SUPREME COURT OF QUEENSLAND

CITATION:	*BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394
PARTIES:	**BM ALLIANCE COAL OPERATIONS PTY LTD** ABN 67 096 412 752 (appellant) **v** **BGC CONTRACTING PTY LTD** ABN 88 008 766 407 (first respondent) **RUSSELL WELSH** (second respondent) **RICS DISPUTE RESOLUTION SERVICE** (third respondent)
FILE NO/S:	Appeal No 3287 of 2013 SC No 4422 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2013
JUDGES:	Holmes and Muir JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appellant is directed to consult with the respondent and bring in draft minutes of order reflecting these reasons within 28 days of today's date.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the appellant (BMA) entered into a contract with the first respondent (BGC) for the construction of a dam – where BGC served a payment claim on BMA pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act) which included claims for alleged latent conditions and termination costs – where the payment claim was referred to adjudication and BGC was awarded a progress payment which included sums on account of latent conditions and termination costs – where BMA sought a declaration that

the adjudication decision was void as a result of three jurisdictional errors – where the primary judge held that the adjudicator had made a jurisdictional error in the determination of the termination costs claim – where, on 13 November 2012, the primary judge declared the decision of the adjudicator void – where, on 22 March 2013, the primary judge revoked the declaration and dismissed BMA's application upon BGC undertaking to repay to BMA the portion of the adjudicated amount affected by jurisdictional error – where BMA submits that the primary judge's conclusion that a decision affected by jurisdictional error was not necessarily invalid for all purposes and has some residual effect was an error of law – whether the primary judge erred in finding that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or make an order quashing or setting aside the decision – whether the primary judge erred in law in withholding the relief sought by BMA – whether the matter should be remitted to the adjudicator for determination according to law

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where cl 26.3(b) of the contract requires BGC to give written notice to BMA of the encountering of latent conditions – where, within 10 business days of notification, the parties must "negotiate in good faith any changes to the Price and/or time for completion of the Services as a result of Latent Conditions" and, in the absence of agreement, must refer the matter to an independent expert for determination – where the primary judge held that cl 26.3 was predicated on the existence of latent conditions and any dispute as to their existence was to be resolved by the general dispute resolution provision, cl 37 – where, contrary to BMA's contentions, the primary judge held that the fact that the machinery for assessment of value under the clause had not been advanced did not alter BGC's entitlement under the contract to be paid in respect of a latent condition – where the primary judge held that the award by the adjudicator in respect of latent conditions did not constitute a jurisdictional error – where BMA contends that cl 26.3 was intended to deal with all aspects of a dispute concerning latent conditions, including the determination of the existence of a latent condition – whether cl 26.3 operates subject to the determination of the existence of latent conditions under cl 37 – whether the adjudicator committed a jurisdictional error in awarding BGC a progress payment which included a sum in respect of latent conditions

INTEREST – RATE OF INTEREST AND COMPOUND INTEREST – RATE IN OTHER CASES – where BMA sought interest on the sums repayable to it at the rate prescribed in practice directions for default judgments – where the primary judge accepted BGC's contentions that the appropriate rate was that payable on term deposits with financial institutions – where BGC's evidence of commercial rates of interest awarded on investments was uncontested – whether the primary judge erred in accepting and acting on evidence of commercial interest rates when awarding interest on the sum repayable to BMA

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 13, s 14, s 18, s 26, s 30, s 31
Civil Proceedings Act 2011 (Qld), s 58(3), s 59(3)

Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation (1992) 39 NSWLR 468, cited
Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 AC 266; [1998] UKHL 19, cited
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346, related
Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399, considered
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
Clyde Bergemann v Varley Power [2011] NSWSC 1039, considered
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, considered
Emergency Services Superannuation Board v Davenport [2004] NSWSC 697, considered
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, cited
Jackson v Purton [2011] TASSC 28, cited
Jadwan Pty Ltd v Secretary, Department of Health and Aged Care (2003) 145 FCR 1; [2003] FCAFC 288, considered
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, considered
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14; [2008] FCAFC 189, cited
Leung v Minister for Immigration and Multicultural Affairs (1997) 79 FCR 400; [1997] FCA 1313, considered
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11, considered
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (2004) 78 ALJR 992; [2004] HCA 32, cited
Morris v Riverwild Management Pty Ltd (2011) 284 ALR 413; [2011] VSCA 283, cited
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, considered

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389; [1949] HCA 33, cited
Serisier Investments Pty Ltd v English [1989] 1 Qd R 678, cited
South East Civil & Drainage Contractors P/L v AMGW P/L & Ors [2013] 2 Qd R 189; [2013] QSC 45, cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189; [2007] HCA 35, cited
Truenergy Australia Pty Ltd v Minister for Industrial Relations (2005) 93 SASR 393; [2005] SASC 490, cited

COUNSEL: P J Dunning QC, with G D Beacham, for the appellant
R A Holt QC, with S B Hooper, for the first respondent
No appearance for the second and third respondents

SOLICITORS: Herbert Smith Freehills for the appellant
McCullough Robertson for the first respondent
No appearance for the second and third respondents

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.

[2] **MUIR JA**: **Introduction** The appellant, BM Alliance Coal Operations Pty Ltd (BMA), entered into a contract with the first respondent, BGC Contracting Pty Ltd (BGC), under which BGC agreed to construct a dam at BMA's Goonyella Riverside Mine in central Queensland. On 10 February 2012, BGC served a payment claim on BMA, pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act), claiming a progress payment of $35,806,055.99 (excluding GST). That amount was comprised of various components including claims for an alleged latent condition and termination costs. BMA served a payment schedule under s 18 of the Act which contained a scheduled payment amount of nil and did not include the great bulk of the amounts claimed by BGC for latent conditions and termination costs. The payment claim was referred to adjudication and, on 7 May 2012, the adjudicator awarded BGC a progress payment of $25,600,758.64 (excluding GST), which included sums on account of latent conditions and termination costs.

[3] BMA commenced proceedings in the Supreme Court seeking a declaration that the adjudication decision was void as a result of two jurisdictional errors allegedly made by the adjudicator in the determination of the latent conditions claim and another such error in the determination of the termination costs claim. The primary judge upheld only the latter allegation but, in the exercise of his discretion, he refused to make the declaration of invalidity sought by BMA and dismissed BMA's application upon BGC undertaking to repay to BMA the portion of the adjudicated amount in respect of which the adjudicator had made a jurisdictional error.

[4] BMA appeals against the primary judge's orders on the grounds discussed below.

Ground 1 – the primary judge erred in construing cl 26.3 of the contract

[5] As the arguments advanced in respect of this ground concerned the construction of cl 26.3 and cl 37 of the contract, it is desirable to set them out.

"26.3 Subject to clause 26.2(c), the parties agree that conditions encountered on, in, under, near, or in connection with, the Site which have not been disclosed to the Contractor, or of which the Contractor could not otherwise reasonably have anticipated or been aware ('Latent Conditions'), are not within the Contractor's risk, and the Price does not contain allowance for them. If Latent Conditions are encountered, the Contractor must:

(a) use its reasonable endeavours to minimise the effect of such Latent Conditions on the Price and time for completion of the Services; and

(b) promptly (but no later than 28 days after encountering the Latent Conditions) give written notice of the Latent Conditions to the Principal, including a description of the Latent Conditions, and their anticipated impact (if any) on Price and time for completion of the Services.

Within 10 Business Days after receipt by the Principal of a notice given under clause 26.3(b), the parties will meet to negotiate in good faith any changes to the Price and/or time for completion of the Services as a result of the Latent Conditions. If no agreement is reached within a further 10 Business Days, the parties must refer the matter to an independent expert for determination. If the parties cannot agree an independent expert, the independent expert will be nominated by the Institute of Arbitrators and Mediators Australia. The independent expert will determine any impact on Price by reference to the rates and prices specified in Schedule F, and to the extent that Schedule F does not apply, by reference to reasonable rates or prices. The parties will share the costs of the independent expert equally, and will use their reasonable endeavours to ensure that the independent expert makes his or her determination promptly. The independent expert's determination will be binding on the parties.

…

37. Dispute Resolution

37.1 Until the relevant provisions of this **clause 37** have been complied with, no Party shall commence any action, bring any proceedings or seek any relief or remedy in a court or by arbitration, except that nothing in this **clause 37** prevents either Party from seeking interlocutory or equitable relief from a court.

37.2 Any issue, dispute, controversy or claim (a 'Dispute') arising out of or in relation to this Agreement must be the subject of a notice from the disputing Party to the other Party setting out the material particulars of the Dispute ('Notice'), and must immediately be referred to the Representative of each

Party who must endeavour in good faith to resolve the Dispute expeditiously.

37.3 If the Dispute has not been resolved within 7 days of reference to the Representatives pursuant to **clause 37.2** the Dispute must be referred to the Dispute Resolution Representative of each Party who must endeavour in good faith to resolve the Dispute expeditiously.

37.4 If the Dispute has not been resolved or an alternate method of resolving the Dispute has not been agreed within 7 days of reference to the Dispute Resolution Representatives pursuant to **clause 37.3**, or a longer period if the Parties agree, the Dispute may be submitted by either Party to mediation. If the Dispute is submitted to mediation and the Parties do not, within 7 days after the Dispute is submitted to mediation, agree on:

(a) a mediator and the mediator's compensation;

(b) the procedure for the mediation; or

(c) the timetable of each step of the procedure,

the mediation will be conducted in accordance with the Australian Commercial Dispute Centre's Mediation Guidelines in force at the time that the Dispute is referred.

37.5 If a Dispute is not resolved within 60 days after the date of the Notice given in accordance with **clause 37.2**, either Party who has complied with this **clause 37** may terminate the dispute resolution process undertaken and commence court proceedings in relation to the Dispute."

The primary judge's findings and BGC's contentions in respect of the construction argument

[6] Before the adjudicator, BMA argued that under cl 26.3 an entitlement to be paid in respect of a latent condition could arise only by operation of the mechanism set out in the clause – i.e. by the agreement of the parties or, failing that, the determination of the independent expert. The adjudicator awarded an amount for which no contractual entitlement existed rather than assessing BGC's contractual entitlement as he was required to do by s 14 of the Act. Consequently, the award by the adjudicator constituted a jurisdictional error.

[7] The primary judge held that cl 26.3 provided a mechanism for valuing an entitlement in respect of latent conditions and that its operation was predicated on the existence of latent conditions. His Honour reasoned as follows. Where BMA did not acknowledge the existence of latent conditions, any dispute about their existence was required to be resolved by "the processes contained in the contract for dispute resolution, in particular cl 37".[1] That cl 26 is premised upon an entitlement

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[1] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 at [19].

to be paid for latent conditions is reinforced by cl 26A, which provides, *inter alia*, that "the matters listed in clause 26.3, are not within the Contractors risk and the Price does not contain adequate allowance for them".

[8] Clause 26, as a whole, assumes the existence of an entitlement to be paid for the impact of latent conditions. The fact that the machinery for assessment of value under the clause had not been advanced did not alter BGC's entitlement under the contract to be paid. Consequently, BGC was able to seek payment in respect of that entitlement in the form of an interim payment under the Act. There was, thus, no jurisdictional error.

[9] The primary judge stated that, had he concluded that the adjudicator erred in construing the contract and in concluding that BGC had an entitlement under cl 26 to claim for latent conditions, he would nevertheless have found that there was no jurisdictional error. Rather, any such error would have been made in the course of the decision making process based on what the adjudicator considered to be the true construction of the contract and the merits of the claim.

[10] On appeal, BGC relied on the primary judge's reasons supplemented by the following:

(a) Had the parties intended that the expert appointed under cl 26.3 would determine entitlement as well as value, the language of the clause would have been different and not simply have assumed the existence of latent conditions. The second full paragraph of the clause requires the parties to meet to negotiate "any changes to the Price and/or time for completion of the Services". It does not require the parties to negotiate regarding the existence of latent conditions.

(b) If no agreement is reached by the parties, consequent on negotiations, the parties must refer "the matter to an independent expert for determination". The "matter" plainly relates back to "any changes to the Price and/or time for completion of the Services".

(c) The reference to "**the** Latent Conditions" in cl 26.3(b) further confirms that cl 26.3 assumes the existence of latent conditions.

(d) Disputes about latent conditions are often complex and protracted. Recourse to expert opinions is normally necessary. Consequently, most disputes of this nature are not suited to determination by a single expert; a person with expertise in the pricing and/or timing of construction work may well lack any expertise relevant to the determination of the existence, nature and extent of a latent condition.

BMA's contentions on the construction question

[11] BMA's submissions in relation to the construction of cl 26.3 may be summarised as follows. The analysis of cl 26.3 should commence with the appreciation that the clause manifests an intention to protect both contractor and principal should latent conditions be encountered or alleged. The contractor is protected by the prompt and conclusive determination of its entitlement. The principal is protected by ensuring that if a latent condition claim is asserted it is made and determined swiftly. Although cl 26.3 speaks of latent conditions as if they in fact existed, the language is simply a convenient way of referring to the condition for which the claim is made

and in respect of which the clause will operate. A latent condition, by definition, is something that the parties assumed did not exist when the contract was entered into and, consequently, is something which one can assume would have to be proved before an entitlement to be paid would arise. Even if the clause is predicated upon the existence of a latent condition, it remains to be determined, in the event of a dispute, whether the latent condition exists and how the dispute as to its existence is to be determined.

[12] There are good practical reasons for the parties to have intended that all aspects of the dispute be dealt with by cl 26.3. The matters relevant to the determination of the existence of a latent condition would be relevant to the extent of any such condition and therefore to the amount of money that BGC should be paid on account of it. It is not sensible to have cl 26.3 deal with the extent but not the existence of a latent condition.

[13] A conclusion that cl 26.3 was intended to deal with all aspects of a dispute concerning latent conditions is consistent with commercial commonsense and with the usual incentives underlying an expert determination clause, namely, the swift, binding and often unchallengeable resolution of a dispute over a particular matter. The primary judge's conclusion, if correct, means that the existence of a latent condition and its value are to be determined under two different mechanisms, at different times and by different decision makers. The emphasis on expedition apparent in cl 26 would become largely pointless.

Consideration

[14] Plainly there are considerations which support the respective constructions of cl 26.3 urged by the parties. Neither construction is entirely satisfactory. The strongest points, in my view, in favour of the primary judge's construction are: the implicit confining of the negotiations referred to in cl 26.3 to "changes to the Price and/or time for completion of the Services" and the implicit bestowal of only that "matter" on the expert. However, in the absence of agreement, the expert will be unable to decide "the matter" without deciding the existence, nature and extent of the latent conditions and the extent, if at all, to which BGC should have anticipated or been aware of the latent conditions (the latent conditions issues) unless those matters are decided under cl 37.

[15] I do not consider the argument propounded by BGC and noted in paragraph [10](d) above to be strong. There is no cogent reason why the parties could not have contemplated the appointment of an expert who could inform himself or herself of matters involving particular expertise by obtaining appropriate expert opinions.

[16] If cl 37 applies, cl 26.3 is necessarily inconsistent with it. At the latest, a dispute regarding the latent conditions issues for the purposes of cl 37.2 will have arisen, if no agreement is reached, within 10 business days after the commencement of negotiations under cl 26.3. The parties are then obliged to refer the matter to an expert for determination. If cl 37 applies, the dispute must be must be referred to the "Representative of each Party".[2] The cl 26.3 and cl 37 procedures would thus progress together. If the dispute has not been resolved within seven days of reference to the representatives, the dispute must be referred to the "Dispute Resolution Representative of each Party".[3] If the dispute has not been resolved or

[2] Clause 37.2.
[3] Clause 37.3.

an alternative method of resolving the dispute has not been agreed within seven days of reference to the Dispute Resolution Representative, or an extended period as agreed by the parties, the dispute **may** be submitted by either party to mediation.[4] If the dispute is not resolved within 60 days after notice is given under cl 37.2, a party who has complied with cl 37 may terminate any dispute resolution process and commence court proceedings.[5] Within the 60 day period and during any litigation that may result from a failure to resolve the dispute, the processes under cl 26.3 continue until the expert determination is made. That would almost invariably occur prior to the conclusion of any litigation consequent on a failure to agree.

[17] If cl 37 is intended to operate in respect of a dispute about matters so fundamental to the operation of cl 26.3 as the latent conditions issues, it is remarkable that cl 26.3 does not expressly or implicitly advert to cl 37, particularly as the timetable in cl 26.3 assumes that cl 37 has no application.

[18] A plausible explanation for the absence of any reference to cl 37 in cl 26.3 is that it was assumed that the expert, in order to determine the matters entrusted to him for determination, would have to first determine the existence, nature and extent of the latent conditions. The primary judge's construction could produce awkward results. It requires that any dispute as to the existence of latent conditions, in the absence of agreement, be resolved under cl 37. However, the precise nature and extent of such latent conditions and the extent to which those conditions depart from the conditions disclosed or known by BGC when the contract was entered into are critical to the matters specifically entrusted to the expert for determination. Even if disputes about these matters are to be left for determination under cl 37, the possibility that a declaration or order by a court will not provide a satisfactory basis for the expert's determination is obvious. Also, the results of the litigation may well falsify the basis on which the expert determination was made. Furthermore, if the primary judge's construction is correct, it would have made more sense for the negotiating period in cl 26.3 to have commenced after the latent conditions issues had been resolved by agreement or litigation.

[19] That the language of cl 26.3 appears to assume the existence of latent conditions is not decisive. The clause could have been expressed to make the trigger for its operation, not the encountering of latent conditions but, the making of a claim by BGC that latent conditions existed. It is necessarily implicit in cl 26.3, however, that it operates in respect of such a claim by BGC. The words:

> "If Latent Conditions are encountered, the Contractor must:
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> (a) use its reasonable endeavours to minimise the effect of such Latent Conditions … ; and
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> (b) promptly … give written notice of the Latent Conditions to the Principal, including a description of the Latent Conditions…"

apply to a situation in which, rightly or wrongly, BGC forms the opinion that latent conditions exist such that it should seek a consequential change in price and/or in the time for completion. Before BGC gives notice under cl 26.3(b), BMA cannot

4 Clause 37.4.
5 Clause 37.5.

be expected to know of, let alone accept, the existence of the latent conditions that BGC intends to allege. Nevertheless, the operation of cl 26.3 is triggered by BGC's notice even if it is subsequently determined that the alleged latent conditions do not exist.

[20] The cl 26.3(b) notice must describe the latent conditions and "their anticipated impact (if any) on Price and time for completion". BMA, having been so informed, must consider its position and, within 10 business days of notification, "negotiate in good faith **any changes** to the Price and/or time for completion … as a result of the Latent Conditions". The "latent conditions" to which reference is made are the latent conditions described in the notice under cl 26.3.

[21] It is implicit in the words "any changes" that the latent conditions notified need not necessarily result in a change to either price or time for completion. Those words are repeated in the description of the matter to be determined by the expert.

[22] BGC does not have the right to determine the latent conditions issues unilaterally. If the parties are unable to agree, the mechanisms for their resolution must be found either in cl 26.3 or cl 37. If cl 37 applies, the parties' intention, manifested in cl 26.3, that changes in price and/or time for completion be resolved expeditiously will be seen to be illusory. It would have been apparent to the parties that agreement on the latent conditions issues was likely to be significantly more difficult to arrive at than agreement on the price and time implications of the latent conditions issues once determined. This is a significant consideration, as is the objective unlikelihood that the parties, having chosen to address the issue of changes in price and time for completion in a specific clause dealing only with that topic, would have intended that specific clause to operate subject to a general dispute resolution provision, the terms of which were inconsistent with the terms of the specific clause and the application of which would tend to defeat the specific clause's aim of ensuring prompt expert determination.

[23] For the above reasons, the primary judge erred in construing cl 26.3 of the contract.

The Ground that the primary judge erred in failing to find that the adjudicator made a jurisdictional error in awarding BGC $8,662,655.17 for its latent condition claim

[24] This ground was not raised in the notice of appeal but was the subject of written and oral argument.

[25] BGC contended that, even if the primary judge's interpretation of cl 26.3 was incorrect, the adjudicator did not make a jurisdictional error. In addition to relying on the primary judge's reasons, reliance was placed on the following observations of McDougall J in *Clyde Bergemann v Varley Power*:[6]

> "… where matters are entrusted to adjudicators for decision, a decision involving error of law is not, for that reason alone, a decision beyond jurisdiction. Any other conclusion would be, as I said and as Hodgson JA agreed in *Brodyn*, inconsistent with the statutory scheme. In this context, I note that in *Chase* at [55], Spigelman CJ observed that 'the purpose of the legislative scheme

6 [2011] NSWSC 1039 at [43]–[44].

> [of the Act] is best served by restricting the scope of intervention by the courts'.
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> In determining the amount of a progress payment, adjudicators are required to consider, among other things, the provisions of the construction contract under which the claimed entitlement arises (s 22(2)(b)). Presumably, they are required to do so so that they can work out 'the amount calculated in accordance with the terms of' that contract. In other words, their task requires them to identify the contractual provisions that are relevant to quantification of the amount of a progress payment, to decide (where there is a contest) the proper construction of those provisions and to apply them to the facts of the particular dispute. As Palmer J said in *Multiplex* at [58]:
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> > '... If determination of a disputed progress claim depends upon resolution of a question as to what are the relevant terms of a contract, it must necessarily be implicit in the jurisdiction conferred on the adjudicator by the Act that he or she have jurisdiction to decide that question.'"

[26] BMA's arguments were to the following effect.

[27] *Clyde Bergemann* is not authority for the proposition that all errors of law are within the adjudicator's jurisdiction.[7]

[28] Errors of law are not non-jurisdictional merely because they arise in the course of something that the decision maker is required to consider. In *Kirk v Industrial Court (NSW)*,[8] the High Court held that the Industrial Court had fallen into jurisdictional error because, in a prosecution under s 15 and s 16 of the *Occupational Health and Safety Act* 1983 (NSW) (the OHS Act), it misconstrued s 15 of the OHS Act and failed to comply with the rules of evidence by permitting the prosecution to call the defendant as a witness. The construction of the OHS Act and the admissibility of evidence were matters which the Industrial Court was required to consider in the course of trying the case, but were jurisdictional errors as they led the Court to misapprehend the nature and limits of its power.[9]

[29] Here the error was jurisdictional because the adjudicator disregarded a limitation on his functions and powers. He could not award an amount for the latent condition unless there was an entitlement to be paid for that under the contract. An entitlement to be paid could only arise by the mechanism set out in cl 26.3. The parties did not meet to negotiate and the matter was not referred to an independent expert for determination. These requirements were not steps in assessing an entitlement conferred under the contract. Compliance with cl 26.3 was a precondition to the adjudicator having jurisdiction to award a sum at all. Also, the extent of an adjudicator's jurisdiction on matters of law is, at best, limited. Bodies other than courts do not have power to authoritatively determine questions of law or make decisions other than in accordance with law, subject to contrary intent in the statute creating the body.[10]

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7 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67]; *South East Civil & Drainage Contractors P/L v AMGW P/L & Ors* [2013] QSC 45 at [54].

8 (2010) 239 CLR 531.

9 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574–575 [74]–[76].

10 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572–573 [68].

[30] As BGC could have no entitlement to payment in respect of the alleged latent condition until the requirements of cl 26.3 were fulfilled, the adjudicator committed a jurisdictional error in making the award by disregarding a limitation on his function and powers. The award effectively created a right, rather than assessing a right that existed under the contract. Contrary to the findings of the primary judge, the adjudicator's error was not one made "in the course of the decision-making process itself based on what the adjudicator considered to be the true construction of the contract and the true merits of the claim"[11] and thus not a jurisdictional error even if the adjudicator's construction was wrong. If BMA's construction of cl 26.3 and cl 37 of the contract are accepted, the adjudicator necessarily assessed the progress payment other than by reference to the terms of the contract.

Consideration of the jurisdictional error in respect of the cl 26.3 ground

[31] The nature of a "jurisdictional error" was discussed as follows by Brennan, Deane, Toohey, Gaudron and McHugh JJ in *Craig v South Australia*:[12]

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.
>
> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers … **[A]n inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, 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**

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[11] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 at [26].

[12] (1995) 184 CLR 163 at 177–178.

> **existence of any authority to make an order or decision in the circumstances of the particular case.** Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern." (citations omitted) (emphasis added)

[32] Later in their reasons, their Honours contrasted the position of an inferior court in relation to jurisdictional error with that of an administrative tribunal:[13]

> "The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

[33] In *Kirk*, the majority summarised a discussion of jurisdictional error by the Court in *Craig*,[14] as follows:[15]

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13 *Craig v South Australia* (1995) 184 CLR 163 at 179–180.

14 *Craig v South Australia* (1995) 184 CLR 163 at 176–180.

15 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573–574.

> "The Court in *Craig* explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows.
>
> First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist' (emphasis added). Secondly, the Court pointed out that jurisdictional error 'is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*' (emphasis added). (The reference to '*theoretical* limits' should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken [into] account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case. The Court said of this last example that 'the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern' and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes*, *R v Gray; Ex parte Marsh* and *Public Service Association (SA) v Federated Clerks' Union*." (citations omitted)

[34] Their Honours noted that the foregoing discussion provided examples of jurisdictional error which were "not to be taken as marking the boundaries of the relevant field".[16]

[35] In order to apply these principles, it is necessary to identify precisely what the adjudicator did and how, by reference to the provisions of the Act, he exceeded his jurisdiction.

[36] Section 12 of the Act creates an entitlement to a progress payment on the part of a person who has carried out construction work or supplied related goods and services under a construction contract. Section 13 provides that the amount of such payment is the amount calculated under the contract or, if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied under the contract. Section 14(1) provides that:

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16 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 [73].

"Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) under the contract; or

(b) if the contract does not provide for the matter, having regard to …" (various matters are then listed)

[37] Section 26 of the Act provides:

"**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

(c) the rate of interest payable on any amount.

(2) In deciding an adjudication application, the adjudicator is to consider the following matters only—

(a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building Services Authority 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;

(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."

[38] The adjudicator's reasons in respect of the latent conditions claim are to be found in paragraphs [273]–[294] of his reasons. That part of the reasons may be summarised as follows. BMA assessed the $11,685,437 claim on account of latent conditions (claimed as a variation) at nil on the bases that:

(a) the basis of the claim was not identified;

(b) if the claim was made as a variation, the requirements of the contract had not been complied with and neither entitlement nor quantum were established;

(c) if the claim was a latent conditions claim, there was no latent condition, no compliance with cl 26.3 and the costs claimed were not caused by any latent condition; and

(d) the sum claimed was not reasonable.

[39] BGC contended that the work could be claimed as a variation under cl 18, which deals with variations of the agreement. The adjudicator found that variations to the agreement are not limited to those made under cl 18. Clause 26.3 is an example of another provision of the contract which "exist[s] to vary the Agreement".

[40] The adjudicator did not "necessarily agree with [BMA's] view that a change in the nature of the material encountered is not a 'variation of the Services'". If "the ground conditions are at variance to the geotechnical report included in the specification … and the variance results in additional work being undertaken [there will be] a variation to the scope of the works". "[T]echnically", BGC could seek a variation for the alleged latent condition, but the matter "is more appropriately dealt with under … clause 26.3".

[41] If the provisions of cl 26.3 are not adhered to, neither party has a remedy, but BGC "is not barred from entitlement under [cl 26.3] if [BMA] does not participate in the process" under the clause.

[42] BGC had a valid claim for latent conditions under either cl 18 or cl 26.3.[17]

[43] BMA's assessment of BGC's entitlement at $1,929,525, in the alternative, was flawed for the reasons given by BGC. BGC's methodology for its claim was accepted, but not all of the claim was substantiated by the materials provided by BGC.

[44] Although the adjudicator noted BGC's claim to have satisfied the notice provisions of cl 26.3 by its notification of 6 June 2011 and its letters of 10 and 20 October 2011, there is no finding of either compliance or non-compliance with cl 26.3 by either party.

[45] BMA's argument is based on the assumption that the adjudicator disregarded the requirements of cl 26.3 and otherwise ignored the provisions of the contract in making his adjudication. It is clear, however, that the adjudicator found that BGC could claim either under cl 18 or cl 26.3 in respect of the alleged latent conditions.

[46] Neither party made submissions in respect of cl 18 on the hearing of the appeal. It seems an unlikely basis for a latent condition claim. Clause 18.1 provides that the terms of the contract "may not be varied except in writing and signed by both parties".[18] BMA may vary "the Services" by written notice of variation to BGC.[19]

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17 Mistakenly referred to in para [281] as 23.6.

18 Clause 18.1.

19 Clause 18.2.

BGC is required to vary "the Services" in accordance with BMA's notice and provide BMA with a written claim prepared as prescribed by cl 18.4 "within 30 days of the effective date of variation".[20] In cl 18.7, BGC "acknowledges and agrees that the remedy set out in clause 18.3(b) [the provision of the written claim prepared as prescribed within the prescribed time] is its sole and exclusive remedy in respect of a variation of the Services" by BMA.

[47] It appears that none of the requirements of cl 18 was met. That was implicitly acknowledged by BGC in its adjudication application where it asserted:

> "28.41 Accordingly, BMA's decision not to direct a formal variation in respect of the extra work needed to overcome the latent condition was reviewable, and if BMA behaved inappropriately in withholding such a direction, then the adjudicator may proceed as if the direction were given and the formal requirements in clause 18 complied with."

[48] It is arguable that the adjudicator's error in not applying cl 26.3 was jurisdictional. He was required by s 14(1) of the Act to value construction work under the contract unless the contract did not provide for the matter. Clause 26.3 provided for the matter. The adjudicator was required to apply its provisions. He referred to it but ignored its terms. In particular, he ignored the fact that entitlement to any payment in respect of latent conditions was dependent on the determination of an expert approved under cl 26.3.[21] This was so even if, contrary to the view expressed earlier, cl 37 was also applicable. Once a latent condition, and presumably its nature and extent, were established by agreement, mediation or litigation under cl 37 the expert was required to determine the "changes to the Price and/or time for completion", if any. If, for some reason which did not emerge on the hearing of the appeal, cl 18 was applicable as the adjudicator found, he also appears to have ignored its provisions. It is unnecessary, however, to decide the jurisdictional argument. As I have already mentioned, it was not raised in any ground of appeal and, if the adjudication decision is of no legal effect as a result of the adjudicator's jurisdictional error in respect of termination costs, the identification of further jurisdictional errors has no utility.

Ground 2 – the primary judge erred in holding that the adjudication decision retained effect unless and until the Court exercised its discretion to grant a declaration or make an order quashing or setting aside the decision

Ground 3 – the primary judge erred in dismissing BMA's application on condition that BGC paid to BMA the portion of the adjudication decision affected by the jurisdictional error found by the primary judge and other consequential amounts on the basis that this course of action provided a more convenient and satisfactory remedy than a declaration that the decision was void coupled with consequential orders

[49] The primary judge found that the adjudicator had made a jurisdictional error in allowing BGC's claim for termination costs in the sum of $4,345,377.42. The Act gave BGC a right to progress payments based only on contractual entitlements which accrued on or before the reference date. It was found that the adjudicator had erred because an entitlement to payment of the sums claimed could not have arisen

[20] Clause 18.3(b).

[21] See e.g. *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 288–289; *Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468 at 476.

on or before 1 January 2012, the relevant reference date. On appeal, BGC did not contest these findings. In his reasons delivered on 13 November 2012, the primary judge held that, "A decision affected by jurisdictional error is void".[22] His Honour said:[23]

> "[61] In conclusion, **BMA has succeeded in establishing one of the three jurisdictional errors alleged by it. It has established an entitlement to a declaration that the decision of the [adjudicator] dated 7 May 2012 in relation to Adjudication Application No 1064504-831 is void.**
>
> [62] It will be necessary to consider consequential orders including an order remitting the matter to the [adjudicator] for reconsideration.
>
> [63] On 16 May 2012 BMA paid to BGC the adjudicated amount (excluding GST) together with accrued interest in accordance with the adjudication decision and the adjudication fee. In paragraph 3 of the originating application filed on 18 May 2012 BMA sought an order that BGC pay to it the sum of $26,135,709.37 together with interest from 16 May 2012. I will hear the parties in relation to the terms of orders including the rate of interest and on the issue of costs." (emphasis added)

[50] On 13 November 2012, the primary judge declared the decision of the adjudicator void. When the matter came before the primary judge for hearing on 29 November 2012 and 8 March 2013, he revoked the declaration. On 22 March 2013, the primary judge made the following orders:[24]

> "Upon the undertaking of [BGC] by its counsel to pay to [BMA] within 14 days:
>
> (a) the sum of $4,345,377.42; and
>
> (b) the sum of $147,992.84 (representing interest on the amount in (a) from 16 May 2012 to 22 March 2013); and
>
> (c) the sum of $434,537.74 (representing GST paid by [BMA] to [BGC] in respect of the amount in (a)).
>
> the order of the Court is that:
>
> 1. The application filed 18 May 2012 is dismissed.
>
> 2. There be no order as to costs."

[51] In reasons given on 22 March 2013, the primary judge stated that when he delivered his initial reasons he anticipated making a declaration that the adjudicator's decision was void and making consequential orders, including an order remitting the matter

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22 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2012] QSC 346 at [58].

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

24 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [69].

to the adjudicator for reconsideration. The parties made further written and oral submissions about the appropriate orders that should be made. BMA contended that the adjudicator's decision should be declared void; that BGC should be restrained from enforcing or otherwise relying on the decision; and that BGC should be ordered to repay the $26,135,709.37 it had been paid by BMA on 16 May 2012 together with interest and GST. BGC contended that on its undertaking to pay to BMA within 14 days $4,345,377.42 together interest thereon from 16 May 2012 and a further sum on account of GST paid by BMA to BGC, the application should be dismissed.

[52] The primary judge discussed authorities concerned with the power of a court to decline to grant prerogative remedies and to make declaratory orders on discretionary grounds. His Honour identified as a critical issue:[25]

> "… whether the form of conditional order proposed by BGC represents 'a more convenient and satisfactory remedy' than an order declaring the decision void, together with an order for the repayment of the adjudicated amount in full, along with interest. More generally, the issue is whether the circumstances make it just to withhold the declaratory and other relief sought by BMA in the circumstances, which include the objectives of the Act, the nature of the jurisdictional error, its ascertainable monetary consequences and BGC's undertaking to remedy those consequences by repaying to BMA the component of the adjudicated amount, together with interest and GST."

[53] The primary judge then considered the effect of a decision such as that of the adjudicator until set aside or declared void. His Honour referred to *Emergency Services Superannuation Board v Davenport*,[26] in which McDougall J upheld two of the plaintiff's three challenges to the validity of the adjudicator's determination. McDougall J indicated that he was prepared to grant the plaintiff relief on condition that the plaintiff pay the contractor the unaffected amount of the determination, together with interest thereon, in accordance with the determination. The plaintiff accepted the imposition of the condition.

[54] In *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*,[27] Basten JA, after observing that the amount included in the condition proposed by McDougall J in *Davenport* was not "arbitrarily selected" and was justified by reference to the otherwise invalid determination, said:[28]

> "Such an approach has much to recommend it, particularly, it might be added, if the claimant is otherwise unable to pursue its original payment claim to achieve a second adjudication. However, such conditional relief can itself only be valid if it is designed to achieve a legitimate purpose: cf *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11; (2003) 215 CLR 518 at [15]–[16] (Gleeson CJ); [39] (McHugh J); [68] Gummow and Hayne JJ). If the determination is indeed legally ineffective in all respects, it would be

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25 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [21].
26 [2004] NSWSC 697.
27 (2011) 81 NSWLR 716 at 730.
28 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716 at 730 [52].

> doubtful whether the court could condition declaratory relief (or an order setting aside the decision) upon the applicant making such payment as would be required by the determination if validity could be determined part by part, like the curate's egg. Accordingly, the underlying assumption was inconsistent with total invalidity for all purposes."

[55] The primary judge noted[29] that he was not invited by BGC to make an order which conditioned the declaratory relief (or an order setting aside the decision) upon a requirement that BMA pay the unaffected amount. He said in that regard:[30]

> "Basten JA observes in the passage [quoted in paragraph [54] above], an order of that kind, as made in *Emergency Services Superannuation Board v Davenport*, is inconsistent with the proposition that a determination affected by jurisdictional error carries the consequence of 'total invalidity for all purposes.' I respectfully follow his Honour's discussion of the concept of nullity."

[56] The primary judge then discussed authorities including *Minister for Immigration and Multicultural Affairs v Bhardwaj*;[31] *Leung v Minister for Immigration and Multicultural Affairs*;[32] and *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*.[33]

[57] Having done so, his Honour observed:[34]

> "[29] … In a case in which the decision is challenged, and the Court declines to declare it invalid for a discretionary reason, the decision will remain binding. In other cases, a decision affected by jurisdictional error, such as a denial of natural justice, will lack validity without the need for a challenge in proceedings as to its validity, for example, where the decision-maker appreciates there has been a jurisdictional error and treats the decision as no decision at all.
>
> …
>
> [32] The [adjudicator's] decision did not cease to have legal and other consequences upon BMA challenging it for jurisdictional error on three grounds, two of which failed, or even upon my finding that the third ground of alleged jurisdictional error was established. It continued to have operational effect and also provided the legal justification for BGC to retain the money which had been paid to it pursuant to the decision. An order declaring the decision void might be made conditional upon the

29 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [25].
30 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [25].
31 (2002) 209 CLR 597.
32 (1997) 79 FCR 400.
33 (2003) 145 FCR 1.
34 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [29] and [32].

payment of a certain amount, in the form of an order of the kind made in *Emergency Services Superannuation Board v Davenport*. As Basten JA observes, such an approach has much to recommend it, particularly if the claimant is otherwise unable to pursue its original payment claim to achieve a second adjudication. However, I have yet to make a declaration that the decision is void. **As matters stand, the decision does not lack effect notwithstanding my finding of jurisdictional error. It retains effect unless and until I exercise my discretion to grant a declaration or make an order quashing or setting aside the decision.**" (emphasis added)

[58] His Honour rejected submissions by BMA that a refusal to make the declaration it sought would "clothe the decision with a measure of legal validity", remarking, "The decision already has a measure of validity".[35]

[59] After considering the competing arguments as to whether remittal of the matter to the adjudicator was permissible, and/or desirable, his Honour concluded that the most satisfactory course was to make the order he eventually made. His Honour's reasons for adopting this course were:

- such an order was "best suited to correct the error which resulted in the determination of an amount in excess of jurisdiction and to achieve a just result, being the result that would have been achieved had the adjudication decision been made without jurisdictional error";[36]
- it would avoid the risk of further litigation and the cost and complexity in relation to the conduct of a further adjudication;[37]
- it would avoid BGC being deprived of approximately $24,000,000;[38] and
- it would avoid any doubt about whether remittal was possible.[39]

[60] BMA argued that the primary judge's conclusion that a decision affected by jurisdictional error was not necessarily invalid for all purposes and had some residual effect was an error of law. In particular, BMA complained about the conclusion that the adjudicator's decision "retains effect unless and until [the primary judge] exercise[s] [his] discretion to grant a declaration or make an order quashing or setting aside the decision".[40] In support of its contentions, BMA referred to *Bhardwaj*;[41] *Plaintiff S157/2002 v The Commonwealth*;[42] *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*;[43] and *SZFDE v Minister for Immigration and Citizenship*.[44]

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35 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [38].
36 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [42].
37 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [43].
38 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [43].
39 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [45].
40 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [32].
41 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614–615 [50]–[51] per Gaudron and Gummow JJ; at 618 [63] per McHugh J; at 646–647 [152]–[153] per Hayne J.
42 (2003) 211 CLR 476 at 506 [76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
43 (2004) 78 ALJR 992 at 997 [29] per Gummow and Hayne JJ.
44 (2007) 232 CLR 189 at 206 [52].

[61] BGC sought to uphold the primary judge's findings under consideration, relying, in particular, on *Truenergy Australia Pty Ltd v Minister for Industrial Relations*;[45] *Jackson v Purton*;[46] and *Jadwan*.[47] It was further submitted that the provisions of the Act did not support a conclusion that an adjudicator's decision affected by jurisdictional error is necessarily of no legal effect. I will refer to the basis for this submission later.

Consideration

[62] In *Bhardwaj*, Gaudron and Gummow JJ, with whose reasons McHugh J relevantly agreed, said:[48]

> "There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition."

[63] To like effect, Hayne J said:[49]

> "In general, judicial orders of superior courts of record are valid until they are set aside on appeal, even if they are made in excess of jurisdiction. By contrast, administrative acts and decisions are subject to challenge in proceedings where the validity of that act or decision is merely an incident in deciding other issues. If there is no challenge to the validity of an administrative act or decision, whether directly by proceedings for judicial review or collaterally in some other proceeding in which its validity is raised incidentally, the act or decision may be presumed to be valid. But again, that is a presumption which operates, chiefly, in circumstances where there *is* no challenge to the legal effect of what has been done. Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the

45 (2005) 93 SASR 393 at 413 [107].

46 [2011] TASSC 28 at [60]–[61].

47 *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 at 16 [42].

48 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614–615 [51].

49 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 645–647 [151]–[153].

> Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.
>
> This is not to adopt what has sometimes been called a 'theory of absolute nullity' or to argue from an a priori classification of what has been done as being 'void', 'voidable' or a 'nullity'. It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for *jurisdictional error*, the statutory power given to the Tribunal has not been exercised …
>
> Nothing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the September decision. In particular, the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect. Once it is recognised that *a* court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences." (citations omitted)

[64] In *Plaintiff S157/2002*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ, referring to passages from the reasons of Gaudron and Gummow JJ,[50] McHugh J[51] and Hayne J[52] in *Bhardwaj*, said:[53]

> "This Court has clearly held that an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all'." (citations omitted)

[65] Finkelstein J observed in *Leung*,[54] in a passage implicitly approved of by Gleeson CJ in *Bhardwaj*:[55]

> "There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside."

[66] BGC relied on these observations and on a number of decisions of the Full Court of the Federal Court, including *Jadwan*, which expressed the view that whether jurisdictional error on the part of a tribunal or decision maker will render the

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50 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614–615 [51].
51 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 618 [63].
52 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 646–647 [152].
53 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76].
54 *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 413.
55 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 604–605 [12].

decision nugatory for all purposes may depend on the terms of the statute under which the decision was made.[56] That proposition, with respect, may be accepted but, absent statutory provisions necessitating a contrary conclusion, the general principle identified in paragraphs [62]–[64] above applies.[57]

[67] BGC identified two matters which it claimed demonstrated a legislative intention that an adjudicator's decision affected by jurisdictional error not be deprived of any legal effect:

- The absence of a statement in the Act that an adjudicator's decision affected by jurisdictional error lacked legal effect and the mechanism provided by s 30 and s 31 of the Act whereby an adjudication certificate may be obtained and "filed as a judgement for a debt, and may be enforced, in a court of competent jurisdiction".[58]

- The "pay now, argue later" nature of the scheme.

[68] The fact that the Act provides for a simple expeditious and robust mechanism for ensuring the payment of progress claims does not, of itself, support the conclusion for which BGC contends. The Act also provides a relatively straightforward framework which facilitates compliance. I am unable to detect anything in the Act which indicates a legislative intention that the benefits provided to claimants and the corresponding detriments to respondents under the Act should exist irrespective of whether there has been compliance with the Act's provisions. To the contrary, some of the Act's provisions are expressed in peremptory language.[59]

[69] Sections 30 and 31 are merely machinery provisions to enable the enforcement of adjudication decisions which provide for the payment of money. Without such provisions, an adjudication decision that a sum of money was payable to a claimant would lack practical consequences.

[70] As BMA submitted, respondents under the Act do not have the benefit of decisions made after mature consideration based on evidence admitted under the evidentiary rules applied in Court proceedings and tested by cross-examination. Nor do they have any right of appeal. Respondents are afforded a measure of protection only by strict compliance with the provisions of the Act.

[71] Whatever the position might be if the parties to an adjudication make no complaint about the adjudication decision, the decisions of the High Court relied on by BMA make it plain that once a court determines that a decision of the type in question is affected by jurisdictional error, the decision cannot give rise to legal consequences.

[72] On 13 November 2012, not only did the primary judge find jurisdictional error resulting in the invalidity of the adjudication decision, he declared the decision void. Even without the declaration, it necessarily followed from the findings in the 13 November reasons, that the adjudication decision had no legal effect. It is

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56 *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 at 16 [42]; 22 [64].

57 See *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 47–50 [156]–[176]; *Morris v Riverwild Management Pty Ltd* (2011) 284 ALR 413 (VCA) at 423–424 [38]–[41].

58 *Building and Construction Industry Payments Act* 2004 (Qld), s 31(1).

59 Sections 17(2), 17(4), 18(2), 18(3), 21(2), 21(3), 21(4), 21(5), 21(6), 24(2), 24(3), 24(4), 24(5), 25(1), 25(2), 25(3), 25(5) and 26(2).

difficult to see how the declaration that the decision was void could have been revoked, but no issue about that was raised in the grounds of appeal or in argument.

[73] There was no suggestion at first instance or on appeal that BMA did not have a legally enforceable right to the repayment of the sum of $26,135,709.37. The primary judge's 22 March 2013 orders effectively defeated that right, except in respect of the $4,345,377.42, and interest, relating to the termination costs claim.

[74] In order to justify the revocation of the 13 November 2012 declaration and the making of the 22 March 2013 orders, the primary judge relied on the existence of a discretion as to whether to grant declaratory relief even though a legal basis for the making of the subject declaration existed. His Honour identified as a relevant circumstance the existence of "alternative and adequate remedies for the wrong of which complaint is made".[60]

[75] The primary judge then, with respect, proceeded to deny BMA the remedy dictated by the finding of jurisdictional error. In so doing, the primary judge was motivated by a desire to allow BGC to retain the amounts which the adjudicator had allowed and to which BGC would have been entitled had there been no jurisdictional error. In his Honour's view, "[s]uch a course advances the policy of the Act".[61] It is not clear what connection, if any, existed between this rationale and the existence of an alternative and adequate remedy.

[76] As previously discussed, there is nothing in the Act which would support the denial to a respondent to a payment claim of its rights and entitlements under the Act except to the extent that the Act expressly or implicitly so provided. Nor is there any principle identified which would authorise a court to deny a litigant a legal right or remedy on the grounds that the policy of an Act would thereby be advanced. In this case the matters discussed in respect of the latent conditions claim indicate that a failure to permit BMA to enjoy the normal benefits of its success in the proceeding were unlikely to assist in advancing the policy of the Act but were likely to cause injustice. It is also relevant that the primary judge's refusal to grant appropriate declaratory relief may well have left it open to BMA to bring other proceedings to recover the monies paid by it to BGC.[62]

[77] The adjudication decision gave BGC no entitlement to payment of any part of the adjudication amount as BMA had no obligation to pay it. BMA, having paid it, had a right to recover it. The primary judge erred in law in withholding the relief sought by BMA. His Honour also erred in finding in his 22 March 2013 reasons that the adjudication decision, which he held to be affected by jurisdictional error, retained effect until he exercised his discretion to grant a declaration or make an order quashing or setting aside the decision.

[78] For the above reasons, the primary judge's orders of 22 March 2013 should be set aside.

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[60] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 449 [284]; see also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400.

[61] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [48].

[62] See e.g. *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 49 [166].

Ground 4 – the primary judge erred in accepting and acting upon evidence of commercial interest rates when awarding interest on the sum repayable to BMA in circumstances where no sufficient basis was made out to justify such a course

[79] BMA sought interest on the sums repayable to it at the rate prescribed in practice directions for default judgments. BGC contended that the appropriate rate was that payable on term deposits with financial institutions. It adduced evidence in that respect. BMA referred to *Serisier Investments Pty Ltd v English*,[63] in which Thomas J said:

> "It would be undesirable to encourage the calling of accountants or other experts to give evidence on applicable rates of interest in every case or even frequently. This would lead to multiplicity of issues, increase in costs and waste of human resources."

[80] It was submitted that the principle expressed by Thomas J accorded with the practice of the court in awarding interest at an established rate, unless some other rate is shown to be more appropriate. In that regard, BMA referred to McPherson JA's observation in *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)*[64] that "In Queensland, a simple interest rate of 12 per cent p.a. has generally been applied under s. 47 [of the *Supreme Court Act* 1995 (Qld)] since about 1985 or earlier."

[81] It was submitted that the current practice in Queensland was to award interest at the rate prescribed in practice directions from time to time[65] and that a similar practice existed in New South Wales.[66]

[82] According to the argument, the statement of principle in *Serisier Investments Pty Ltd* and the practice of the Court reflect the undesirability of encouraging disputes over an appropriate interest rate and are inconsistent with a departure from the generally applied rate simply because it differs from prevailing commercial interest rates. To entertain such departures from the norm would encourage frequent disputation over the appropriate rate as commercial interest rates regularly differ. Consequently, it was submitted, BGC bore the onus of demonstrating that there was a rate of interest more appropriate than the prescribed rate. It could not discharge the onus by merely introducing evidence of different commercial interest rates. The primary judge gave no reason for adopting the deposit investment rate, beyond concluding that the evidence of such was admissible.[67] That finding, however, did not demonstrate that the deposit rates were more appropriate to compensate a large mining company for the loss of its money than interest at the rate set in a practice direction. The primary judge reversed the onus of proof when he stated that BMA had put on no evidence as to how the money would have been used.[68]

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[63] [1989] 1 Qd R 678 at 681.

[64] [2003] 1 Qd R 26 at 55 [65].

[65] See e.g. *Fulcher & Ors v Knott Investments Pty Ltd & Ors* [2012] QSC 232 at [173]–[174]; *Cashmere Bay Pty Ltd v Hastings Deering (Australia) Ltd (No. 2)* [2011] QSC 134 at [23]–[24].

[66] *Hexiva Pty Limited & Ors v Lederer & Ors* [2007] NSWSC 49 at [16]. In *Interchase Corporation Ltd* at [65], MacPherson JA considered it appropriate to consider the rates and practice in New South Wales.

[67] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [51].

[68] *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [52]–[53].

[83] The substance of the primary judge's reasons may be summarised as follows. BGC's evidence of "commercial rates of interest awarded on investments"[69] was uncontested. BMA led no evidence as to commercial rates of interest or rates relevant to its having been denied the use of the money. There was no reason to suppose that the money in question would not have been held by BMA in a bank deposit if it had not been paid to BGC. Consequently, the rate of four per cent per annum put forward by BGC on the basis of the evidence adduced by it as the commercial rate applicable to investments was appropriate.

[84] BGC contended that the submission in relation to the practice in New South Wales in relation to awards of interest was not accurate.[70]

Consideration

[85] BMA did not contend that there was any requirement under statute or the *Uniform Civil Procedure Rules* 1999 (Qld) for the primary judge to apply the interest rate applicable to default judgments. Section 58(3) of the *Civil Proceedings Act* 2011 (Qld) provides for the payment of pre-judgment interest "at the rate the court considers appropriate". It was not contended that the primary judge was not entitled to award interest nor was it submitted that the primary judge was bereft of a discretion in that regard.

[86] The object of the award of interest was to compensate BMA for the loss of the use of the subject monies. The approach adopted by the primary judge, having regard to the limited evidence before him, was apt to serve that end. No error of principle was made out. As the orders made on 22 March 2013 should be set aside, it is appropriate that interest at the rate of 8.75 per cent per annum be awarded from 3 October 2012, the date on which the original declaration in favour of BMA was made. That is the rate of interest prescribed by Practice Direction No 7 of 2013, pursuant to s 59(3) of the *Civil Proceedings Act* 2011 (Qld), in respect of money orders.

Conclusion

[87] BGC submitted that, in the event that BMA's appeal succeeded, the matter should be remitted to the primary judge for a determination of whether the adjudication application should be remitted to the adjudicator. Such an order would not be desirable in my view. It would cause these proceedings to be further prolonged. In his reasons of 22 March 2013, the primary judge explained that he had resiled from his original intention to order that the matter be remitted to the adjudicator. That was because of doubts raised by BMA as to whether such a course was open and, if it was open, whether remittal was appropriate in the circumstances. This Court heard no argument on whether remittal to the adjudicator was legally possible. Also, it may be doubted, having regard to the above discussion on the latent conditions question, that remittal to the adjudicator would be desirable.

[88] For the above reasons, I would order to the effect that:

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69 *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors (No 2)* [2013] QSC 67 at [50].

70 Practice Note SC Gen 16 provides that pre-judgment interest can be expected to be included in a judgment at a rate which is referred to a cash rate last published by the Reserve Bank prior to commencement of the pre-judgment period. Federal Court practice note CM 16 is to like effect.

1. The appeal be allowed.

2. The orders made on 22 March 2013 be set aside.

3. The first respondent pay to the appellant the sum of $26,135,709.37.

4. The first respondent pay to the appellant interest on such sum at the rate of four per cent per annum from 16 May 2012 until 3 October 2013 and from that date until today's date at the rate of 8.75 per cent per annum.

5. The first respondent pay to the appellant the sum of $2,613,570.94 being the sum paid by the appellant to the respondent in respect of GST.

6. The first respondent pay to the appellant interest on the sum of $2,613,570.94 from 16 May 2012 at the rate of four per cent per annum and from 13 November 2012 until today's date at the rate of 8.75 per cent per annum.

7. The first respondent pay the appellant's costs of the proceedings including the costs of this appeal.

[89] On the hearing of the appeal, the precise terms of the order sought by BMA in the event that it succeeded on the appeal were not identified. In particular, if there was evidence of dates of payment and partial repayment of monies, it was not identified. This Court should not have to scour the appeal record in an attempt to find facts necessary for the formulation of an order. The appellant should be directed to consult with the respondent and bring in draft minutes of order reflecting these reasons within 28 days of today's date. The rather leisurely period allowed takes the Christmas and New Year period into account.

[90] **A LYONS J:** I agree with his Honour's reasons and the orders proposed.