
>
> > **'**The content of the concept of good faith (in the *Brodyn* sense, if I make call it that) is unsettled - - see the judgment of Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [63] and following. There is possibility for that concept to overlap with the reference to 'good faith' in s 30(1). In those circumstances, I think the courts should be slow to decide applications on the basis of a lack of '*Brodyn*' good faith unless it is necessary to do so. In many cases, it will be possible to decide the application on the basis of a denial of natural justice; and if this is so, then that should be sufficient.'"

[80] Gzell J declined to decide the matter on the basis of the concept of good faith in the decision.

[81] In *Queensland Bulk Water Supply Authority (t/as Seqwater) v McDonald Keen Group Pty Ltd (in liq)*,[105] the line of authority from *Brodyn* was reviewed by Holmes JA,[106] having identified that arguments had been developed in favour of a broad approach or alternatively a narrow approach to the question. The broad approach identified good faith as a condition of the validity of the exercise of an adjudicator's power, as requiring more than mere honesty; it required faithfulness to the obligation and a conscientious effort to perform the obligation. It was often referred to as a "genuine attempt" to exercise power. Under the narrow approach, for there to be an absence of good faith there must be personal fault and a conscious intent to be recreant in respect of the duty of the adjudicator.

[82] Holmes JA referred to the contentions advanced by the appellant in that case in this way:[107]

> "[48] QBWSA argued for the approach taken at first instance in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* in the Supreme Court of New South Wales. Brereton J conducted an extensive review of cases considering the

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101 [2006] NSWSC 1202.
102 [2004] 61 NSWLR 421 ("*Brodyn*").
103 [2005] NSWCA 142.
104 [2005] NSWSC 1129 ("*Holmwood*").
105 [2010] 2 Qd R 322 ("*QBWSA*").
106 With whom Fraser JA agreed.
107 *QBWSA* at [48]–[49] (internal references omitted).

'good faith' formula, including the *Migration Act* cases. Of them, he said that there were two schools of thought; while both schools supported the first six propositions advanced in *SBBS*, they diverged on whether there was a dichotomy between good faith and bad faith, or some middle ground, and on whether want of good faith could be established by recklessness or capriciousness short of deliberate and wilful conduct. He preferred the broader view, concluding that recklessness or capriciousness such as to show the absence of a genuine or conscientious attempt by the adjudicator to perform his or her function, while falling short of a wilful and deliberate failure, could amount to a want of good faith. He summarised:

> '[G]ood faith as a condition of validity of the exercise of an adjudicator's power to make a determination requires more than mere honesty. It requires faithfulness to the obligation. It requires a conscientious effort to perform the obligation. And it does not admit of capriciousness.'

[49] On appeal, however, Brereton J's approach was not endorsed. Giles JA gave the leading judgment; he identified the vice in the adjudicator's determination as his arrival at an adjudicated amount by a process unrelated to a consideration of the matters in the equivalent of s 26(2), a conclusion which, he observed somewhat tersely, could be reached:

> 'without embarking on an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a *bona fide* attempt to exercise the statutory power.'"

[83] Holmes JA then expressed her view in these terms:[108]

> "[51] I incline to the view that the absence of good faith may not be the exact converse of bad faith, and I agree with the learned primary judge that the content of what is required may vary according to context. But I am not entirely convinced of the significance his Honour attributed to the context here, and, more particularly, to the interim character of the arbitrator's decision. In that context, of the *Payments Act* which is designed to provide an expeditious mechanism for payment, and which allows of further proceedings, unaffected by the arbitrator's decision, to determine the parties' contractual rights, I think there is a good deal to be said for a narrow approach to questions of good faith. However, as will emerge from what follows, I agree with the learned primary judge that on either test, QBWSA has not demonstrated a want of good faith on the adjudicator's part."

[84] The reference by Holmes JA to the appeal from the decision of Brereton J in *Holmwood* is to the decision of the New South Wales Court of Appeal in *Halkat*

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108 *QBSWA* at [51].

Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd.[109] The passage cited by Holmes JA from that decision is at paragraph [26] of *Halkat*. On any view, the Court of Appeal did not adopt the reasoning in *Brodyn*.[110] Indeed, in a later appeal, *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd*,[111] the Court of Appeal referred to the issue again in these terms:[112]

> "[113] In *Brodyn Pty Ltd v Davenport* at [55] Hodgson JA included in the basic requirements for existence of an adjudicator's determination 'a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the Legislation and reasonably capable of reference to this power'. In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* Brereton J considered that something less than wilful and deliberate failure to perform an adjudicator's function could suffice, and that there could be failure in the basic requirement if, despite honesty, there were recklessness or capriciousness; in another phrase used, if there were not 'a conscientious effort to perform the obligation' at [109]–[117].
>
> [114] The appellant noted this Court did not on appeal 'fully endorse' this 'broader approach to the question of good faith'. This Court did not endorse it at all, declining to embark on 'an exegesis of the reference in *Brodyn Pty Ltd v Davenport* to a bona fide attempt to exercise the statutory power' (*Halkat Electrical Contractors Pty Ltd v Holmwood Holdings Pty Ltd* [at [26]. The appellant's submissions did not venture into the correct understanding of the basic requirement. It is again unnecessary to do so, since even on the so-called broader approach the facts did not approach making out failure of the adjudicator to make a bona fide attempt to exercise the powers under the Act."

[85] The issue received attention again in Queensland in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*.[113] White JA dealt with the line of authority from *Brodyn* and *Holmwood*, and referred to the appeal from *Holmwood* in *Halkat*.[114] In addition, White JA reviewed this Court's decision in *QBWSA*[115] and then referred to the debate as to whether the narrow view of broader view should be adopted. Her Honour concluded her analysis in this way: [116]

> "[96] The discussion in *Minister for Immigration and Citizenship v SZMDS* concerning the relationship between jurisdictional error in respect of reasoning which is 'clearly unjust', 'arbitrary', 'capricious' and '*Wednesbury* unreasonable' demonstrates that attaching these descriptors to the good

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109 [2007] NSWCA 32 ("*Halkat*").

110 Santow JA and Tobias JA agreed with Giles JA.

111 [2009] NSWCA 157.

112 *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [113]–[114]; Giles JA, with whom McColl and Young JJA agreed.

113 [2012] 1 Qd R 525.

114 *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [81]–[85] ("*Northbuild*").

115 *Northbuild* at [90].

116 *Northbuild* at [96]. Internal citations omitted.

> faith debate possibly adds little more than did the original understanding of good faith in the review of statutory decision making that the power must be exercised honestly for the purpose for which it was given. As the New South Wales Court of Appeal did in *Holmwood*, the enquiry should focus more on whether the adjudicator has performed the function demanded by the *Payments Act* and less on pursuing elusive synonyms, keeping always in mind that the legislative intent dictates a person with recognised expertise in the area be selected for the task by an informed body and this, necessarily, facilitates the rapid decision making required."

[86] The other judges in *Northbuild*, McMurdo P and Chesterman JA, did not deal with the point.

[87] In *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd*,[117] Atkinson J referred to the *Brodyn* and *Holmwood* line of authority, and the debate about whether a narrow or broad approach should be taken. In the process she reviewed the authorities including *QBWSA* and the decision of White JA in *Northbuild*. Atkinson J declined upon review of those authorities, to approach the matter on the basis of a consideration as to whether it was necessary that the adjudicator's task be accompanied by questions of whether it was made in good faith or as a bona fide attempt, saying:[118]

> "[28] My approach, therefore, will be to consider whether there has been a jurisdictional error because of a failure to perform the function required of the adjudicator by BCIPA which includes relevantly for these proceedings, the duty to consider only the matters set out in s 26(2) of BCIPA and to accord natural justice in doing so."

[88] In light of the reservations expressed as to the applicability of the *Brodyn* and *Holmwood* line of authority, I would not adopt it as the method of resolving the issue in this case. The issue was not fully argued on this appeal and should await another occasion when it can be properly determined.

[89] However, there is support, in my view, for the approach set out in paragraphs [108] – [109] of the reasons of Jackson J. In *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*,[119] Hodgson JA[120] considered a case where what was being contended was that the adjudicator failed to consider a particular party's submissions. He said:[121]

> "[54] In my opinion, there may be a sense in which s 22(2) is breached if there is any relevant provision of the Act or provision of the contract which is not considered by the adjudicator, or indeed if there is any one of what may be numerous submissions duly made to the adjudicator which is not considered. However, in my opinion a mere failure

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117 [2011] QSC 145.

118 *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145 at [28].

119 *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 ("*John Holland*").

120 With whom Beazley JA agreed.

121 *John Holland* at [54]–[55].

> through error to consider such a provision of the Act or of the contract, or such a submission, is not a matter which the legislature intended would invalidate the decision.
>
> [55] The relevant requirement of s 22(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s 22(2), so long as the specified classes of considerations are addressed; or alternatively, if one takes the view that s 22(2) does require consideration of each and every relevant provision of the Act and the contract and each and every submission duly made, the intention of the legislature cannot have been that this kind of mistake should invalidate the determination. In a case where there were 1,000 submissions duly made, an accidental failure to consider one of them could not reasonably be considered as invalidating a whole determination; and there is no basis for partial invalidation of a determination, that is, invalidation only of that part affected by the omitted submission."

[90] That part of Hodgson JA's reasoning has since been referred to as settled law.[122]

[91] More particularly it has been referred with approval by this Court. In *Northbuild*, White JA[123] had the following to say:[124]

> "Northbuild had contended that the payment claim made by CIL did not comply with s 17(2) of the *Payments Act* in that it failed to identify the construction works the subject of the claim. No complaint is made about the adjudicator's finding that the payment claim did so. It was contended by Northbuild that cl 3(d) of the contract specifically set out the manner in which claims were to be made and, since CIL had not complied, no amount was due. The adjudicator assessed those provisions in the contract as machinery provisions and concluded that the *Payments Act* provided another provision for making a claim and gave effect to it. Again, that finding is not the subject of any complaint. It is the manner in which the adjudicator dealt with the claim for variations (including the delay claims) and the valuation of the work done under the contract which Northbuild contended demonstrated that he did not approach

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122 *Over Fifty Mutual Friendly Society Ltd v Smithies* [2007] NSWSC 291, per Einstein J at [19]; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941, per Hammerschlag J at [30].

123 In this respect, with the concurrence of McMurdo P and Chesterman JA.

124 *Northbuild* at [107]. Internal citations omitted.

and carry out his task in good faith, or, 'have regard to' its submissions. The primary Judge, after quoting extensively from the judgment of Hodgson JA in *Brodyn*, concluded in a passage about which there can be no criticism:

> 'In summary, what is required of an adjudicator is that he or she make a genuine attempt to understand and apply the relevant contract and to exercise the power in accordance with the Act.'

His Honour admonished that in assessing the decision of an adjudicator where there is a claim of want of bona fides:

> 'It does not assist in the determination of such a question to simply cherry pick particular paragraphs from a lengthy decision and, by pointing at them alone, attempt to show an absence of bona fides.'

His Honour adopted the approach described by Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* and by Hodgson JA in *John Holland Pty Limited v Roads and Traffic Authority of NSW*. In *Shellbridge*, Barrett J said:

> '… the whole of the content and tenor of an adjudication may be called in aid in deciding whether particular submissions were considered in the way the Act requires. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions.'

In *John Holland*, Hodgson JA noted:

> 'The relevant requirement of s 22(2) [s 26 of the *Payments Act*] is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s 22(2), so long as the specified classes of considerations are addressed …'

Although not referred to by the primary Judge, in *John Holland* Basten JA noted, firmly, that authority to decide the scope of the right conferred by the Act or, if relevant, the scope of the right under the construction contract rests conclusively with the adjudicator."

[92] In my respectful view, there is no logical point of distinction between an adjudicator's accidental or erroneous omission to consider a submission, and an

adjudicator's accidental or erroneous omission to deal with a part of a claim the subject of the submission. Here the adjudicator simply did not deal with the backcharge item amounting to $11,727. There is no suggestion other than that it was by accident or error. That being so the approach in *John Holland* is applicable. That is to say, the accidental or erroneous omission to deal with that part of the claim does not invalidate the determination. It is consistent with the adjudicator having complied with his or her obligations under s 26(2) of BCIPA,[125] but simply, by accident or error having omitted to deal with one part.

[93] That approach sits comfortably with the view, expressed by Jackson J, that the presence of s 28 of the BCIPA reflects the legislature's view that the accidental or erroneous omission to consider part of claim does not invalidate the adjudicator's decision for jurisdictional error.

[94] I pause to note that a similar approach was adopted by Skoien AJ in *Hitachi Ltd v O'Donnell Griffin Pty Ltd*.[126] In that case the adjudicator had taken the view that the particular payment claim, with its supporting material and material to the contrary, was simply too big to permit a proper examination of each separate claim. Instead, the adjudicator took a selection of claims which were examined in detail. In that respect the adjudicator took what Skoien AJ described as a conservative approach, in that he "valued only six claims and relied specifically on [three of them] but he satisfied himself that all of the other claims gave him enough padding to justify his resultant conservative progress payment".[127]

[95] Skoien AJ concluded that there was no jurisdictional error in the adjudicator's approach. In the course of his reasons he referred to what Hodgson JA had to say in *John Holland*, in evident support of his approach.[128] Skoien AJ expressed his conclusion in this way:[129]

> "[41] If I can see nothing in principle illegitimate in his methodology, does the *Payments Act* or legal authority reveal illegality? Section s 26 says nothing specifically on the point. It does not in terms require the adjudicator to consider, assess and value each separate claim under pain of having the adjudication annulled. Given the time constraints and the size of many adjudications, that would be an unlikely intention of the legislature and, one would expect, would have been carefully spelled out if intended.
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> [42] One of the major intentions of the legislature in passing the *Payments Act* was the quick assessment of progress claims to keep up the vital cash flow to sub-contractors. Does s 26(2) require that every separate claim in a voluminous progress claim must be considered in full detail before the adjudicator's decision can be handed down? It does not say so in terms. Any number of possible factual situations can be advanced to argue against such an inflexible construction of s 26. Would failure to deal specifically with a handful of

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125 The analogue to s 22(2) of the NSW *Building and Construction Industry Security of Payment Act* 1999.
126 [2008] QSC 135 ("*Hitachi*").
127 *Hitachi* at [32].
128 *Hitachi* at [53].
129 *Hitachi* at [41]–[42].

> claims worth a few hundred dollars nullify a decision on a payment claim made up of many hundred claimed variations, worth many millions of dollars all of the other claims having been carefully considered and individually valued? I hardly think so."

[96] In my view the adjudicator's failure to deal with the backcharge item for $11,727, in B31, was an accident or error, but one which does not invalidate the adjudicator's decision for jurisdictional error. I agree with Jackson J that the error could be corrected under s 28 of BCIPA, but whether the parties do so is a matter for them.

[97] I agree with the orders proposed by Gotterson JA.

[98] **JACKSON J:** In the result, I agree with the orders proposed by Gotterson JA. As well, except for one point, I agree with the reasons of Gotterson JA. The exception concerns the question whether the adjudicator's error in failing to consider the $11,727 claim for a backcharge or reduction by McNab might have invalidated her determination of the whole adjudicated amount of $241,441.20. In my view, in the circumstances of this case, it does not. Nevertheless, a failure to consider a matter in reduction of a payment claim, properly raised by a respondent in a payment schedule, which an adjudicator is required to consider in deciding an adjudication application, is an error of law. The critical question, on which my view differs from Gotterson JA, is whether such an error only invalidates the adjudicator's decision if there is also a lack of good faith by the adjudicator.

[99] Section 18(2)(b) of the *Judicial Review Act* 1991 (Qld) provides, inter alia, that the *Judicial Review Act* 1991 (Qld) does not apply to decisions made or required to be made under an enactment mentioned in Schedule 1, Part 2 of that Act. Schedule 1 Part 2 mentions the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"), Part 3, Division 2. Those provisions exclude this Court's power to set aside an adjudicator's decision to some extent. However, they do not reach the power to set aside an adjudicator's decision for non-compliance with BCIPA that amounts to jurisdictional error. Since *Kirk v Industrial Court of New South Wales*,[130] it has been recognized that the supervisory jurisdiction of this Court on judicial review for jurisdictional error is constitutionally entrenched, so that no Act of the Parliament of the State of Queensland can exclude it.

[100] Notwithstanding the decisions on the operation of the near identical NSW Act, I am not persuaded that a failure to consider, of the presently relevant kind, can only amount to jurisdictional error if the adjudicator acts without good faith in breach of the statutory requirement to consider the matter.

[101] The attraction of the contrary conclusion stems from two factors. First, as the object section (s 8) summarises, BCIPA provides for payment to a claimant of any adjudicated amount (s 29), as decided by an adjudicator (s 26), by a speedy administrative process of payment claim (s 17), payment schedule (s 18), adjudication application (s 21), adjudication response (s 24) and accompanying material and submissions. That process gives effect to the right to a progress payment conferred by BCIPA upon a person who has undertaken to carry out construction work, or supply related goods and services under a construction contract, often at monthly

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130 (2010) 239 CLR 531.

intervals (s 12). As already mentioned, judicial review of the validity of an adjudicator's decision under the *Judicial Review Act* 1991 (Qld) is excluded. Yet, the constitutionally entrenched supervisory jurisdiction of this Court operates outside the reach of the Parliament of Queensland to diminish it. Thus, if the error which attends the making of an adjudicator's decision is a jurisdictional error, there is no scope for the operation of a secondary principle which would restrict this Court's power in the supervisory jurisdiction to a subset of decisions made without good faith.

[102] Secondly, because an adjudicator's decision results in the determination of a single adjudicated amount, jurisdictional error in reaching that amount on a relatively minor scale may invalidate the whole of the adjudicator's decision. There is no ability to sever the adjudicated amount so as to preserve any part of the determination that was not affected by the jurisdictional error. On the facts of the present case, the amount affected by the adjudicator's error is small in comparison to the rest of the adjudicated amount. It is unattractive that the whole of the adjudicated amount is invalidated for a relatively minor error. Yet, if the true principle is that an error of the present kind will invalidate an adjudicator's decision for jurisdictional error only where there is a lack of good faith, that must be just as true whether the amount of the error is large or small.

[103] Whether or not a particular non-compliance with the requirements of BCIPA results in jurisdictional error turns upon the construction of the Act. If the Act in question, properly construed, does not invalidate a non-complying decision, there will be no jurisdictional error. The provisions of the Act in question will inform the answer to that question. For example, in tax legislation it is provided that a failure to comply with the provisions for making an assessment does not invalidate the assessment.[131] There is no such provision in BCIPA, but the inquiry as to construction is wider than that.

[104] That an adjudicator who fails to consider material that they are required to take into account may fall into jurisdictional error was accepted as correct in relation to an adjudicator's "disregard" of a respondent's material provided by way of the payment schedule and submissions under BCIPA in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*.[132] That conclusion gives due recognition to the terms of s 26(2) of BCIPA, which provide that in deciding an adjudication application an adjudicator "is to consider" those matters, among others.

[105] The precise question in this case, as *Project Blue Sky Inc v Australian Broadcasting Authority*[133] clarified, is: can there be discerned a legislative purpose to invalidate an adjudicator's decision which the adjudicator reached by failing to comply with s 26(2), because she failed to consider the $11,727 claim for a backcharge or reduction by McNab? This is "ascertained by reference to the language of the statute, its subject matter and objects, and the consequences of holding void every act done in breach".[134]

[106] Gotterson JA's reasons accept Palmer J's view, from *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor*,[135] that where an adjudicator fails to address the matters

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131 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 156-157 [23]-[24].
132 [2012] 1 Qd R 525, 540 [21] and 556 [79].
133 (1998) 194 CLR 355.
134 (1998) 194 CLR 355, 388-389 [91]-[92].
135 [2006] NSWSC 1.

required by s 26(2), it must also appear that there was a failure to address the issues overall in good faith, before the decision is held to be invalid, because "error in identifying or addressing issues, as distinct from lack of good faith in attempting to do so, is not a ground of invalidity".

[107] In support of that reasoning, Gotterson JA refers to three other cases, including *Brodyn v Pty Ltd (t/a Time Cost and Quality) v Davenport*.[136] However, those cases all antedate the identification of the constitutionally entrenched *Kirk* supervisory jurisdiction, based on jurisdictional error, and the focus of more recent cases on the question of statutory construction involved in the determination of whether non-compliance with a provision of BCIPA amounts to a jurisdictional error, as *Northbuild* shows.

[108] Nevertheless, it is also clear that not all non-compliances by an adjudicator in considering the matters required to be considered under s 26(2) will invalidate the adjudicator's decision. Section 28 of BCIPA provides:

> **"28 Adjudicator may correct clerical mistakes etc.**
>
> (1) Subsection (2) applies if the adjudicator's decision contains—
>
> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision; or
>
> (d) a defect of form.
>
> (2) The adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the decision."

[109] In the present case, there is a factual question whether the adjudicator's error is an error arising from an accidental slip or omission. In my view, the adjudicator's reasons and the absence of any contrary evidence support the inference that, more likely than not, it is.

[110] Once that conclusion is reached, s 28(1)(b), at the least, preserves the adjudicator's decision as one which may be corrected. Applying the *Project Blue Sky* approach, in my view, it follows that non-compliance with the s 26(2) requirement to consider the payment schedule and submissions and relevant documentation which comprises an accidental slip or omission does not invalidate the adjudicator's decision for jurisdictional error. An administrative decision which is invalid for jurisdictional error may in law amount to no decision at all.[137] However, since s 28(2) preserves the operation of an adjudicator's decision to be corrected, there is no other reason, in my view, why the decision should be treated as invalid and of no effect until that power is exercised. It may be that none of the relevant parties considers that a particular error is important enough to warrant correction.

[111] It is unnecessary to go further to decide this case. In a number of contexts, it is accepted that a lack of good faith is a ground of invalidity for the exercise of an administrative power.[138] It is also accepted to be jurisdictional error.[139] But that is

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136 (2006) 61 NSWLR 421.

137 *S157/2002 v Commonwealth* (2003) 211 CLR 476, 506 [76].

138 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 164-165 [55]-[56].

a different thing from saying that the s 26(2) requirement that an adjudicator is to consider the payment schedule and submissions and relevant documentation will not amount to jurisdictional error unless there is also a lack of good faith, on the proper construction of BCIPA. I would not so find, and to that extent would not follow *Brookhollow* or any other case which so decides.

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139 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 573; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 186 [134]; Aronson, Groves and Dyer, *Judicial Review of Administrative Action*, 5 ed, 18 [1.140].