

SUPREME COURT OF QUEENSLAND

CITATION: *Ostwald Bros Pty Ltd v Jaylon Pacific Pty Ltd & Ors* [2016] QSC 240

PARTIES: **OSTWALD BROS PTY LTD**
ACN 099 115 009
(applicant)
v
JAYLON PACIFIC PTY LTD
ACN 099 559 609
(first respondent)
and
MICHAEL HOPE CHESTERMAN (ADJUDICATION REGISTRAR)
(second respondent)
and
JONATHAN HOWARD SIVE (ADJUDICATOR J1099713)
(third respondent)

FILE NO/S: BS No 2474 of 2016

DIVISION: Trial

PROCEEDING: Originating application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 October 2016

DELIVERED AT: Brisbane

HEARING DATE: 24 March 2016, supplementary submissions received on 6 and 8 April 2016, further supplementary submissions received on 4 and 9 May 2016, second further supplementary submissions received on 26 and 31 May 2016

JUDGE: Burns J

ORDERS:

- 1. Declare that the adjudication decision of the third respondent dated 24 February 2016 upon adjudication application number QBCC10046 is void.**
- 2. Direct the parties to confer within seven days of this order with a view to agreeing upon the orders to be made to give effect to paragraph 1 of this order and any consequential orders.**
- 3. Failing agreement, direct the parties within 14 days of this order to provide written submissions as to the further orders to be made having regard to Order 1 and the reasons published this day, limited to no**

more than five pages.

4. Otherwise adjourn the hearing of the application to a date to be fixed.

5. Costs reserved.

CATCHWORDS: ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – GROUNDS FOR CERTIORARI TO QUASH – EXCESS OR WANT OF JURISDICTION – PARTICULAR INSTANCES OF JURISDICTIONAL ERROR – where the applicant and the first respondent were parties to a construction contract – where the first respondent served a payment claim under the *Building and Construction Industry Payments Act 2004* (Qld) for work claimed to have been performed under the contract as well as additional work by way of variations – where the applicant disputed the claim and sought to claim an amount for liquidated damages for late performance by the first respondent – where an adjudication decision was purportedly made under the Act – whether the applicant had been denied procedural fairness because the adjudicator determined the dispute on a basis that was not the subject of submissions from either party – whether the adjudication decision should be declared void

Building and Construction Industry Payments Act 2004 (Qld), s 17, s 18, s 21, s 23, s 24, s 26

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346, cited

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2013] QCA 394; [2015] 1 Qd R 228, cited

Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421, cited

John Holland Pty Ltd v TAC Pacific Pty Ltd [2009] QSC 205; [2010] 1 Qd R 302, cited

Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd [2014] QSC 223, cited

David Hurst Constructions Pty Ltd v Durham [2008] NSWSC 318, followed

Illawarra Retirement Trust v Denham Constructions Pty Ltd [2015] NSWSC 1173, cited.

Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd [2014] QSC 80; [2015] 1 Qd R 463, cited

Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 69 LGR 1; 1 BLR 111, cited

Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2016] NSWSC 462, cited

SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391, cited

Walton Construction (Qld) Pty Ltd v Corrosion Control

Technology Pty Ltd [2011] QSC 67; [2012] 2 Qd R 90, cited

COUNSEL: G Beacham QC for the applicant
M Ambrose for the first respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
BCCS Law for the first respondent

- [1] The applicant, Ostwald Bros Pty Ltd, seeks a declaration that an adjudication decision purportedly made under the *Building and Construction Industry Payments Act 2004* (Qld) on 24 February 2016 is void and, further, an injunction permanently restraining the adjudication registrar from issuing an adjudication certificate based on that decision.
- [2] The first respondent, Jaylon Pacific Pty Ltd, appeared at the hearing to oppose the relief sought by Ostwald. In accordance with established principle, the adjudicator, Mr Sive, and the adjudication registrar, Mr Chesterman, took no active part in the hearing, indicating instead that they would abide the order of the court.
- [3] The dispute that eventually found its way to the adjudicator had its beginnings in a subcontract entered into by Ostwald as contractor and Jaylon as subcontractor for the supply and installation of lining for an effluent pond in Condabri Central in Queensland. Although the date for substantial completion under the subcontract was to become a matter in issue in the adjudication, the latest date contended for by the parties was 30 June 2015. Almost five months later (27 November 2015), Jaylon submitted a payment claim which, when later reduced in line with a concession made by Jaylon as to what could be pursued under the Act, amounted to \$441,466.51. Ostwald disputed much of that claim and, further, sought to set off from any sum that the adjudicator found to be due an amount for liquidated damages for late performance. These damages were calculated by Ostwald to be \$403,614. In the result, Ostwald claimed, Jaylon was indebted to it in the sum of \$201,423.84.
- [4] The adjudicator effectively upheld Jaylon's claim and rejected Ostwald's claim for liquidated damages in its entirety. He decided that Ostwald should pay the sum of \$424,901.40 to Jaylon and be responsible for the full amount of his fees.
- [5] Ostwald relied on a number of grounds to attack the adjudication decision. First, it was contended that Ostwald had been denied substantial procedural fairness because the adjudicator rejected its claim for liquidated damages on a basis that was not the subject of submissions from either party. Alternatively, it was argued that the rejection of the liquidated damages claim was affected by jurisdictional error because the adjudicator construed the subcontract in a manner that involved "no attempt to apply the contract terms" and in a way that was "unreasonable and without foundation". Lastly, it was argued that, when determining Jaylon's claims for "stand downs", the adjudicator "misunderstood the nature and limits of his function and powers" by, in effect, reversing the onus of proof under the subcontract.
- [6] Of these grounds, it is only necessary to consider the first. That is because, although an adjudicator is not required to provide an opportunity to the parties to be heard on every point, there is a clear obligation to do so where the point is material to the outcome of

the adjudication, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result. Unfortunately, that obligation was not met here and, for the reasons that follow, the adjudication decision involved a substantial denial of natural justice and must in the circumstances of this case be declared void.

The subcontract

- [7] Prior to 20 January 2015, Australia Pacific LNG Pty Ltd as principal and Ostwald as contractor entered into a head contract in respect of certain civil works to be carried out at Condabri Central to facilitate the production of coal seam gas. On 20 January 2015, Ostwald and Jaylon entered into a subcontract for the supply and installation of a system of high density lining for an effluent pond that, once constructed, was required as part of the production infrastructure.
- [8] Under the subcontract, the “Subcontract Works” are defined to mean “all work and materials to be carried out or supplied under the subcontract and handed over to [Ostwald], including variations and rectification work”.¹ The expression, “Substantial Completion”, is defined to mean the “stage in the carrying out of the Subcontract Works” when (1) those works are “complete except for inconsequential omissions or defects”, (2) the site has been cleaned, (3) all documents and other information required under the Subcontract to be provided by Jaylon to Ostwald have been provided and (4) all testing has been carried out.² Lastly, and of particular relevance to the arguments advanced on the hearing of this application, are these definitions:

“**Date for Substantial Completion** means the date stated in Schedule 1, as adjusted in accordance with clause 5, but if another date is determined in any litigation, then that other date.

Date of Substantial Completion means the date that the Subcontract Works have reached Substantial Completion as certified in a Certificate of Substantial Completion.”³

- [9] The date for substantial completion that was specified in Schedule 1 was 6 March 2015. Thus, when regard is had to the definitions set out immediately above, Jaylon was obliged under the subcontract to achieve substantial completion of the works by 6 March 2015 or such other date as might be “adjusted in accordance with clause 5”.⁴ That clause, in turn, contains a number of provisions that are concerned with the time for performance of the contract including, relevantly, extension of time claims (clause 5.4) and liquidated damages (clause 5.7). I will consider each of those provisions in detail.
- [10] Clause 5.4 provides as follows:

“5.4 Extension of time

¹ Clause 1.1. The subcontract is exhibited to the affidavit of Eden Tyler Bird; Exhibit EB-1 (p 3).

² Ibid.

³ Ibid.

⁴ See clause 1.1 (Definitions), clause 5.1(c) and Schedule 1.

- (a) Subject to clause 5.4(c), [Jaylon] will only be entitled to claim an extension of time to the Date for Substantial Completion where:
- (i) the Subcontract Works are delayed by any Qualifying Cause⁵ which will prevent [Jaylon] from achieving Substantial Completion by the Date for Substantial Completion;
 - (ii) the Subcontract Works and not concurrently delayed by a cause that is not a Qualifying Cause;
 - (iii) within the time period set out in Schedule 1 after the commencement of the Qualifying Cause, [Jaylon] gives written notice to [Ostwald's] Representative setting out the Qualifying Cause, the particular activities that are delayed and the extension of time to the Date for Substantial Completion that is claimed;⁶ and
 - (iv) if the delay continues beyond the extension of time claimed by [Jaylon] under clause 5.4(a)(iii), [Jaylon] gives [Ostwald's] Representative an updated notice every ten Business Days that satisfies the requirements of clause 5.4(a)(iii) until the delay ends.
- (b) Provided that the requirements of clause 5.4(a) are satisfied, [Ostwald's] Representative will determine the period of the delay to the Date for Substantial Completion caused by the Qualifying Cause referred to in a notice given by [Jaylon] under clause 5.4(a)(iii) or (iv) and extend the Date for Substantial Completion by that period. If an extension of time is granted, [Ostwald's] Representative will notify [Jaylon] of the revised Date for Substantial Completion.
- (c) [Ostwald's] Representative may (without being obliged to do so) at any time and for any reason it thinks fit, extend the Date for Substantial Completion. This right is solely for the benefit of [Ostwald] and may ... be exercised in its absolute discretion, even if [Jaylon] is not entitled to an extension of time or has not claimed an extension of time.
- (d) If [Jaylon] does not make any claim for an extension of time within the time or in the form specified in clause 5.4(a), [Jaylon] is not entitled to an extension of time, or to later claim an extension of time, for that delay.
- (e) A delay or failure by [Ostwald's] Representative to extend the Date for Substantial Completion will not cause that date to be set at large."

[11] It follows that, to claim an extension of the time stipulated under the subcontract for substantial completion, Jaylon needed to establish that its performance of the subcontract had been delayed by an act, default or omission on the part of Ostwald, its personnel or Australia Pacific LNG or that the delay was due to inclement weather occurring prior to the date for substantial completion, that date being either 6 March 2015 or such later date as was already extended by operation of clause 5.4. Jaylon also needed to establish that the delay was not due to some other cause and, further, that it

⁵ "Qualifying Cause means: (a) delay caused by any act, default or omission of [Ostwald], [Ostwald's] Personnel (who are not employed by [Jaylon]) or [Australia Pacific LNG]; or (b) any cause stated in Schedule 1 that is outside the reasonable control of [Jaylon]": clause 1.1. Schedule 1 specified "Inclement Weather occurring prior to the Date the Substantial Completion" as a "Qualifying Cause".

⁶ The "time period" prescribed in Schedule 1 was "within 3 Business Days of the first occurrence of the events or circumstances on which the Claim is based".

had complied with the notice requirements set forth in clauses 5.4(a)(iii) and (iv).⁷ Then, once each of those matters was established by Jaylon, it was for Oswald's Representative to determine the period of the delay and to extend the date for Substantial Completion by that period.

[12] Clause 5.7 is, so far as is relevant, in these terms:

“5.7 Liquidated damages

- (a) If [Jaylon] fails to reach Substantial Completion by the Date for Substantial Completion, [Jaylon] will be indebted to [Oswald] for liquidated damages at the rate stated in Schedule 1, if any, for every day after the Date for Substantial Completion up to and including the Date of Substantial Completion or the date that the Subcontract is terminated pursuant to clause 18, whichever occurs first.
- (b) If, after [Jaylon] has paid or [Oswald] has deducted liquidated damages, the Date for Substantial Completion is extended, with the effect that [Jaylon] would not have incurred liquidated damages had the extension of time been granted earlier, then subject to the terms of this Subcontract, [Oswald] will repay to [Jaylon] that much of the liquidated damages in respect of the period up to and including the new Date for Substantial Completion.
- (c) [Oswald] and [Jaylon] agree that all liquidated damages which may be payable by [Jaylon] to [Oswald] pursuant to this clause 5.7:
 - (i) are a genuine pre-estimate of the damages likely to be suffered by [Oswald] if [Jaylon] does not achieve Substantial Completion by the Date for Substantial Completion;
 - (ii) do not limit [Oswald's] other rights under the Subcontract or at law for any other breach of the Subcontract; and
 - (iii) do not relieve [Jaylon] from any of its obligations or liabilities under the Subcontract, including its obligations to achieve Substantial Completion.”

[13] The “rate” specified in Schedule 1 for liquidated damages is as follows:

“Liquidated damages (clause 5.7)

For each day of delay in completing the Subcontract Works by the Date for Substantial Completion: *AU \$18,020, EXCLUDING GST.*

Liability to liquidated damages is limited to a maximum of: 20% of the Subcontract Sum *\$360,559.*”⁸

[14] The entitlement on the part of Oswald to liquidated damages arose if Jaylon failed to bring the works to substantial completion by 6 March 2015 or such later date as was fixed by the operation of clause 5.4. The point of relevance here is that, absent any extension of time under that provision of the subcontract, on the face of the bargain struck by the parties Oswald has a right to payment of liquidated damages calculated by reference to the period of delay (if any) between the date fixed (or adjusted) by the

⁷ And see clauses 20.1 (Requirements for notice) and 31 (Notice).

⁸ The italicised words and figures appear in Schedule 1 in handwriting.

contract for substantial completion and the date when the works actually reached that stage.

The adjudication

- [15] On 27 November 2015, Jaylon served a payment claim on Ostwald pursuant to s 17 of the Act.⁹ A total progress claim of \$917,976.74 was advanced.¹⁰
- [16] On 11 December 2015, Ostwald replied to the payment claim by serving a payment schedule pursuant to s 18 of the Act.¹¹ In it, Ostwald contended that there was no money owing to Jaylon under the subcontract and that Jaylon had been overpaid \$201,423.84. In support of that contention, Ostwald maintained that the “Date of Substantial Completion” had already been certified under the subcontract¹² as having been reached on 30 June 2015, that it was accordingly not open to Jaylon to make another progress claim under the subcontract and that it was entitled to claim \$403,614 for liquidated damages for late performance and to “deduct that amount from any amount claimed by Jaylon”.¹³ That sum, Ostwald contended, equated to 20% of the subcontract works when adjusted for variations (\$2,018,073). Ostwald claimed that the adjusted date for substantial completion was 31 March 2015 and that, because substantial completion was not achieved until 30 June 2015, Jaylon was 91 days late.
- [17] On 14 January 2016, Jaylon served an adjudication application pursuant to s 21 of the Act.¹⁴ Jaylon conceded that a number of claims it had advanced in its payment claim for “stand downs” were claims for “damages for breach of contract and not recoverable” through the adjudication process under the Act.¹⁵ The making of that concession had the effect of reducing the total amount claimed by Jaylon to \$441,466.51.¹⁶ As for the claim for liquidated damages, Jaylon submitted that it achieved substantial completion by 8 June 2015 and that this date (or, alternatively, the date certified of 30 June 2015) should be adopted as the “Date of Substantial Completion” for the purposes of the subcontract.¹⁷ Further, Jaylon argued that the reason why it was unable to achieve substantial completion until then was because of a number of variations to the subcontract. As such, it submitted, the variations were a “Qualifying Cause” within the meaning of clauses 1.1 and 5.4 of the subcontract or, alternatively, recourse to the so-called “prevention principle”¹⁸ could be had in order to recover its progress claim under the Act (as reduced in accordance with its concession) and disentitle Ostwald to most, if not all, of the liquidated damages it claimed.¹⁹ That principle, if it operates in a given case, may serve to disentitle a principal from relying on a liquidated damages provision

⁹ Affidavit of Eden Tyler Bird; Exhibit EB-2 (p 43).

¹⁰ All dollar amounts that appear in this judgment are expressed in a way that is inclusive of GST.

¹¹ Affidavit of Eden Tyler Bird; Exhibit EB-3 (p 155).

¹² Pursuant to clause 5.8.

¹³ Affidavit of Eden Tyler Bird; Exhibit EB-3 (p 206).

¹⁴ Affidavit of Eden Tyler Bird; Exhibit EB-4 (p 208).

¹⁵ Ibid (p 216).

¹⁶ Ibid (p 218).

¹⁷ Ibid (pp 236, 245).

¹⁸ As to which, see *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1; 1 BLR 111.

¹⁹ Affidavit of Eden Tyler Bird; Exhibit EB-4 (pp 240, 244).

in the face of delay caused by its own acts or omissions.²⁰ So far as the argument based on that principle was concerned, Jaylon submitted that the date for substantial completion was set “at large” or, alternatively, that its obligation under the subcontract to substantially complete the works was no longer governed by the date stipulated in Schedule 1 (or as adjusted under clause 5.4) but, rather, it was required to complete within a “reasonable time”.²¹

- [18] On 20 January 2016, the adjudication was accepted by the adjudicator pursuant to s 23 of the Act.
- [19] On 8 February 2016, Ostwald delivered its adjudication response to the adjudicator under s 24 of the Act.²² It maintained that nothing was owed to Jaylon under the subcontract. In particular, it argued that Jaylon’s claim was based on disputed variations, extensions of time and dayworks.²³ In respect of the claims for extensions of time, Ostwald submitted that Jaylon had not proved that the relevant periods of delay came about because of a “Qualifying Cause” within the meaning of the subcontract or, if they did, that it had complied with the procedure under clause 5.4 to give rise to such an entitlement.²⁴ Ostwald pressed its claim for liquidated damages²⁵ and, in the course of so doing, submitted that the subcontract left no room for operation of the “prevention principle”.²⁶ To the extent that Jaylon had expressed doubt in the adjudication application as to whether a variation was capable of constituting a “Qualifying Cause”, Ostwald accepted that a variation could very well be a “Qualifying Cause” of delay under the subcontract.²⁷ Lastly, based on a statutory declaration accompanying its adjudication response, the submission was advanced that Jaylon had miscalculated the amount by which its claim was reduced by the concession it had made in relation to claims that it could not pursue under the Act.²⁸ Instead of \$441,466.51, the correct calculation (if Jaylon’s claims were accepted and Ostwald’s claim to liquidated damages was rejected) was submitted to be \$424,901.36.²⁹
- [20] The adjudication decision was delivered on 24 February 2016.³⁰ The adjudicator rejected completely the claim for liquidated damages and, instead, upheld Jaylon’s payment claim. To use the parlance of the Act, the adjudicator decided that the amount of the progress payment to be paid by Ostwald to Jaylon was \$424,901.40 and, further, that Ostwald should be liable for the payment of his fees in full.

The adjudicator’s determination of the liquidated damages claim

²⁰ See *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 at 395; *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2016] NSWSC 462 at [26].

²¹ Affidavit of Eden Tyler Bird; Exhibit EB-4 (p 235).

²² Affidavit of Eden Tyler Bird; Exhibit EB-5 (p 281).

²³ *Ibid* (p 285).

²⁴ *Ibid* (pp 286, 318 ff).

²⁵ *Ibid* (p 329 ff).

²⁶ *Ibid* (pp 332-334).

²⁷ *Ibid* (p 335).

²⁸ Affidavit of Eden Tyler Bird; Exhibit EB-6 (p 355).

²⁹ *Ibid* (p 361).

³⁰ Affidavit of Eden Tyler Bird; Exhibit EB-7 (p 385).

- [21] Before considering Jaylon’s claims for extensions of time and Ostwald’s competing claim for liquidated damages, the adjudicator dealt with the submissions of the parties regarding the question of jurisdiction. Although no challenge to his ultimate conclusion in that regard was made by Ostwald, the adjudicator noted when discussing that question the submissions made on behalf of Jaylon to the effect that the “adjudication application can, to the extent that it is necessary, be [Jaylon’s] claim for an extension of time pursuant to clause 5.4 of the Subcontract”³¹ and its accompanying submission that he, the adjudicator, should “extend the Date for Substantial Completion because [Jaylon] has been delayed for a total of 109.6 (round up to 110) working days”.³² The adjudicator recorded that he was satisfied that Jaylon had, amongst other things, “demonstrated in its material” that there were “excusable delays occasioned by [Jaylon] during the performance of the works”, that Jaylon had provided “timely notice” of those delays and “made a proper request for a time extension under the subcontract” and that Ostwald had “whether unreasonably or improperly, refused [Jaylon’s] requests and repeated requests to extend time under the subcontract”.³³ In that regard, the adjudicator expressed the “conclusion” that Ostwald had “failed to demonstrate that it was deprived of any opportunity to assess [Jaylon’s] requests to extend time but rather unreasonably refused to give any consideration to the changed circumstances which were created by [its] conduct”.³⁴
- [22] Then, after deciding that the adjudication application was within jurisdiction and recounting details of the formal steps in the adjudication process, the adjudicator turned to the “issues in dispute”. His treatment of the competing claims for extensions of time and liquidated damages was as follows:
- “77. **Extension of time and liquidated damages.** The concurrent delay analysis presented by the parties in this payment dispute is extremely fact sensitive and adds more than another dimension to any delay analysis because of manner [sic] in which the parties are polarised in their respective positions.
 - 78. [Jaylon] says that it has been delayed by the conduct of [Ostwald] and is entitled under the construction contract to an extension of time in the sum of 112 days (rounded up).
 - 79. In contrast [Ostwald] maintains that the entire duration of the project delays (but for 11.5 days, that is, 6 March 2015 to 18 March 2015) were caused by [Jaylon’s] *‘failure to provide adequate resources for the Subcontract Works; failure to competently deal with the QA process as required by the Subcontract ...; the significant amount of defect rectification and [Jaylon’s] own delay in properly attending to defects’* and assessed liquidated damages.
 - 80. [Ostwald] seeks in the payment schedule to collect or otherwise recover liquidated damages assessed against [Jaylon] in an effort to offset [Jaylon’s] claim.
 - 81. [Ostwald], not [Jaylon], has the burden of segregating the delays and must clearly distinguish [Jaylon’s] responsibility for the ‘concurrent delay’ from its own. Otherwise, [Ostwald] cannot collect liquidated damages.

³¹ Ibid (p 389).

³² Ibid.

³³ Ibid (p 393).

³⁴ Ibid (p 395).

82. [Ostwald] also has the burden of proof to demonstrate that the contract standard for assessing liquidated damages was met.
83. Clause 5.7 of the construction contract pertains to liquidated damages and states: *If the Subcontractor fails to reach Substantial Completion by the Date for Substantial Completion, the Subcontractor will be indebted to the Contractor for liquidated damages at the stated in Schedule 1 [sic], if any, for every day after the Date of Substantial Completion up to and including the Date of Substantial Completion [sic] or the date that the Subcontract is terminated pursuant to clause 18, whichever occurs first.*
84. The contract standard in clause 5.7 (namely, *'If the Subcontractor fails to reach Substantial Completion by the Date for Substantial Completion'*) is that [Jaylon] must solely be responsible for the delay in order for the liquidated damages provision to become assessable by [Ostwald].
85. Given this contractual standard, [Ostwald] must prove that it did not contribute to the delay, that [Ostwald] was not concurrently liable, and that the delay was not otherwise excusable. If the responsibility for the delay is unclear, [Ostwald] cannot recover liquidated damages.
86. At paragraph 102 of his statement, Mr Roffe says that *'Both parties accept that the Project suffered significant delays. In broad terms, Jaylon is attempting to convince the Adjudicator that the majority of these delays were caused by events falling within the definition of "Qualifying Cause" in the Subcontract.'*
87. Clause 1.1 of the construction contract says that *'Qualifying Cause' means delay caused by any act, default, or omission of the Contractor*, the Contractor's Personnel (who are not employed by the Subcontractor) or the Principal, or any cause stated in Schedule 1 that is outside the reasonable control of the Subcontract. Schedule 1 identifies 'Inclement Weather occurring prior to the Date for Substantial Completion.'
88. At paragraph 4.5.3 of the adjudication application, [Jaylon] says *'that it was prevented from reaching the Substantial Completion of the Subcontract Works (which include by definition, variations) by the Date for Substantial Completion set out under the Subcontract because: (a) The Respondent ordered the Claimant to perform additional or different work by way of variations (including variations claimed by the Claimant as or daywork [sic]); (b) The Subcontract Works that had to be performed to reach Substantial Completion then included, by virtue of the definition of that term in the Subcontract, the additional or different work ordered by the respondent as variations; (c) In particular, the Respondent ordered the following additional or different works as daywork after the date on which it alleges was the Date for Substantial Completion in the Payment Schedule (and which works are admitted by the Respondent to be variations in the Payment Schedule): (i) DW-029 – 7th April 2015: Assisted OBC in moving LDRS pipe into pond; (ii) DW-030 – 15th April 2015: Off load rolls from delivery vehicle; (iii) DW-031 – 19th April 2015: Repairs to secondary and primary liner (by others); (iv) DW-032 – 21st April 2015: Completion of repairs to secondary and primary liner damage (by others); (v) DW-033 – 6th May 2015: Retest Extrusion Bend; (vi) DW-034 – 10th May 2015: Line concrete structure; (vii) DW-035 – 13th May 2015: Hand welding concrete structure; (viii) DW-036 – 14th May: Install and weld rub sheet; (ix) DW-037 – 16th May 2015: Vac box rub sheets; (x) DW-38 – 16th May 2015: Ballast filling; (xi) DW-039 – 17th May 2015: Ballast filling; (xii) DW-040 – 19th*

May 2015: Repair machine damage (by others); (xiii) DW-041 – 22nd May 2015: Rubsheet and strap; (xiv) DW-042 – 23rd May 2015: Weld HDPE Plates to carrier sheets; (xv) DW-043 – 24th May 2015: Weld HDPE plate and numbers to carrier sheet; (xvi) DW-044 – 25th May 2015: Weld HDPE plate and numbers to carrier sheet; (xvii) DW-045 – 27th May 2015: Repair machine damaged liner (by others); (xviii) DW-046 – 5th June 2015: Repair damaged liner (by others) around crest; (xix) DW-047 – 7th June 2015: Repair machine damage to liner (by others); and (xx) DW-048 – 8th June 2015: Patch water injection holes (by others); (d) As the “Subcontract Works” included these variations, the Claimant was prevented from achieving “Subcontract Completion by the Date for Substantial Completion” until these ordered variations for additional or different work (to the original scope of Works under the Subcontract) were performed.’

89. In relation to the claim to extend time under EOT 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18 and 19, I calculate that [Jaylon] is entitled to extend time under the construction contract **by 67 working days**. In relation to the claim to extend time under VO 1, 2, 4, 6, 7, 10 and 11 and also under DW 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49, I calculate that [Jaylon] is entitled to extend time under the construction contract by **44.55 working days**.
90. For the reasons outlined in the preceding paragraphs, I am satisfied that [Jaylon] is entitled to extend time under the construction contract in the amount of 112 working days (111.55 rounded up).
91. The Date for Substantial Completion is 24 June 2015. [Ostwald] is not entitled to liquidated damages in part or at all. The justification is found in clause 5.7 of the construction contract. [Ostwald] failed to show that [Jaylon] was solely responsible for the delay, and I am persuaded by [Jaylon’s] material that delay occasioned by [Jaylon] is attributable solely to [Ostwald]. It is therefore not necessary to discuss the ‘*effect on time of the application of the prevention principle*’ as outlined and discussed by the parties in their respective material.”³⁵ [Emphasis in original]

[23] The passages extracted immediately above have been reproduced without the footnotes that accompanied them. There were three such footnotes and each was lengthy. For present purposes though, it is sufficient to refer only to the footnote to paragraph 82.³⁶ It was in these terms:

“I am unable to agree with the suggestion advanced by Mr Roffe³⁷ at paragraph 110 of his statement: “*Ostwald’s position is that unless Jaylon, with reference to the clear terms of the Subcontract, prove its entitlements to the EOT and other claims that it seeks, must conclude that the delays to the Subcontract Works were Jaylon’s own doing*”. I am satisfied, after carefully considering the evidence before me, that [Ostwald] unreasonably delayed the processing of [Jaylon’s] claim and also delayed payment of benefits permitted by the construction contract. The evidence, as previously discussed throughout this decision, assists in showing that [Jaylon] complied with the requirements of the construction contract. However, the record is full of unexplained delays in communicating and performing on the part of [Ostwald] and directions issued by [Ostwald] for [Jaylon] to perform different

³⁵ Ibid (pp 400-403).

³⁶ Footnote 11; Ibid (p 401).

³⁷ The Contracts Manager employed by Ostwald.

and other work under the construction contract with the inescapable outcome for [Jaylon] being the denial of [Jaylon's] request to extend time being based on unverified information, mere opinions, and isolated facts or events that were never relevant. There is not one scintilla of evidence provided by [Ostwald] to assist in showing that investigation of [Jaylon's] claim was carried out objectively. The record assists in showing that there was no effort on the part of [Ostwald] to gather or assess facts material to the claim. Rather, the picture presented with the evidence before me is one that shows [Ostwald] focusing only on securing evidence simply to deny benefits due to [Jaylon] under the construction contract. The impression presented in the material provided by Mr Roffe is that he started out having fixed in his mind, and his feet in cement that he was going to deny [Jaylon's] requests.”³⁸

Consideration

- [24] It may be immediately observed from the adjudicator's treatment of the competing claims for extensions of time and liquidated damages that he decided each on a basis that was not the subject of submissions from either Ostwald or Jaylon. A principal focus of those submissions was on whether the “prevention principle” operated but that was the very issue the adjudicator found it unnecessary to decide. Instead, the adjudicator focussed, and then decided the adjudication, on a construction of clauses 5.4 and 5.7 that neither party had contended. In doing so, the adjudicator seemed to construe those provisions as requiring Ostwald to prove that Jaylon was not entitled to any extensions of time and that, in the absence of such proof, Jaylon must succeed and Ostwald must fail.
- [25] Indeed, such a conclusion becomes irresistible when regard is had to the following:
- (a) Holding in paragraph 81 that Ostwald and not Jaylon had the “burden of segregating the delays and must clearly distinguish [Jaylon's] responsibility for the ‘concurrent delay’ from its own” coupled with the observation immediately following that “otherwise, [Ostwald] cannot collect liquidated damages”;
 - (b) The further observation in paragraph 82 that Ostwald had “the burden of proof to demonstrate that the contract standard for assessing liquidated damages was met” and, in paragraph 84, the finding that the “contract standard” under clause 5.7 required Jaylon to “solely be responsible for the delay in order for the liquidated damages provision to become assessable” in favour of Ostwald;
 - (c) The observation in paragraph 85 that Ostwald “must prove that it did not contribute to the delay, that [it] was not concurrently liable, and that the delay was not otherwise excusable” and that, “if the responsibility for the delay is unclear, [Ostwald] cannot recover liquidated damages”;
 - (d) The conclusion in paragraph 91 that Ostwald was “not entitled to liquidated damages in part or at all” by reason of the terms of clause 5.7 and the failure on the part of Ostwald to “show that [Jaylon] was solely responsible for the delay”; and
 - (e) The adjudicator's rejection in the footnote to paragraph 82 that of the proposition advanced by Mr Roffe that Jaylon was obliged under the subcontract to “prove its entitlements to the [extensions of time] and other claims that it seeks” along with

³⁸ Affidavit of Eden Tyler Bird; Exhibit EB-7 (p 401).

the accompanying criticism of the evidence assembled on behalf of Ostwald in comparison to that adduced before him on behalf of Jaylon.

- [26] The task of an adjudicator is to decide the adjudication application having regard only to the matters specified in s 26(2) of the Act. That involves a consideration of the provisions of the Act to the extent that they are relevant, the provisions of the construction contract from which the application arose, the payment claim (and all supporting submissions and material) and the payment schedule (and all supporting submissions and material). As McDougall J observed in *David Hurst Constructions Pty Ltd v Durham*³⁹ in connection with the New South Wales scheme of provisions:

“[What] is called for is some process of balancing or evaluating the competing materials supplied by the parties. It is not a matter of calling evidence. Nor is it a matter of conducting some mini trial. But at the same time, if the Adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that he or she be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward).

Thus, one might think, it is incumbent on the claimant to put before the adjudicator material that is rationally capable of persuading the adjudicator that the amount claimed was in fact payable.”⁴⁰

- [27] Thus, at that broad level of persuasion, it was for Jaylon to make good its case for payment of the variations and other work claimed under the subcontract and for Ostwald to make good its case for liquidated damages. That required findings to be made about two things: (1) the date *of* substantial completion and (2) the date *for* substantial completion under the subcontract. Of those, there was not a great deal of difference between the respective positions of the parties regarding the date of substantial completion. Rather, the real controversy was to be found in what each contended was the date for substantial completion. In that respect, and so far as the extensions of time claimed by Jaylon were concerned, it was for Jaylon to make good its contention that the date for substantial completion should be regarded by the adjudicator as having been extended to June 2015. Unless it was able to do so, then, by operation of clause 5.7 of the subcontract, Ostwald had an entitlement to the payment of liquidated damages.
- [28] It follows that the adjudicator would appear to have misconstrued the effect of clauses 5.4 and 5.7 of the subcontract. Moreover, not only does the adjudicator appear to have done so in a way that cast a burden of proof on Ostwald that it did not have, but he also appears to have regarded it as necessary for Ostwald to satisfy that burden as a precondition to recovery of liquidated damages.
- [29] An error in the interpretation of a contractual provision will not usually amount to a jurisdictional error,⁴¹ although where it appears that the adjudicator has misunderstood

³⁹ [2008] NSWSC 318.

⁴⁰ At [69]-[70]. And see *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 1173 at [72]-[75].

⁴¹ *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 at [8]; *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80; [2015] 1 Qd R 463 at [29].

the scope of his or her jurisdiction the position may well be different.⁴² It is however unnecessary for me to decide whether what the adjudicator did in this case rendered his decision voidable. That is because, as I earlier observed, regardless of the merits or otherwise of the adjudicator’s construction of the subcontract, he decided Ostwald’s claim for liquidated damages on a basis that was not the subject of submissions from either Ostwald or Jaylon.

- [30] It is well settled that a substantial denial of natural justice may invalidate an adjudication decision with the consequence that such a decision may be declared void.⁴³ Where an adjudicator decides a dispute on a basis for which neither party contended, there will be a substantial denial of natural justice unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.⁴⁴
- [31] Indeed, on the hearing of the application, counsel for Jaylon quite rightly accepted that the parties had not been given an opportunity to make submissions about the “stated application of [clause] 5.7 as giving rise to an onus”.⁴⁵ Instead, he submitted that Ostwald had not been denied procedural fairness because those matters were not “germane” in the sense that they did not have any “substantive effect” on the adjudication decision.⁴⁶ In support of those submissions, reliance was placed on a number of other passages from the adjudication decision. The presence of these passages, it was submitted, meant that the adjudicator had satisfied himself on the material advanced by Jaylon that it was entitled to extensions of time.⁴⁷ Particular reliance was placed on the part of paragraph 91 where the adjudicator recorded that he was “persuaded by [Jaylon’s] material that delay occasioned by [Jaylon] is attributable solely to” Ostwald. This, it was submitted, was sufficient to inform that, whatever may have been recorded in the passages that preceded that paragraph (and which I have extracted above),⁴⁸ the adjudicator had in the end decided the question of extensions of time in the correct way.
- [32] I cannot accept those submissions. The passages that Jaylon asks the court to ignore cannot be ignored. Their presence strongly suggests that the adjudicator adopted a construction of clauses 5.4 and 5.7 that was not only in my respectful view erroneous, but that shaped the way in which he assessed the material before him. Ostwald was entitled to be heard on the question whether the adjudicator’s construction was correct and, further, whether it was open to him to decide the adjudication on that basis. Had Ostwald been given such an opportunity, it cannot be said that no submission could

⁴² *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 and, on appeal, *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394; [2015] 1 Qd R 228 at [49].

⁴³ *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at 441-442; *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80; [2015] 1 Qd R 463 at [35].

⁴⁴ *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67; [2012] 2 Qd R 90 at [60]; *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2014] QSC 80; [2015] 1 Qd R 463 at [35].

⁴⁵ T. 1-6, ll 40-41.

⁴⁶ T. 1-6, ll 43-46.

⁴⁷ See First Respondent’s Outline of Submissions dated 22 March 2016, par 16.

⁴⁸ At [22].

have been made to the adjudicator which might have produced a different result. This is particularly so in circumstances where Jaylon would most likely have agreed with Ostwald's submissions as to the proper construction of clauses 5.4 and 5.7.⁴⁹ In such circumstances, I am not prepared to hold that the adjudicator could not have been persuaded to change his mind or, at the very least, to reconsider the material before him in light of the proper construction of the subcontract.⁵⁰

- [33] Otherwise, there can be no denying that the denial of natural justice in this instance was substantial. It had a direct impact on the reasoning adopted by the adjudicator to decide the adjudication in the way in which he did. Ostwald should have been afforded an opportunity to be heard and, because it was not, the decision cannot stand.

Disposition

- [34] For these reasons, the adjudication decision must be declared void.
- [35] The parties will be directed to confer with a view to agreeing upon the orders to be made to give effect to this conclusion and any consequential orders (including costs). Failing agreement, written submissions will be required as to those matters.

⁴⁹ See T. 1-30 ll 42-46 where counsel for Jaylon conceded that what appears in paragraphs 84 and 85 of the adjudication decision did not "appear ... to be right" and that no authority could be cited to support it.

⁵⁰ See *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 at [40].