SUPREME COURT OF QUEENSLAND

CITATION:	*Annie Street JV Pty Ltd v MCC Pty Ltd & Ors* [2016] QSC 268
PARTIES:	**ANNIE STREET JV PTY LTD** ACN 160 994 016 (applicant) **v** **MCC PTY LTD** ACN 002 243 263 (first respondent) **MAX TONKIN (ADJUDICATOR J1066620)** (second respondent) **MICHAEL HOPE CHESTERMAN** **(Adjudication Registrar)** (third respondent)
FILE NO/S:	SC No 9681 of 2016
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2016
JUDGE:	Flanagan J
ORDER:	**1. The applicant's originating application filed 20 September 2016 is dismissed.** **2. I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – DECLARATIONS – EXCESS OR WANT OF JURISDICTION – PARTICULAR INSTANCES OF JURISDICTIONAL ERROR – where the applicant and the first respondent were parties to construction contract – where the first respondent served a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) – where the second respondent made an adjudication decision under the Act – where the second respondent determined, as part of the adjudication, that the applicant was not entitled to set-off an amount for liquidated damages – where the applicant alleges that this part of the second respondent's decision is affected by jurisdictional error – whether the second respondent's decision that the applicant was not entitled to set-off an amount for liquidated damages

was without foundation and illogical, with a deficient reasoning process – whether the second respondent's decision that the applicant was not entitled to set-off an amount for liquidated damages involved a failure to provide reasons or adequate reasons in accordance with s 26(3)(b) of the Act – whether the second respondent's decision that the applicant was not entitled to set-off an amount for liquidated damages involved a denial, to the applicants, of natural justice

ADMINISTRATIVE LAW – DECLARATIONS – EXCESS OR WANT OF JURISDICTION – PARTICULAR INSTANCES OF JURISDICTIONAL ERROR – where the applicant and the first respondent were parties to construction contract – where the first respondent served a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) – where the applicant served a payment schedule under the Act – where the payment schedule did not raise contractual time limitations as a basis for withholding payment – where the second respondent did not consider contractual time limitations in the adjudication – whether, in not considering contractual time limitations, the second respondent committed jurisdictional error

Building and Construction Industry Payments Act 2004 (Qld), s 17, s 18, s 24, s 26(2)
Judicial Review Act 1991 (Qld), s 18(2)(b), Schedule 1, Part 2

Bauen Constructions v Westwood Interiors [2010] NSWSC 1359, cited
Camden v McKenzie [2008] 1 Qd R 39; [2007] QCA 136, cited
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
City of Ryde v AMDM Constructions Pty Ltd & Anor [2011] NSWSC 1469, cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, cited
Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd [2005] NSWSC 1129, cited
John Holland Pty Limited v Roads & Traffic Authority (NSW) [2007] NSWCA 19, applied
John Holland Pty Limited v TAC Pacific Pty Ltd & Ors [2010] 1 Qd R 30; [2009] QSC 205, cited
Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142, cited
QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd and Consolidated Contracting Company Australia Pty Ltd & Anor [2011] QSC 292, cited
Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor [2009] QSC 165, cited

Re Rich Rivers Pty Ltd and Independent FM Radio Pty Ltd v Australian Broadcasting Tribunal & Goulburn Valley Broadcasters Pty Limited [1989] FCA 132, cited
Roseville Bridge Mariner Pty Ltd v Bellingham Marine Australia Pty Ltd [2009] NSWSC 320, cited
SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631, cited
Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors [2016] QSC 108, considered
State Water Corporation v Civil Team Engineering Pty Ltd [2013] NSWSC 1879, considered

COUNSEL: GD Beacham QC with M Martinez for the applicant
DG Clothier QC with M Hickey for the first respondent

SOLICITORS: McInnes Wilson for the applicant
Clayton Utz for the first respondent

Introduction

[1] The applicant, Annie Street JV Pty Ltd, seeks both declaratory and injunctive relief in respect of an adjudication decision made by the second respondent pursuant to s 26(1) of the *Building and Construction Industry Payments Act* 2004 (Qld) (**the Act**).

[2] The decision was made on 6 September 2016. The adjudication was that the applicant pay the first respondent, MCC Pty Ltd, an amount of $528,505.09 (inclusive of GST), together with interest at the rate of 7.75 per cent per annum, and that the date for payment was 9 August 2016. The declaratory relief sought is a declaration that the decision is void.[1] The injunctive relief sought is an injunction to permanently restrain the third respondent, in his role as Adjudication Registrar, from issuing an adjudication certificate pursuant to s 30 of the Act in respect of the decision.[2]

[3] The first respondent opposes the granting of the relief sought.

[4] By Notices of Address for Service filed 26 September 2016 and 29 September 2016, the second and third respondents submit to all orders of the Court save as to cost.

[5] The applicant seeks the relief on the basis that the decision is affected by jurisdictional error in two respects. First, the applicant contends that the adjudicator's decision not to allow the applicant a set-off for liquidated damages in the amount of $164,160.00:

(a) was without foundation and illogical, with a deficient reasoning process;

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1 Originating Application, [1].
2 Originating Application, [2].

(b) involved a failure to provide reasons or adequate reasons in accordance with s 26(3)(b) of the Act; and

(c) involved a denial to the applicant of natural justice.

Secondly, the applicant contends that the adjudicator committed jurisdictional error by failing to consider the provisions of the relevant building contract in connection with seven variations claimed by the first respondent (one of which was not allowed).[3]

[6] For the reasons which follow the applicant's originating application for declaratory and injunctive relief should be dismissed.

Background

[7] On 19 July 2016 the first respondent served a payment claim for $808,843.44.[4] The claim was made under a contract for a building project involving the construction of 18 residential units in New Farm, Brisbane.

[8] On 27 July 2016 the superintendent, Mr Dugan, on behalf of the applicant, served a payment schedule in which it scheduled $nil.[5]

[9] On 8 August 2016 the first respondent served an adjudication application.[6] The adjudication application comprised 11 lever-arch folders, including a statutory declaration of Mr Scroope, a director of the first respondent.[7]

[10] On 23 August 2016 the applicant served an adjudication response.[8] The adjudication response comprised one lever-arch file[9] including a statutory declaration of Mr Dugan.

The first alleged jurisdictional error

[11] An adjudication decision is not reviewable under the *Judicial Review Act* 1991 (Qld).[10] Both parties accept however that an adjudicator's decision may be declared void if it is affected by jurisdictional error.[11]

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3 Variations 11A, 58, 60, 61A, 67, 69 and 72. The reasons for the adjudicator's decision are Exhibit "ETB-6" to the affidavit of Eden Tyler Bird, filed 28 September 2016, CD 6 (**the Bird affidavit**). Variation 11A was not allowed: Exhibit "ETB-6" to the Bird affidavit, [119]-[126].

4 Exhibit "ETB-1" to the Bird affidavit. The payment claim was served pursuant to s 17 of the Act

5 Exhibit "ETB-2" to the Bird affidavit. The payment schedule was served pursuant to s 18 of the Act.

6 The adjudication application was served pursuant to s 21 of the Act.

7 The Bird affidavit, [4]; Exhibit "CS-1" to the affidavit of Christopher Scroope, filed 14 October 2016, CD8.

8 Pursuant to the regime set out in s 24 of the Act.

9 The Bird affidavit, [4]; Exhibit "ETB-5" to the Bird affidavit.

10 See s 18(2)(b) and Schedule 1, Part 2 of the *Judicial Review Act* 1991 (Qld).

11 Written Submissions for the Applicant, [11]. The proposition is implicitly accepted in the Outline of Submissions of the First Respondent; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [6] per Margaret McMurdo P, at [33] per Chesterman JA and at [78] per White JA.

[12] The applicant, through Mr Dugan, deducted $164,160.00 for liquidated damages in the payment schedule. Such damages were able to be claimed pursuant to clause 34.7 of the contract if the first respondent did not reach practical completion by the date for practical completion. Item H of the Special Conditions provided, in effect, that the date for practical completion was "35 weeks after the completion of the Basement (Definition Basement Completion is the following:- Excavation, Retaining Walls and Basement Slab)." The claim for liquidated damages was based on the applicant's contention that the superintendent, Mr Dugan, and Mr Scroope had made an agreement to amend or vary the contract with effect that the 35 week period identified in item H commenced on 19 March 2015 rather than commencing after the completion of the basement.

[13] The adjudicator's decision in respect of this issue is said to reveal jurisdictional error. It is first necessary to consider the statutory framework in which the adjudicator was required to give reasons for the decision.

[14] The procedure for recovering progress payments is outlined in Part 3 of the Act. The procedure is commenced by the serving of a payment claim pursuant to s 17. A person served with a payment claim may reply to the claim by serving a payment schedule pursuant to s 18. Section 18(2) provides that a payment schedule –

> (a) must identify the payment claim to which it relates; and
>
> (b) must state the amount of the payment, if any, that the respondent proposes to make (***the scheduled amount***).

[15] Section 18(3) provides that if the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

[16] An adjudication proceeding is commenced by an adjudication application under s 21. If the adjudication application is accepted under s 23, there is a right to provide an adjudication response under s 24. Section 24(4) provides that if the adjudication application is about a standard payment claim, the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant. It is common ground that the present case concerns a standard payment claim. This is to be contrasted with s 24(5) which deals with an adjudication application involving a complex payment claim. In those circumstances the adjudication response may include any reasons for withholding payment whether or not those reasons were included in the payment schedule when served on the claimant. Section 24B(2) gives the claimant a right of reply to the adjudication response. This right of reply is however, confined to an adjudication response to a complex payment claim under s 24(5). The practical consequence of s 24(5) and s 24B(2), for present purposes, is that the first respondent had no right of reply to the applicant's adjudication response which included Mr Dugan's statutory declaration. The first respondent therefore had no right under the Act to serve a further statutory declaration of Mr Scroope responsive to the one given by Mr Dugan. By s 25(1)(a),

subject to the time requirements under s 25A, an adjudicator must decide an adjudication application "as quickly as possible".

[17] The relevant provision in respect of an adjudicator's decision is s 26:

> "**Adjudicator's decision**
>
> (1) An adjudicator is to decide—
>
> (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant **(*the adjudicated amount*)**; and
>
> (b) the date on which any amount became or becomes payable; and
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> (c) the rate of interest payable on any amount.
>
> (2) In deciding an adjudication application, the adjudicator is to consider the following matters only—
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> (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;
>
> (b) the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
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> (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
>
> (3) The adjudicator's decision must—
>
> (a) be in writing; and
>
> (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision."

[18] A decision under s 26(1) has three subjects, namely the adjudicated amount, the date for payment and the rate of interest. The adjudicated amount is a single amount determined as the amount of the progress payment to be made.[12] An adjudication decision under the

[12] *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 at [92] per Palmer J; *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145 at [57]-[59] per Atkinson J; *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 at [48] per Applegarth J; *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QSC 373 at [61]-[62] per A Lyons J.

Act is, therefore, not a series of decisions as to amounts owing in respect of discrete claims.[13]

[19] I consider s 26(2) in more detail below in dealing with the second alleged jurisdictional error.

[20] As to s 26(3)(b), the only requirement is that the adjudicator "include the reasons for the decision". The relevant "decision" for which reasons must be included is the decision identified in s 26(1).

[21] The procedures outlined in Part 3 and in sections 17 to 26 of the Act in particular, are how the object of the Act stated in s 7 is to be achieved.[14] That object is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person relevantly undertakes to carry out construction work under a construction contract.

[22] In *Craig v South Australia*[15] the High Court stated:[16]

> "… jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case."

[23] Given the mandatory language of s 26(3)(b), absent the consent of both parties for the adjudicator not to include the reasons in the decision, it may be accepted that a complete failure on the part of an adjudicator to give reasons constitutes jurisdictional error. As observed by Jackson J, when considering s 26(3) in *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd*:[17]

> "… something which is in writing but does not include the reasons for the decision is not such a decision. Those conclusions are required by the use of the word "must" in the text."

[24] The reasons for a decision under s 26(3)(b) should reflect a genuine consideration of the matters identified in s 26(2). As observed by Palmer J, when considering the equivalent provision to s 26(3) in the *Building and Construction Industry Security of Payments Act* 1999 (NSW) (**the NSW Payments Act**) in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd:*[18]

> "The extent to which an adjudicator must give reasons for the determination in accordance with s.22(3)(b) reflects the extent of his or her duty to give consideration to the matters required by s.22(2). In a fully contested adjudication in which several issues have been raised, the adjudicator's

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[13] Outline of Submissions for the First Respondent, [16].
[14] Section 8 of the Act.
[15] (1995) 184 CLR 163.
[16] (1995) 184 CLR 163, 177.
[17] [2016] QSC 108 at [54].
[18] [2006] NSWSC 1 at [66].

reasons should demonstrate that he or she has endeavoured in good faith to consider those issues, in compliance with the requirements of s.22(2)(c) and (d)."[19]

[25] In *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*[20] Vickery J identified that the requirement to give reasons for the decision means that an adjudicator must proceed to make the critical findings: This process, according to his Honour involves:

> " (j) The adjudicator must proceed to make critical findings by:
>
> (i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
>
> (ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;
>
> (iii) arriving at a rational conclusion founded upon the evidence;
>
> (iv) in so doing, is not called upon to act as an expert; and
>
> (v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.
>
> (k) Pursuant to s 23(3) of the Act,[21] the adjudicator must include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided. In providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow."[22]

[26] Jurisdictional error may also occur where findings or conclusions have no basis, are bare conclusions and do not reveal due consideration. In such circumstances the decision would be set aside –

> "… being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or there was no evidence or other material sufficient to justify the making of the decision or the decision was so

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19 Section 22 referred to by Palmer J is the equivalent of s 26 of the Act.
20 [2015] VSC 631 at [101].
21 The equivalent to s 26(3) of the Act.
22 Cited with approval in *Richard Crookes Constructions Pty Ltd v CES Projects (Aust) Pty Ltd* [2016] NSWSC 1129 at [23] per McDougall J.

> unreasonable that no reasonable person would have so exercised the power."[23]

[27] Similarly, if one party's evidence is rejected for no reason or on no other ground than a bare conclusion that one party's evidence is preferred over another does not constitute the giving of reasons for a decision.[24] As observed by Keane JA (as his Honour then was) in *Camden v McKenzie*:[25]

> "The appellants contend … that adequate reasons for judgment will refer to the evidence which was important to the determination of the matter, and will set out material findings of fact, giving the judge's reasons for his or her findings of fact, and stating the basis on which the judge has come to prefer one body of evidence over a competing body of evidence.
>
> As a general rule, observance of these requirements is necessary to demonstrate that litigation has been determined fairly and rationally. Adherence to these requirements ensures that rights of appeal are not rendered meaningless, and that a party affected by a decision adverse to his or her interests is not left with a justified sense of grievance that the case has not been properly considered. In short, these standards promote the conscientious public discharge of the responsibilities of a judge to litigants, as well as to the community, which has a vital interest in the integrity of the judicial process." (Citations omitted).

[28] *Camden* concerned reasons for judgment of a trial judge. The distinction between giving reasons in a curial process rather than an adjudication process was noted by McDougall J in *Bauen Constructions v Westwood Interiors*:[26]

> "Although adjudicators work under significantly greater time pressures than judges, and their reasons should not be scrutinised with the attention to detail to which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal, nonetheless the reasons must indicate why it was that the adjudicator arrived at the determination given in accordance with s 22(1). Just as there is with judges, so too with adjudicators there is a presumption that the stated reasons are all of the reasons for coming to the conclusion expressed."

The jurisdictional error identified by McDougall J in *Bauen* was that the determination revealed no intellectual justification for the decision that was made.[27]

[29] In considering the adjudicator's reasons for decision in the present case, there is an important distinction to keep in mind between an error committed within jurisdiction and

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[23] See *Re Rich Rivers Pty Ltd and Independent FM Radio Pty Ltd v Australian Broadcasting Tribunal & Goulburn Valley Broadcasters Pty Ltd* [1989] FCA 132 at [49]-[50] per Davies J; *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* [2009] QSC 165 at [32]-[33] per P Lyons J, cited with approval in *John Holland Pty Limited v TAC Pacific Pty Ltd & Ors* [2009] QSC 205 at [21] per Applegarth.

[24] W195/01A v Minister for Immigration & Multicultural Affairs [2002] FCA 396 at [34]-[36] per Lee J.

[25] [2008] 1 Qd R 39, 47-48 at [30]-[31].

[26] [2010] NSWSC 1359 at [23]; *John Holland Pty Limited v TAC Pacific Pty Limited* [2010] 1 Qd R 302, 323-324 at [66]-[67] per Applegarth J

[27] [2010] NSWSC 1359 at [40].

jurisdictional error. As observed by Brereton J in *City of Ryde v AMFM Constructions Pty Ltd & Anor*:[28]

> "… the inadequacy, insufficiency, inconsistency or illogicality of reasons for a decision, even when the governing statute requires a decision-maker to give reasons in conjunction with and contemporaneously with the decision, does not of itself amount to jurisdictional error. The significance of the reasons, or their inadequacy, is that in the context of the surrounding material they may reveal jurisdictional error, or that the adjudicator has not performed the task of determining an adjudicated amount by reference to the specified relevant factors in accordance with s 22 of the Act."

[30] Where however, the reasons do not reveal any foundation or logical basis for the decision, then there has been a failure to exercise jurisdiction.[29]

[31] A denial of natural justice may constitute jurisdictional error. Such a denial of natural justice would occur where a decision is made on a basis not advanced by either party.[30]

[32] In determining the amount of the progress payment, if any, to be paid by the applicant to the first respondent, the adjudicator had before him 12 binders of documents, including a 53 page statutory declaration (without annexures) of Mr Scroope[31] and a 32 page statutory declaration (without annexures) of Mr Dugan,[32] together with 54 pages of submissions from the first respondent[33] and 29 pages of submissions from the applicant.[34]

[33] The reasons for decision extend over 79 pages and 297 paragraphs dealing with many legal issues, including 55 variations as well as the liquidated damages claim.

[34] The adjudicator's consideration of the liquidated damages claim commences at paragraph [57] and continues through to paragraph [77]. At paragraph [57] the adjudicator commences his analysis by noting that the payment schedule shows that $164,160.00 has been deducted for liquidated damages.

[35] In paragraph [58] the adjudicator identifies the relevant parts of the first respondent's adjudication application that dealt with the applicant's liquidated damages claim. These included sections 12 and 13 of the submissions in the adjudication application and paragraphs [467] to [497] of Mr Scroope's statutory declaration.

[36] In paragraph [59] the adjudicator notes the first respondent's primary position, namely that the date for practical completion was 35 weeks from the date of Basement Completion, which was 16 October 2015.

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28 [2011] NSWSC 1469 at [9].

29 *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 at [126] per Sackar J; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at [177] per McDougall J.

30 *John Holland Pty Limited v TAC Pacific Pty Ltd* [2010] 1 Qd R 302, 321 at [57] per Applegarth J; *Caltex Refineries (Qld) v Allstate Access (Australia) Pty Ltd* [2014] QSC 223 at [38] per Philip McMurdo J.

31 Exhibit "CS-1" to the affidavit of Christopher Scroope, filed 14 October 2016, CD8.

32 Exhibit "ETB-5" to the Bird affidavit.

33 Exhibit "ETB-3" to the Bird affidavit.

34 Exhibit "ETB-4" to the Bird affidavit.

[37] In paragraph [60] the adjudicator summarises and considers in some detail (extending over three pages) the first respondent's submissions in support of its primary position. This includes, in paragraphs [60(a)] and [60(b)], the first respondent's understanding that the date for practical completion was to be calculated on the basis of 35 weeks after the first respondent had completed the basement. The first respondent's understanding of the date for practical completion was accepted by the adjudicator upon the adjudicator's construction of the contract outlined in paragraphs [64] to [66] of the decision. The adjudicator's analysis in this respect refers to clause 34.7 of the contract which deals with liquidated damages, together with clause 1, Item 7(a), Item 7(b) and Item H on page 27 of 29 in the Schedule of Amendments to the contract. The adjudicator's conclusion as to the construction of the contract in this respect is found at paragraph 67:[35]

> "My construction of these contract provisions is that the date of practical completion is the last day of the period of 35 weeks commencing on the date of basement completion where basement completion as defined in item H of the Special Conditions is completion of excavation, retaining walls and basement slab."

[38] The adjudicator in considering the first respondent's primary submission that the date for practical completion was 35 weeks from the date of the completion of the basement, refers to contemporaneous documents from Mr Dugan consistent with this position. These documents include an email of 17 July 2016 from Mr Dugan, whose advice regarding practical completion was: [36]

> "35 weeks after completion of basement (which includes the excavation, retaining walls and basement slab)."

[39] In summarising and considering the relevant submissions of the first respondent in the adjudication application and Mr Scroope's statutory declaration, the adjudicator makes reference to a number of other contemporaneous documents, including an email from Mr Dugan dated 11 December 2014, the first respondent's email of 2 February 2015 and an email from Mr Dugan dated 30 September 2015.

[40] At paragraphs [60(i)] and [60(j)] the adjudicator refers to a "Notice of Start and Completion" dated 25 March 2015 sent by Mr Dugan to the first respondent on or about 6 May 2015:

> "We confirm that the official start date for the project after the wet season has been completed and basement works substantially complete has been agreed between MCC Representative and The Superintendent John Dugan and as per MCC programme is 19/03/2015 and Official completion date is 19/11/15."

[41] The first respondent's submission in the adjudication application in relation to the notice of 6 May 2015 is recorded by the adjudicator in paragraph 60(j):

> "The Claimant agrees that the project was significantly disrupted by inclement weather in the period December 2014 to February 2015, for which the claimant erroneously claimed an EOT. However, it was never agreed that

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35 Exhibit "ETB-6" to the Bird affidavit, page 190.
36 Exhibit "ETB-6" to the Bird affidavit, page 183, [60(c)].

> the definition of the date for practical completion was modified to the extent that the trigger for the 35 weeks commenced other than after basement completion as defined by the Contract. The basement was not substantially complete either on 25 March 2015 or 6 May 2015."

[42] In paragraph [60(s)] the adjudicator records the first respondent's submission in the adjudication application that it had completed the basement on or about 16 October 2015. Accordingly, the original date for practical completion was 17 June 2016, being 35 weeks after basement completion.

[43] The adjudicator summarises and considers the applicant's adjudication response from paragraphs [61] to [63], which extend over approximately four and one-half pages. At paragraph [61(f)] the adjudicator notes the matters set out in Mr Dugan's statutory declaration for his proposition that the date for practical completion was varied between Mr Dugan on behalf of the applicant and the first respondent in March 2015.

[44] The adjudicator's reasoning for concluding that the date for practical completion had not been varied in March 2015 is found in paragraphs [68] to [72]:

> "68. The Respondent's and Superintendent's submissions indicate that the Respondent and Superintendent consider the Respondent and Claimant agreed to change the terms of the Contract such that the 35 week period commenced on 19 March 2015. The Superintendent referred to this as "the official start date for the project" in his notice dated 25 March 2015. Mr Scroope acknowledged that he received the Superintendent's notice on 6 May 2015. I found no submission in the Superintendent's statutory declaration, that indicates where in the contract the Superintendent is given the power to determine the start date of the 35 week period. In the adjudication response, the Respondent submitted that the Superintendent acted on behalf of the Respondent.
>
> 69. The Superintendent's submissions and the materials he provided indicate that the Revised Program issued by Mr Scroope on 27 March 2015 indicated 19 March 2015 as day zero in the program, however the submissions and materials to support the proposition that the Claimant, or Mr Scroope on behalf of the Claimant, agreed to amend item H in the Special Conditions have been generated by the Superintendent. Given that Mr Scroope submitted in his statutory declaration that it was never agreed expressly or otherwise to change the start date of the 35 week period, and given that Mr Scroope also submitted and provided substantial back up evidence that the basement works were not completed by 25 March 2015 or 6 May 2015, I am not satisfied that the submissions and materials provided by the Superintendent are sufficient to substantiate that the parties agreed to amend what is a fundamental provision in the Contract.
>
> 70. In these circumstances I am not satisfied that the contract terms that define the date for practical completion have been amended.
>
> 71. Mr Scroope submitted that he proposed to the Superintendent to proceed with the building works before completing the basement

> instead of undertaking the basement and building works in sequence as originally planned. In any case, Mr Scroope submitted that basement completion was achieved on 16 October 2015. I found no submission in the adjudication response submissions or the Superintendent's statutory declaration that challenges this contention.
>
> 72. Given the lack of challenge and given Mr Scroope's submission that the Claimant commenced building works before basement completion, and given the status of basement construction in March 2015 as outlined in sub-paragraphs (c) to (f) of paragraphs 488 of Mr Scroope's statutory declaration; I accept Mr Scroope's contention that basement completion as defined in item H occurred on 16 October 2015. Adding 35 weeks to that date as provided in item H of the Special Conditions means that the date for practical completion was 17 June 2016 as submitted by Mr Scroope, not 24 December 2015 as submitted by the Superintendent."

[45] By reference to the sentence in paragraph 68, "*I found no submission in the Superintendent's statutory declaration, that indicates where in the contract the Superintendent is given the power to determine the start of the 35 week period*", the applicant submits that this observation constitutes a denial of natural justice. This is because neither party had referred to nor made submissions concerning the superintendent's power to determine the start date of the 35 week period. The applicant submits that not only does this sentence suggest "a misunderstanding of the debate"[37] but the inclusion of this sentence in the reasons for decision is "opaque": [38]

> "It is unclear to what extent this issue, not raised by either party, frames the Adjudicator's mind when he approached the liquidated damages claim. To the extent that it informed his decision, it amounts to a breach of natural justice, as the Adjudicator was required to give the parties notice of intention so that they could put submissions on it. ASJV was given no opportunity to deal with it." (Citations omitted).

[46] I do not accept this submission. The applicant's use of the word "opaque" is a reference to the decision of Jackson J in *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors*.[39] In *Sierra* his Honour stated:[40]

> "In my view, the reasons of the second respondent in the adjudication decision for the original contract works claim are opaque."

[47] The use of the word "opaque" by his Honour, in context, does not suggest that jurisdictional error occurs where the reasoning of an adjudicator is opaque. His Honour's use of the word "opaque" should not be taken out of context. As explained by his Honour:[41]

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37 Written Submissions for the Applicant, [38].
38 Written Submissions for the Applicant, [40].
39 [2016] QSC 108.
40 [2016] QSC 108 at [44].
41 [2016] QSC 108 at [44]-[45].

> "Although the second respondent referred to having "carefully" considered the applicant's material, the only particular reference made was to paragraph 119 of the adjudication response. Paragraph 119 was concerned with the dispute as to how the amount originally included in the schedule for the deleted swimming pools should be allocated. No reference was made to the extent of the work completed in any of the nine relevant contract categories, either as claimed by the first respondent or as disputed by the applicant.
>
> In my view, the statement of reasons did not adequately discharge the obligation to "include the reasons for the decision" under s 26(3)(b) of the Payments Act."[42]

[48] Properly understood, his Honour found the reasoning to be "opaque" in the sense that no reasons for decision were revealed. This of course is a recognised basis for finding jurisdictional error.

[49] The adjudicator's reference to the superintendent not having the power to unilaterally determine the start date of the 35 week period is not, in my view, opaque. The statement was made in the context of a written contract which expressly identified in item H the date for practical completion. What the adjudicator had to decide was whether this date had been varied. The adjudicator had already made reference to a document dated 25 March 2015 sent by the superintendent entitled "Notice of Start and Ccompletion" which was received by the first respondent on or about 6 May 2015. By this notice Mr Dugan, as superintendent, had purported to determine the start date. The adjudicator's observation in paragraph [68] is to the effect that this could not be done unilaterally. This observation was made in the context where the adjudicator was deciding whether there had in fact been an agreed change to the date for practical completion. I accept the first respondent's submission that the adjudicator simply recorded what was not contended as well as what was. Rather than revealing a misunderstanding of the issue, the comment represents an accurate statement about the limited nature of the relevant issue before him.[43] The adjudicator's statement isolated the true issue, namely whether an agreement had been reached to vary the date for practical completion from that which was expressed in the written contract. No breach of natural justice arises as a result of this statement.

[50] The applicant submits that the sentence in paragraph [69] of the decision, "… *however the submissions and materials to support the proposition that the Claimant, or Mr Scroope on behalf of the Claimant, agreed to amend item H in the Special Conditions have been generated by the Superintendent*" reveals reasoning that is "internally inconsistent".[44] The internal inconsistency is said to arise because in the same paragraph the adjudicator refers to a revised program issued by Mr Scroope on 27 March 2015, which indicated 19 March 2015 as day zero in the program. According to the applicant, the adjudicator does not explain how he found that this program is a document "generated by the Superintendent" or otherwise how or why he discounts it.[45] The revised program showed a completion date of 19 November 2015.

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42 [2016] QSC 108 at [44]-[45].
43 Outline of Submissions for the First Respondent, [43](b).
44 Written Submissions for the Applicant, [44].
45 Written Submissions for the Applicant, [44].

[51] The adjudicator referred to the revised program in paragraph [69]. The fact that a revised program was issued by Mr Scroope on 27 March 2015 does not detract from the adjudicator's finding that the material supportive of the alleged agreement to amend item H in the special conditions was generated by the superintendent. That is, an arrangement or agreement as between Mr Dugan and Mr Scroope for the issuing of a revised program does not, in itself, evidence an agreed variation to the date for practical completion. The documents said to evidence this variation were in fact all sent by Mr Dugan. The adjudicator had already referred to the Notice of Start and Completion dated 25 March 2016 sent by Mr Dugan on 6 May 2015. As previously observed, this notice referred to the "basement works substantially complete". The first respondent's case was that as at 25 March 2015 or 6 May 2015 the basement works had not been substantially completed. It was also Mr Dugan who sent the email dated 30 September 2015. This was referred to by the adjudicator in paragraph [60(k)]. In that email Mr Dugan referred to the new start date as being 15 March 2015 rather than 19 March 2015. He further stated in this email:

> "This was a bonus because you already completed the bulk excavation."

The adjudicator accepted that the basement completion was not actually achieved until 16 October 2015.[46] There is in my view no internal inconsistency, as submitted by the applicant. To the extent that any inconsistency may be identified, it does not constitute jurisdictional error because there are contemporaneous documents that support the adjudicator's finding.

[52] The applicant submits that the adjudicator's reasoning in paragraph 69 amounts to a conclusion that the agreement relied upon by the applicant could not be accepted, because all of the evidence was produced by Mr Dugan. The applicant therefore submits that on this reasoning, a party propounding an agreement at adjudication could never win, no matter how cogent the evidence was, unless the agreement was admitted or evidenced in the other party's documents.[47] The submission is in effect, that jurisdictional error occurred because the adjudicator failed to identify a proper basis for rejecting Mr Dugan's evidence as to an agreement to vary the date for practical completion. The applicant submits that the rejection of Mr Dugan's evidence by the adjudicator on the basis that it has been generated by Mr Dugan was irrational and without foundation.[48] This submission was further explained in oral submissions by Senior Counsel for the applicant:

> "The jurisdictional error that we argue is that he never got to the point of considering that evidence and whether or not it made out the agreement altered the date for practical completion because he rejected it, and it was the rejection that constituted the jurisdictional error, because we accept that we have to get to the point where he rejected it without reason, for want of a better word, and we accept that he said something about it in his reasons."[49]

[53] I do not accept that the adjudicator's reasoning in this respect reveals jurisdictional error. The first respondent, through Mr Scroope, had no right to reply to the adjudication response, including Mr Dugan's statutory declaration.[50] The adjudicator's starting point

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46 Exhibit "ETB-6" of the Bird affidavit, page 191, [71]-[72].
47 Written Submissions for the Applicant, [46].
48 Written Submissions for the Applicant, [45].
49 T1-7, line 46 to T1-8, line 4.
50 See [16] above.

in his consideration of whether there was a variation, was the express provision of the written contract. This provision identified the date for practical completion as being 35 weeks after the completion of the basement. The adjudicator was therefore deciding whether there had been a variation to an express term of the contract. It is implicit in this proposition that the adjudicator would have required cogent evidence that the parties had actually agreed to such a change, particularly where such a variation exposed the first respondent to liquidated damages from an earlier date. This is in circumstances where Mr Scroope had stated in his statutory declaration that not only were the basement works not completed by 25 March 2015 or 6 May 2015, but that it was never agreed, expressly or otherwise, to change the start date of the 35 week period from being the completion of the basement. It was by reference either expressly or implicitly to all these matters that the adjudicator concluded:[51]

> "… I am not satisfied that the submissions and materials provided by the Superintendent are sufficient to substantiate that the parties agreed to amend what is a fundamental provision in the Contract."

This does not constitute a rejection of Mr Dugan's evidence simply on the basis that the evidence was generated by him. Even if the reasoning was inadequate, insufficient, inconsistent or illogical, at least some process of reasoning for arriving at the decision is revealed. No jurisdictional error is therefore established.

[54] The first respondent submits that if this aspect did involve jurisdictional error, it did so only to the extent of the adjudicator's consideration of a set-off of $164,160.00. By reference to s 100(4) of the Act the first respondent submits that the part of the adjudicator's decision not affected by jurisdictional error is the part which is not affected by the claim for set-off.[52] Section 100(4) is a remedial provision that applies where the Court is able to identify "the part of the decision" affected by the error and "allow the part of the decision not affected by the error to remain binding on the parties to the proceeding". The applicant submits however, that the discretion in s 100(4) cannot be exercised because if jurisdictional error was found the liquidated claim does not relate to a particular part of the decision in that it does not relate to a discrete claim under the contract.[53] As I have found that the reasons for decision are not affected by jurisdictional error, it is not necessary to decide whether the set-off amount of liquidated damages of $164,160.00 could be severed in accordance with s 100(4).

The second alleged jurisdictional error

[55] The applicant submits that the adjudicator committed jurisdictional error by failing to consider the provisions of the contract relevant to time limitations in respect of claims for certain variations. These time bar issues had not been raised by the applicant in its payment schedule.

[56] This jurisdictional error concerns the adjudicator's decision in respect of six variations, 11A, 58, 60, 61A, 67, 69 and 72. The adjudicator found against the first respondent in

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51 Exhibit "ETB-6" to the Bird affidavit, page 191, [69].
52 Outline of Submissions for the First Respondent, [7].
53 Applicant's Written Submissions, [74].

respect of variation 11A.[54] The sum allowed by the adjudicator for the variations, apart from variation 11A, was $64,354.40 (inclusive of GST).

[57] In the adjudication application at paragraph 8.1(b)(i) the first respondent raised the issue of whether it had complied with the contractual time requirements in respect to variation 024. The decision of the adjudicator in relation to this variation is not the subject of any complaint concerning jurisdictional error. In paragraph 8.1(b)(i) of the adjudication application the relevant time requirements in the contract are identified as follows:[55]

> "(A) **Clause 8.1(c) of the Schedule of Amendments** – that is, the claimant failed to make a variation claim within 10 days of receiving the direction and in any case prior to the commencement of the Work to which the direction relates; or
>
> (B) **Clause 13(d) of the Schedule of Amendments** – that is, the claimant failed to make a variation claim within 15 days after receipt of the Superintendent's instruction, or prior to commencement of the work, whichever is the earlier."

[58] Paragraph 8.1(b)(ii) of the adjudication application referred to a number of variations which had not been approved by the superintendent, including variations 60 and 72 which are the subject of complaint. Variation 58 is referred to in paragraph 8.1(b)(iii) of the adjudication application but not in the context of any time requirements under the contract. The adjudication application in paragraphs 8.3 to 8.6 specifically raised the operation of s 24(4) of the Act which provides that the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant.

[59] The contractual time requirements were raised by the applicant in its adjudication response in paragraphs 3.16 to 3.24.[56]

[60] It was in that context that the adjudicator considered the issue of variations at paragraphs [84] to [283]. The adjudicator dealt with the submissions in respect of s 24(4) of the Act:[57]

> "Each party also included submissions in respect of s 24(4) of the Act. I am satisfied that this section is relevant where submissions in the adjudication response and the Superintendent's statutory declaration submitted with the adjudication response attributable to a variation include reasons for withholding money that are not included in the submissions in the payment schedule that are attributable to the variation.
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> The parties have provided extensive submissions dealing with conditions precedent to the Claimant's entitlement to make claims for unapproved variations. I have read the submissions in detail and have taken them into

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54 Exhibit "ETB-6" to the Bird affidavit, pages 203-204, [119]-[126].
55 Exhibit "ETB-3" to the Bird affidavit, page 34.
56 Exhibit "ETB-4" to the Bird affidavit, pages 79-81.
57 Exhibit "ETB-6" to the Bird affidavit, page 195, [86]-[87].

> account where appropriate and where the Respondents' and Superintendent's submissions in the adjudication response attributable to individual variations do not contravene s 24(4) of the Act."

[61] The adjudicator applied this reasoning to the relevant variations. For example, in relation to variation 58 the adjudicator stated:[58]

> "I found no reference to a time bar in the reasons in the payment schedule associated with V058. On that basis, the Superintendent's submission in the adjudication response that the claim is time barred contravenes s 24(4) of the Act. I am not satisfied that the submissions are submissions that had been properly made for the purpose of s 26(2) of the Act."

[62] Pursuant to s 26(2) in deciding an adjudication application the adjudicator is to consider specified matters only. These matters include the provisions of the Act, the provisions of the construction contract from which the application arose and the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule. As submitted by the first respondent, s 26(2) both defines and confines the matters to be considered by the adjudicator: [59]

> "The section does not impose a jurisdictional requirement that the adjudicator's consideration of the listed matters be exhaustive or free of legal or factual error. What is required is for the adjudicator to genuinely (in good faith) consider the list of matters. Provided that they have done that, an error in the consideration of those matters will not affect the validity of the decision."

[63] The applicant however submits that an adjudicator may be obliged to take into account the provisions of the contract that are relevant to the sums claimed in the payment claim, even if those provisions are not raised in the payment schedule; and that a failure to do so amounts to jurisdictional error.[60]

[64] The submission proceeds on the basis that the applicant accepts that an adjudicator cannot, pursuant to s 26(2)(d), consider any submission not properly made. Here, the time requirement submissions in the adjudication response were not properly made because they were not included as a reason for withholding payment in the payment schedule as required by s 24(4). The applicant's submission is not that the contractual time requirements had to be taken into account by the adjudicator pursuant to s 26(2)(d) but rather the adjudicator should have taken these contractual time requirements into consideration because of s 26(2)(b).[61]

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58 Exhibit "ETB-6" to the Bird affidavit, page 229, [224].

59 Outline of Submissions for the First Respondent, [18] citing *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [34]-[49]; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [56]; *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2015] 1 Qd R 250.

60 Written Submissions for the Applicant, [68].

61 T1-19, lines 14-21.

[65] The applicant seeks to make good this submission by reference to a number of authorities, none of which are directly on point.

[66] In *Roseville Bridge Mariner Pty Ltd v Bellingham Marine Australia Pty Ltd*[62] Brereton J had to consider whether an alleged agreement said to constitute an accord and satisfaction and which sought to preclude a claim in respect of variations, was void by operation of s 34 of the NSW Payments Act. His Honour observed:[63]

> "The Act does not create a right to remuneration for construction work – that right is created by the construction contract. What the Act does is to create and regulate a right to obtain a progress payment. It is inherent in the concept of a progress payment that it be a payment on account of the amount ultimately due. The contract provides the starting point for the determination of rights under the Act …"

[67] In *State Water Corporation v Civil Team Engineering Pty Ltd*[64] Sackar J accepted that, for the purposes of the NSW equivalent to s 26(2)(d) of the Act, a submission was not "duly made" as it "clearly and obviously advanced reasons for non-payment which were not included in State Water's payment schedule".[65] His Honour however accepted that the adjudicator was still permitted to consider the submission even if not duly made provided it was relevant to issues arising under s 22(2)(a) or (b): [66]

> "However, it must be remembered that the claimant's and respondent's submissions (duly made) are only two of a number of matters that the adjudicator is required to consider. Accordingly, an adjudicator should not ignore something of real relevance to issues arising under s 22(2)(a) or (b) (or both), simply because the matter was not raised in submissions duly made by the parties (*John Holland Pty Ltd v RTA* at [47]-[48]).That applies even where the adjudicator only gained an awareness of those particular matters (i.e. of particular provisions of the relevant construction contract or the Act, as opposed to the facts and circumstances of the particular case) from having come into contact with submissions not duly made (*Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [35] per Hodgson JA). But where that situation arises, the adjudicator must bear in mind the need to afford natural justice to the parties. To address that problem, the adjudicator may wish to call for further submissions (s 21(4)(a)) or arrange a conference (s 21(4)(c))."

[68] The applicant submits by reference to the above quoted passage that even though the adjudicator was not required to consider the contractual time requirements in the context of s 26(2)(d) as submissions "properly made", the contractual provisions, having been brought to his attention, should have been considered by him as required by s 26(2)(b). The failure to consider the contractual time requirements therefore constitutes jurisdictional error.

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62 [2009] NSWSC 320.
63 [2009] NSWSC 320 at [43].
64 [2013] NSWSC 1879.
65 [2013] NSWSC 1879 at [66]. The NSW Payments Act uses the term "duly made" rather than "properly made" as used in s 26(2)(d) of the Act.
66 [2013] NSWSC 1879 at [70].

[69] The relevant challenge to the adjudication decision in *State Water* was that in arriving at his determination the adjudicator, contrary to the New South Wales equivalent to s 24(4) of the Act, took into account a number of submissions for non-payment advanced by State Water in its adjudication response, which were not included in its payment schedule. These "impermissibly considered" submissions all concerned the proper construction of clause 12 of the contract and included:

(a) the relevance of the parol evidence rule to the construction of the contract; and

(b) the effect of *Codelfa Constructions Pty Ltd v State Railway Authority (NSW)* on the permissible use of extrinsic evidence when construing the contract.[67]

[70] State Water submitted that even if the submissions had not been "duly made" the adjudicator was still permitted to consider them provided they were relevant to issues arising under the New South Wales equivalent of s 26(2)(b) of the Act.

[71] Sackar J was therefore considering whether an adjudicator was permitted to take into account submissions that had not been raised in the payment schedule. The issue in the present case is the reverse. It is whether an adjudicator, having decided that a submission contravened s 24(4) and was not properly made for the purposes of s 26(2)(d), is nonetheless required to consider the submission if it raises for consideration provisions of the contract. This is quite a different issue to that considered in *State Water* and raises different considerations. There is, for example, a tension, on the applicant's case, between the requirement of the adjudicator to consider the provisions of the Act under s 26(2)(a) which include s 24(4) and s 26(2)(d) (which specifically limit the reasons for withholding payment which may be included in the adjudication response), and the requirement in s 26(2)(b) for the adjudicator to consider the provisions of the contract.

[72] Under s 26(2)(d) it is the role of the adjudicator to determine whether submissions are or are not properly made and whether a submission contained in an adjudication response is one that should not be considered because of the effect of s 24(4).[68]

[73] In *State Water* Sackar J decided that the adjudicator's consideration of State Water's submissions on the proper construction of clause 12 of the contract was permissible pursuant to the New South Wales equivalent to s 26(2)(b) of the Act. This was on the basis that the submissions were "of real relevance".[69] His Honour was not dealing with a case such as the present, where an adjudicator, aware that the payment schedule raises time bar issues under the contract, refuses to deal with such issues on the basis they contravene s 24(4).

[74] The applicant referred to two further authorities. In *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd & Anor*[70] Brereton J had to consider jurisdictional error in

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67 [2013] NSWSC 1879 at [41]-[42] per Sackar J.

68 *John Holland Pty Limited v Roads & Traffic Authority (NSW)* [2007] NSWCA 19 at [63] per Hodgson JA (with whom Beazley JA agreed) and at [71] per Basten JA.

69 [2013] NSWSC 1871 at [70]-[71].

70 [2005] NSWSC 1129.

the context of a failure by an adjudicator to have regard to a contractual provision relevant to the adjudication. Unlike the present case the payment schedule had raised as an issue how the claim as put could be justified, having regard to the percentage works to be complete, which supported a significantly lower figure than that claimed by the claimant.[71] His Honour concluded:

> "Accordingly, I conclude that a failure by an adjudicator to have regard to a provision of the construction contract which is relevant to the adjudication under consideration is jurisdictional error, resulting in invalidity of the determination."[72]

[75] *Holmwood* was not concerned with whether an adjudicator is required to consider the provisions of the contract where those provisions are not raised in a payment schedule as a reason for withholding payment. As observed by Brereton J, the requirement for consideration in accordance with the NSW Payments Act equivalent to s 26(2)(b)) is not a requirement to consider each and every provision of the contract:

> "… that does not mean that the requirement in s 22(2)(b) to consider the provisions of the contract has the effect that in each adjudication the adjudicator must consider *every* provision of the contract – any more than the requirement in s 22(2)(a) to consider the provisions of the Act has the effect that in each adjudication the adjudicator must consider *every* provision of the Act; both the paragraphs are to be read as requiring consideration of the provisions only to the extent that they relevant to the adjudication application in question. In other words, the adjudicator is not required to consider provisions of the Act or the contract which had no bearing on, or relationship to, the adjudication application under consideration. This follows from the stated function of the considerations required by s 22(2) – which is, as its opening words express, "in determining an adjudication application" – and from the great inconvenience without utility which any other construction would involve."[73]

[76] In *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd & Ors*,[74] QCLNG sought a declaration that the adjudicator's decision was void as a result of, *inter alia*, the adjudicator's failure to consider the contractual requirements in clause 32.4(a) for the contractor to provide estimates within a specified period, notwithstanding submissions in the adjudication response relying on this provision. Peter Lyons J determined that the failure on the part of the adjudicator to consider submissions in respect of the effect of this clause constituted a failure by the adjudicator to comply with an essential requirement of the Act for a valid decision.[75] *QCLNG* did not however, concern a failure to consider a contractual provision in circumstances where the provision was not raised in a payment schedule as a reason for withholding payment.

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71 [2005] NSWSC 1129 at [14].
72 [2005] NSWSC 1129 at [51].
73 [2005] NSWSC 1129 at [50].
74 [2011] QSC 292.
75 [2011] QSC 292 at [123]; *City of Ryde v AMFM Constructions Pty Ltd & Anor* [2011] NSWSC 1469 at [22] per Brereton J and *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1879 at [71]-[72] per Sackar J.

[77] The first respondent submits that the extent to which an adjudicator is required to consider the provisions of the contract is affected by the payment claim and payment schedule, and the adjudication application and adjudication response in relation to those matters, because they, in turn, frame the scope of the dispute. Necessarily an adjudicator is not obliged to address provisions of a contract which are not raised as a reason for withholding payment in a payment schedule.[76]

[78] The first respondent referred to the following sections of the Act as framing the scope of the dispute. Section 18(3) requires a payment schedule to state the reasons for withholding payment. Such reasons may include contractual provisions limiting the claimant's right to payment.[77] As observed by Hodgson JA in *John Holland* at [33], the plain purpose (of s 24(4)) is "to avoid new submissions being introduced late in a process going ahead on a brief and strict timetable". The introductory words of s 26(2) "in deciding an adjudication application" are significant in construing s 26(2)(b) which requires the adjudicator to consider the provisions of the contract from which the application arose. From these introductory words it is evident that what the adjudicator decides is the adjudication application, not whether a progress payment should be made under the relevant contract. As stated by Mason P in *Clarence Street Pty Ltd v ISIS Projects Pty Limited*:[78]

> "The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues …"

[79] Senior counsel for the first respondent submits that the decision of the New South Wales Court of Appeal in *John Holland* governs the present case.[79] In that case the adjudicator's reasons referred to submissions made in the adjudication response that had not been included in the payment schedule and would not therefore be considered.[80] Similarly in the present case, the adjudicator, being aware of the time bar submissions, turned his mind to that issue and decided they should not be considered because of the operation of s 24(4).

[80] Similar to the applicant's submission in the present case, in *John Holland* it was submitted that the adjudicator was obliged to consider the substance of the submission, because it concerned the Act, the contract and the payment claim, all of which the adjudicator was required to consider under s 22(2) of the NSW Payments Act.[81]

[81] Hodgson JA at [47] adhered to the views that his Honour had expressed in the *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*[82] at paragraphs [33]-[36].[83] In *Contrax* his Honour stated:[84]

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76 Outline of Submissions for the First Respondent, [57].
77 *John Holland Pty Limited v Roads & Traffic Authority of NSW* [2007] NSWCA 19 at [33] per Hodgson JA (with whom Beazley JA agreed).
78 (2005) 64 NSWLR 448, 455 at [30].
79 T1-43, lines 4-5.
80 [2007] NSWCA 19 at [17] per Hodgson JA (with whom Beazley JA agreed).
81 [2007] NSWCA at [21] per Hodgson JA (with whom Beazley JA agreed).
82 [2005] NSWCA 142.
83 T1-43, lines 4-5.
84 [2005] NSWCA 142 at [35].

> "However, paragraphs (a) and (b) of s.22(2) require the adjudicator to consider the provisions of the Act and the provisions of the construction contract; and in my opinion, that entitles and indeed requires the adjudicator to take into account any considerations (other than considerations arising from facts and circumstances of the particular case not otherwise before him or her) that he or she thinks relevant to the construction of the Act, the construction of the contract, and the validity of terms of the contract having regard to provisions of the Act. Thus, in my opinion, if an adjudicator comes to know of submissions of a respondent that he or she thinks to be relevant to these questions (not being submissions based on facts and circumstances of the particular case not otherwise before him or her), he or she can take them into account under paragraphs (a) and (b), even if they cannot be considered under paragraph (d)."

[82] His Honour clarified the effect of what he had said in *Contrax* at [48] of *John Holland:*

> "… I was saying that the adjudicator should not ignore something which he or she is aware of and also believes is of real relevance to issues arising under paras (a) and (b), simply because the matter was not raised in submissions duly made by a respondent."

Nothing in his Honour's observations as clarified suggest that the adjudicator in the present case was required to have regard to the time bar issue in circumstances where it had not been raised in the payment schedule. By reference to s 24(4), the adjudicator decided that he would not have regard to the time bar issue. It was not jurisdictional error for the adjudicator, being aware of the time bar issue, not to consider it because of his view of the operation of s 24(4). If the adjudicator erred in the application of s 24(4), this is an error committed within jurisdiction. This is because the adjudicator has not failed to consider the time bar issue but rather refused to consider the issue because of the operation of s 24(4).

[83] As stated by Hodgson JA in *John Holland*:[85]

> "Thus, in my opinion, any requirement to consider such matters which were not raised in submissions duly made arises only after a threshold is crossed, involving both awareness of the matters in question and a belief that they are of real relevance. In this case, I would infer that the adjudicator became aware of the submissions to the extent necessary for forming a view that they were affected by s.20(2B), but there is no basis for any conclusion that the adjudicator believed they were of substantial relevance to issues arising under pars. (a) and (b) of s.22(2).
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> In those circumstances, in my opinion the adjudicator was not required to consider RTA's jurisdiction submissions by reason of par.(a) and/or par.(b) of s.22(2)."

[84] The distinction that should be made is between a failure to consider a relevant contractual provision which may constitute jurisdictional error and an adjudicator's decision not to

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[85] [2007] NSWCA 19 at [49]-[50].

consider such a provision because of the operation of s 24(4) which, if erroneous, would constitute an error within jurisdiction.[86] No jurisdictional error has been identified.

[85] The parties accept that had this jurisdictional error been established, the affected part of the decision, namely $64,354.40, could have been severed pursuant to s 100(4).

Disposition

1. The applicant's originating application filed 20 September 2016 is dismissed.

2. I will hear the parties as to cost.

[86] [2007] NSWCA 19 at [57] per Hodgson JA (with whom Beazley JA agreed) and at [71]-[72] per Basten JA.