SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Ors* [2012] QSC 373
PARTIES:	**THIESS PTY LTD ABN 87 010 221 486** (applicant) **v** **WARREN BROTHERS EARTHMOVING PTY LTD ABN 45 107 002 93** (first respondent) **RICS AUSTRALASIA PTY LTD ACN 089 873 067** (second respondent) **JONATHON SIVE** (third respondent)
FILE NO/S:	BS No. 1975 of 2012
PARTIES:	**WARREN BROTHERS EARTHMOVING PTY LTD ABN 45 107 002 93** (applicant) v **THIESS PTY LTD ABN 87 010 221 486** (first respondent) **RICS AUSTRALASIA PTY LTD ACN 089 873 067** (second respondent) **JONATHON SIVE** (third respondent)
FILE NO/S:	BS No. 4471 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2012; Further information on 22 October 2012, 5 November 2012.
JUDGE:	Ann Lyons J
ORDER:	**I will hear from counsel as to the terms of the order and as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS –

ADJUDICATION OF PAYMENT CLAIMS – GENERALLY – Where parties entered into contracts for building and constructions works – Where Warren Brothers Earthmoving made payment claims which were disputed by Thiess and Warren Brothers then amended the amount it had originally claimed – Where Adjudicator appointed pursuant to *Building and Construction Industry Payments Act* 2004 (Qld) to decide the amount of the progress payments under the progress claim and parties agree that the amount awarded by the Adjudicator is incorrect – Where Adjudicator states that he was fully aware of the parties' submissions but admits he forgot to take them into account during his deliberations and making his decision – Whether there has been a jurisdictional error – Whether Adjudicator's Decision should be declared void and set aside because Adjudicator failed to consider the submissions at the point of decision making on the basis that it was a jurisdictional error

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – GENERALLY – Where parties entered into contracts for building and constructions works and Thiess terminated the contract – Where Warren Brothers Earthmoving made payment claim after termination of the contract – Whether the *Building and Construction Industry Payments Act* 2004 (Qld) regime contemplates reference dates arising and continuing to rise after the termination of the contract

Building and Construction Industry Payments Act 2004 (Qld), s 10, s 11, s 12, s 17, s 21, s 26, s 28, Sch 2
Supreme Court Rules 1999 (Qld), r 388

BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors [2012] QSC 346
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421
James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors [2011] QSC 145
John Holland Pty Limited v Roads and Traffic Authority of New South Wales & Ors [2007] NSWCA 19
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302; [2009] QSC 205
Laing O'Rourke Australia Construction v H& M Engineering and Construction Pty Ltd [2010] NSWSC 818
Northbuild Construction P/L v Central Interior Linings P/L & Ors [2011] QCA 22
QCLNG Pipeline Pty Ltd v McConnell Dowell Constructions (Aust) Pty Ltd and Consolidated Contracting Company

Australia Pty Ltd & Anor [2011] QSC 292
Queensland Pork P/L v Lott [2003] QCA 271
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor [2011] QSC 345
Uniting Church in Australia Property Trust (Qld) v Davenport & Anor [2009] QSC 134
Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors [2011] QSC 67

COUNSEL: T P Sullivan SC for the applicant/respondent
S Couper QC for the first respondent/applicant

SOLICITORS: Thomsons Lawyers for the applicant/respondent
Mooloolaba Law for the respondent/applicant

ANN LYONS J:

This application

[1] Thiess Pty Ltd ("Thiess") and Warren Brothers Earthmoving Pty Ltd ("Warren Brothers") have entered into a number of separate contracts since 2009 in relation to the Vermont Coal Project and the Burton Coal Project. On 10 June 2010 they entered into the Bullock Creek Dams and Drains/Plumtree South Clear Grub, Topsoil Stripping and Dams and Drains Subcontract. On 4 January 2011 Thiess sent Warren Brothers a document terminating the contract. Warren Brothers lodged a payment claim in relation to certain works under that contract on 31 December 2011.

[2] Pursuant to an application filed in proceeding BS No. 1975 of 2012 on 21 May 2012, Thiess seeks to have declared void, or alternatively set aside, an Adjudication Decision by the second respondent, Rics Australasia Pty Ltd ("Rics") under the *Building and Construction Industry Payments Act* 2004 (Qld) ("BCIPA"). That decision was made by the third respondent Jonathan Sive ("the Adjudicator") on 20 February 2012. He awarded an amount of $480,035 in favour of Warren Brothers.

[3] Pursuant to their application in BS No. 4471 of 2012 also filed on 21 May 2012 Warren Brothers seeks a declaration that the Adjudicator be permitted to correct the error in his Adjudication decision of 20 February 2012 by issuing a fresh Adjudication Decision in an amount of $439,416.08 which is $40,619.06 less than the original decision and that he be ordered to issue a fresh Adjudication Decision in that amount.

Background

[4] Warren Brothers has made a number of previous claims for progress payments under the BCIPA regime in relation its contracts with Thiess with respect to these coal projects which were disputed by Thiess. Those matters were referred to adjudication and on 17 March 2011 the Adjudicator made three adjudication decisions in Warren Brothers' favour.

[5] On 24 March 2011, in BS No. 2486 of 2011, Thiess brought an application in the Trial Division seeking declarations that the three adjudication decisions were void and injunctions restraining Warren Brothers from seeking adjudication certificates. The basis of the application was that the adjudicator had no jurisdiction because the contracts were not construction contracts under the Act.

[6] On 2 December 2011 in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor*,[1] Fryberg J held that the contracts were construction contracts under the BCIPA and dismissed the application by Thiess. A Notice of Appeal was lodged by Thiess on 22 December 2011. The appeal was heard on 24 May 2012 and the Court of Appeal decision was reserved at the time the current applications in relation to this payment claim were heard on 25 May 2012.

[7] Counsel agreed that the decision under appeal was binding on Thiess and Warren Brothers on certain issues of fact and issues of law, unless overturned on appeal. Counsel accordingly submitted that a decision in the applications before me should not be determined until after the Court of Appeal decision was handed down due to the fact that cross-examination in relation to those factual matters might be required after the determination of the appeal.

[8] On 12 October 2012 the Court of Appeal dismissed the appeal by Thiess and held that the subcontracts were all contracts under which Warren Brothers undertook to carry out construction work within the meaning of s 10 of the BCIPA so that each was a construction contract as defined in Schedule 2 to the BCIPA.

[9] On 22 October 2012 the legal representatives for Warren Brothers advised that I should proceed to determination of these applications and that a further hearing was not required. That approached was endorsed by the legal representatives for Thiess on 5 November 2012.

[10] I shall therefore proceed to determine these applications without hearing further evidence or argument.

The BCIPA Chronology for this Payment Claim

[11] Warren Brothers lodged a further Payment Claim in relation to the coal project on 31 December 2011 pursuant to s 17 of the BCIPA. The total amount claimed was $511,219.92 inclusive of GST made up of the following items:

(i) Item 1 - $51,964 plus $39,883.71;

(ii) Item 2 - $25,545.61 plus $2,554.56 plus $16,830.00;

(iii) Item 3 - $309,067.50 plus $18,900.

In particular, Item 1 claimed 3478 "Scraper loads 0 to 500m" and 2447 "Scraper loads 501 to 1000m".[2] It was clear that a different rate applied depending on the distance involved.

---

1 [2011] QSC 345.

2 Exhibit BPH(3)-1 to the Affidavit of B P Harg sworn 2 May 2012.

[12] Thiess delivered a Payment Schedule on 17 January 2012 disputing the claim on a number of grounds. In relation to Warren Brothers' calculation for Item 1 Thiess disputed in particular the allocation of load counts and stated that the "total load counts for 0-500 metres should be 4174 instead of 3,478 and the total load counts for 501-1000 metres should be 1,751 instead of 2,447."[3] Thiess accepted that an amount of $ Nil was owing.

[13] In an undated document titled "WBE's Response to Payment Schedule dated 17 January 2011 (sic)", signed by M Halstead, Warren Brothers amended the amount it had originally claimed. Maree Halstead, who had prepared the calculations for Warren Brothers, stated in that document that she had "mis-described 696 of the loads as being of between 501-1000 m distance rather than between 0 m and 500 m distance". She then resubmitted her calculations and reduced the amount claimed for Item 1 by more than $60,000 from $101,032.51 to an amount of $40,619.06 inclusive of GST (or $36,926.42 before GST).

[14] On 30 January 2012 Warren Brothers made an Adjudication Application[4] in relation to the Payment Claim pursuant to s 21 of the BCIPA claiming $511,219.90 inclusive of GST but noted behind Tab 12 the recalculation by Halstead.

[15] On 6 February 2012 Thiess delivered an Adjudication Response.

[16] On 20 February 2012, the Adjudicator determined that Warren Brothers was entitled to a progress payment in the amount of $480,035.14 inclusive of GST. That Adjudication Decision was notified to the parties on that date.

[17] It is accepted by both Thiess and Warren Brothers that, given the reduction in the amount claimed by Warren Brothers to a total figure of less than $452,000, the amount of $480,035.14 determined by the Adjudicator as the progress payment must be incorrect.

[18] The Originating Application was served on 2 March 2012.

[19] The affidavit of the Adjudicator Jonathan Sive sworn 23 May 2012 exhibits a letter from him to the Court and the parties dated 16 May 2012. In that letter he stated he was the Adjudicator who had made the decisions and advised that Thiess had written to the Adjudication Registrar on 2 March 2012 alleging that in coming to his decision he had disregarded the submissions of the parties as follows. The Adjudicator indicated that the Thiess letter was in the following terms:

> "It is clear that the adjudicator did not review all of the submissions of both parties when reaching his decision. In this regard, a clear example is the fact that, in its adjudication application, the Claimant reduced the quantum for one element of its payment claim from $101,032.48 (plus GST) to $36,926.42 (plus GST). Thiess drew this [to] the adjudicator's attention in its adjudication response and submitted that in the

---

3 Exhibit BPH-4 to the Affidavit of B P Harg sworn 4 March 2012 at para 21.

4 Exhibit BPH-5 to the Affidavit of B P Harg sworn 4 March 2012.

> circumstances the only correct option, should be (sic) have been inclined to make an award in respect of this head of claim, would be to award the amount of $36,926.42 (plus GST). Despite the concession by the Claimant and our raising it to the adjudicator's attention, the adjudicator still awarded $101,032.48 (plus GST) without reference to the claimant's concession or our submission on point. In this regard, the adjudicator awarded the claimant almost three times more than it conceded it was entitled to."

The Adjudicator's letter continued:

> "The Respondent's concern and interpretation of my conduct in this regard is reasonable and justified given the manner in which the decided amount relating to that component of the claim was presented to the parties, and I believe an acknowledgement and affirmation of its mistake identified by the Respondent is appropriate in the circumstance. Although I was fully aware of the submissions made by the parties as it relates to the concession made by the claimant and acknowledged by the respondent, I failed to remind myself of the concession during my deliberations and final drafting of the decision, and I accept full responsibility for my mistake and any resulting consequence or action to be taken in this regard by the Court or by the Registrar. Simply put, "I forgot".
>
> Section 28 of the *Building and Construction Industry Payments Act 2004 (Qld)*, however, excuses mistakes and material miscalculations of figures and permits the adjudicator, on his own initiative or on the application of the claimant or the respondent, to correct the derision. The mistake identified by the Respondent is, in my opinion, captured by the operation of section 28. However, neither the Claimant nor the Respondent brought the mistake to my attention under this provision of the Act, and I did not become aware of the mistake until after the application for declaratory relief was made by the Respondent and after I had submitted to the Jurisdiction of the Court.
>
> Given that the matter is now before this Court, a correction on my own initiative under section 28 of the *Building and Construction Industry Payments Act* 2004 (Qld) is, in my opinion, inappropriate without further direction from the Court."

[20] It is clear therefore that pursuant to its application Thiess wants the Adjudicator's decision set aside completely or declared void on the basis of jurisdictional error. Pursuant to its application, however, Warren Brothers essentially wants the mistake in the adjudicator's decision to be corrected because it submits it was a simple mistake which is able to be corrected pursuant to s 28 of the BCIPA.

The BCIPA Scheme

[21] Justice White summarised the general nature of the scheme established by the BCIPA in the decision of *Northbuild Construction Pty Ltd v Central Interior Living Pty Ltd* ("*Northbuild*"):[5]

> "[52] Although the *Payments Act* has operated for some years now and been the subject of frequent litigation, the nature of the issues raised on this appeal suggests that an overview of its relevant provisions should be summarised. The purpose of the *Payments Act* is to ensure that a person undertaking to carry out construction work or provide goods and services under a construction contract will be able to recover progress payments whether or not the construction contract makes provision for payments of that kind…
>
> [53] To that end the *Payments Act* established a statutory based system of rapid adjudication for the interim resolution of 'payment on account' disputes involving building and construction work contracts. There can be no contracting out of *Payments Act* entitlements. The adjudication is conducted by an independent adjudicator with relevant expertise. If the decision of the adjudicator in whole or in part favours the applicant for a progress payment, the respondent to that claim is required to pay the specified amount directed by the adjudicator to the claimant. Decisions by the adjudicator are enforceable in any court of competent jurisdiction on the filing of an adjudication certificate which will operate as a judgment debt. This rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal relevantly endowed with jurisdiction to hear such a dispute. But, importantly, in order to effect its purpose of a quick resolution of disputes and to maintain cash flow, the *Payments Act* provides for only limited recourse to the courts in respect of the adjudication."

[22] The decision in *Northbuild* also confirmed that an adjudication decision under the BCIPA can be successfully attacked for jurisdictional error:[6]

> "[78] In these proceedings Northbuild sought and continues to seek declaratory and injunctive relief. Although the legislature clearly seeks a 'fast track' investigation into an entitlement, on an interim basis, to a progress payment, there is nothing in the language of the

---

5 *Northbuild Construction P/L v Central Interior Linings P/L & Ors* [2011] QCA 22 at [52]-[53] (footnotes omitted).

6 Ibid at [78] (footnotes omitted).

> *Payments Act* in the nature of a privative clause attempting to exclude the supervisory role of the Supreme Court and s 31(4)(a) does not do so. It is a reference only to proceedings to have a judgment based on an adjudication certificate set aside and that must be in respect of an adjudication reached in conformity with the *Payments Act*. After *Kirk v Industrial Court (NSW)*, the exclusion of Pt 3 Div 2 from the *Judicial Review Act* is limited to review of decisions not infected by jurisdictional error. Even before *Kirk* (and *Craig*) *longstanding authority demonstrates that a prohibition against challenging an administrative decision would be interpreted to mean a decision not infected by jurisdictional error*." (my emphasis)

What constitutes jurisdictional error?

[23] Jurisdictional error has been considered in a number of authorities and is clearly constituted by errors such as a misapprehension or disregard by an adjudicator of the nature or limits of his or her functions and powers. Jurisdictional error has also been found when an adjudicator makes a decision of a kind that lies wholly or partly outside the limits of his or her functions and powers under the relevant Act or misconstrues the Act.

[24] Jurisdictional error also occurs when a decision maker asks himself a wrong question, ignores relevant material, relies on irrelevant material, or in some circumstances, makes an erroneous finding or reaches a mistaken conclusion. In *John Holland Pty Ltd v TAC Pacific Pty Ltd*,[7] Applegarth J stated:

> "[18] The Courts have recognised that an adjudication decision is void if:
>
> 1. it fails to comply with the basic requirements of the Act; or
>
> 2. it is not a bona fide attempt by the adjudicator to exercise the relevant power; or
>
> 3. there has been a substantial denial of natural justice to a party;
>
> and only a declaration regarding its invalidity (and perhaps injunctive relief, if necessary) is needed to give it its quietus."

[25] Justice Applegarth held that an adjudication decision under the BCIPA was void if there had been a substantial denial of natural justice to a party. His Honour held that if an adjudicator was going to decide a matter on a basis other than that contended for by the parties, then natural justice required that

---

7 [2010] 1 Qd R 302; [2009] QSC 205.

the parties be given notice of that fact. Counsel for Thiess argues that the notion of a 'substantial' denial of natural justice means that an adjudicator did not provide an opportunity for a party to be heard in relation to an issue which was actually relevant to the decision being made. A matter will be sufficiently material if they might have persuaded the adjudicator to change his or her mind.

[26] In *Northbuild*, White JA also gave a number of examples of jurisdictional errors in BCIPA adjudications. Those examples were summarised by Atkinson J in *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors* ("*James Trowse*"),[8] as follows:

> "(1) where the adjudicator departed from the only matters the adjudicator might consider in reaching a decision, being the provisions of BCIPA, the terms of the construction contract, the payment claim and response and all submissions properly made;
>
> (2) where the adjudicator, in departing from that list, considered, for example, what the adjudicator regarded as 'a fair thing';
>
> (3) where the adjudicator truly disregarded a claimant's submissions."

[27] There is no doubt that an adjudication decision can be challenged where the essential legislative requirements have not been met. Section 17 of the BCIPA sets out the relevant requirements for a payment claim as follows:

> "**17 Payment claims**
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).
>
> (2) A payment claim—
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
> (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
> (c) must state that it is made under this Act.
>
> (3) The claimed amount may include any amount—
> (a) that the respondent is liable to pay the claimant under section 33(3); or

[8] [2011] QSC 145 at [17].

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within the later of—
(a) the period worked out under the construction contract; or
(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

[28] It is clear therefore that there must be a valid payment claim for there to be a valid adjudication. The adjudicator must also then make a genuine attempt to exercise his power in accordance with the BCIPA. An adjudicator is required to come to a determination based on the factors set out in s 26(2) of the BCIPA and is required to "turn their minds to, grapple with and form a view on all matters that they are required to 'consider'."[9]

[29] The role of the adjudicator is set out on s 26 as follows:

"**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;

---

9 *Laing O'Rourke Australia Construction v H& M Engineering and Construction Pty Ltd* [2010] NSWSC 818 at 34 per McDougall J.

(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.

[30] Accordingly, s 26(1) of the BCIPA requires an adjudicator to decide the amount of the progress payment, the date it becomes payable and the interest payable. Section 26(2) of the BCIPA then requires an Adjudicator in making that determination, to "consider" the matters as set out in (a) to (e) only.

The submissions before the Adjudicator.

[31] Counsel for Thiess argues that in the present case the Adjudicator's decision should be declared void and set aside for jurisdictional error as he has failed to genuinely attempt to exercise his power in accordance with the BCIPA. Counsel argues that the Adjudicator has failed to 'consider' the Payment Schedule, the Adjudication Application and the Adjudication Response in deciding the Adjudication Application. In particular, it is argued that the Adjudicator failed to take into account the express concessions made by Warren Brothers and their recalculation of the Payment Claim from $101,082.51 down to $40,619.06.

[32] Thiess argues that in this case the Adjudicator has not in fact turned his mind to the various parts of the claim and made a determination as to what he considers is actually payable.

[33] There is no doubt that in the Payment Schedule, in relation to Item 1, Thiess disputed the full amount including the methodology for calculation which had been set out in the Warren Brothers' submission which formed part of the Adjudication Application. Warren Brothers' submission was in the following terms:

"**Invoice 2627 Item 1**

85 The claimant claims $51,964.00 plus $39,883.71 inclusive of GST for this part of Invoice 2627. The

> claim relates to work completed prior to termination but which the respondent did not purport to measure until April 2011. The claimant says that the respondent has refused to allow it to be present at the time of taking the measurements and the respondent believes the measurement is inaccurate."[10]

[34] It would seem therefore that on the face of it Item 1 was in fact a claim for $91,847.71 (inclusive of GST) and not the $101,082.51 claimed in the Payment Claim.

[35] In the Adjudication Response served by Thiess on 6 February 2012[11] it is patently clear that that error was drawn to the attention of the Adjudicator. In addition, the recalculation of the loads by Ms Halstead and the subsequent reduction in the amount claimed outlined above was also expressly referred to. In its Adjudication Response, Thiess clearly pointed out to the Adjudicator that Warren Brothers had reduced its claim for Item 1 and accordingly at the very least the total amount which could be awarded was $36,926.42 plus GST. Thiess noted the lack of clarity about the claimed amount in Item 1 as follows:[12]

> "80 WBE does not clearly state that the claimed amount for Item "1 is $36,926.42 plus GST in the body of the Adjudication Application, and Thiess refers the Adjudicator to the following discrepancies:
>
> 80.1 Paragraph 85 of the Adjudication Application states that the claimant claims $51,964.00 plus $39,883.71 inclusive of GST (which should be exclusive of GST), and refers to '*Tab 8 at paragraphs 61 onwards*'. There is no reference to Tab 12 (WBE's Tab 12 Submissions) in paragraph 85 of the Adjudication Application, or the reduction of the claimed amount for Item 1 down to $36,926.42 plus GST.
>
> 80.2 Tab 8 does not address any of the submissions made by Thiess in its Payment Schedule in relation to Item 1. Tab 8 contains an extensive chronology of events relating to the performance of the Subcontract, a description of the works carried out by WBE, and how WBE has invoiced Thiess for the work it carried out pursuant to the Subcontract.
>
> 80.3 The submissions made in WBE's Tab 12 Submissions are the only submissions that

---

10 Above n 4 at p 19.

11 Exhibit BPH-6 to the Affidavit of B P Harg sworn 4 March 2012.

12 Ibid at p 18-19.

address Thiess' submissions in its Payment Schedule.

80.4 At paragraph 12 of WBE's Tab 12 Submissions, it states, *'Upon further research it occurs to me that I should have applied different calculations to the figures supplied in (doc 1) as attached'.*.

80.4.1 The Adjudicator is referred to the fourth page of Tab 12, which is doc 1 as described in paragraph 12 of WBE's Tab 12 Submissions.

80.4.2 It is clear that 'doc 1' provides the calculations by which WBE assessed its claim for Item 1 in its Payment Claim, using the methodology set out in Tab 8 of the Adjudication Application (albeit with a slight adjustment for the errors identified in paragraph 5 of WBE's Tab 12 Submissions).

80.5 Accordingly, it is clear that WBE is not relying on the documents in Tab 8 to support its claim for Item 1 in its Adjudication Application, but rather, after considering Thiess' submissions in its Payment Schedule, it has reassessed its claim for Item 1 at a total sum of $36,926.42 plus GST.

80.6 Paragraph 17 of WBE's Tab 12 Submissions confirms that WBE has revised its claim for Item 1 to $36,926.42 plus GST.

81 The significant reduction in WBE's claim for Item 1 is indicative of the weakness of the calculation upon which WBE's claim is founded.

82 While Thiess denies that WBE is entitled to any moneys it has claimed for Item 1 (for the reasons set out in the Payment Schedule and below), Thiess submits that the Adjudicator cannot award any more than $36,926.42 plus GST for Item 1."

Has there been a genuine attempt by the Adjudicator to exercise his power in accordance with the BCIPA?

[36] Against that factual background it is necessary to consider the decision made by the Adjudicator to award $480,035.14 including GST to Warren Brothers and the process he engaged in to come to that decision. An analysis of the Adjudicator's decision indicates that at the outset he turned his mind to jurisdictional matters and to the question whether the adjudication application fell within the jurisdiction of the BCIPA and was a construction contract covered by the definitions in sections 10 and 11 of the BCIPA.

[37] The Adjudicator then examined the requirements of s 17 and noted the various dates for the making of the Payment Claim, the Payment Schedule, the Adjudication Application and the Adjudication Response. He then turned to the terms of the Contract dated 10 June 2010 and the services to be performed. The Adjudicator duly noted that he was required to have regard only to the matters identified in s 26 and then turned to a consideration of the terms of the contract. He was satisfied that Thiess had not become entitled under the contract to set off money from Warren Brothers and that the contract provided a mechanism that extended the reference date and the due date for payment.

[38] The Adjudicator ultimately concluded at paragraph 82 that he was satisfied that the contract between the parties was a construction contract within the jurisdiction of the BCIPA and that Warren Brothers "is a person who carried out construction work or related goods and services under the construction and has satisfied the requirements of entitlement for a progress payment under the construction contract as set out in section 12 of the Act".[13]

[39] The Adjudicator then turned at paragraph 83 to the issues in dispute. In this regard, s 26(2)(c) and (d) of the BCIPA requires the adjudicator to consider both the payment claim and the payment schedule to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant and the respondent in support of the claim and the schedule.

[40] I have considered the Adjudication Decision where Item 1 is dealt with at paragraphs 88 to 103 and 127 to 130. There is clearly no reference to any of the submissions made by Thiess in its Adjudication Response of 6 February 2012 or indeed to any of the concessions made by Warren Brothers as to the reduced claim for that item in its "Response to Payment Schedule" document.

[41] Furthermore, an analysis of those paragraphs indicates that the Adjudicator endorsed at paragraph 89 the initial calculations put forward by Warren Brothers which were subsequently abandoned as factually incorrect because they were based on an incorrect number of loads in each category of load. As a different rate applied in each category the basis of the calculation within each category altered materially.

[42] At paragraph 95 the Adjudicator outlined 11 paragraphs of Ms Halstead's statement upon which he had placed particular reliance. He then stated at paragraph 96 that there were gaps in Thiess' material and after reviewing the statutory declaration of Andre Giguere, a technical services manager for

---

13 Exhibit BPH-2 to the Affidavit of B P Harg sworn 4 March 2012.

Thiess, considered that Thiess' material was "generally unreliable and non-responsive to the real issues in dispute".

[43] At paragraph 102 the Adjudicator stated "[m]oreover, the respondent's material does not provide a picture of constancy and reliability but portrays one consisting of a procedure prone to human error factors." At paragraph 103 he concluded "[i]t is for this reason I conclude that the respondent's material generally is unreliable and non-responsive to the real issues in dispute. My confidence in the respondent's material therefore becomes doubtful and suspicious."

[44] The Adjudicator then set out his decision as follow:

> "**Valuing the Claimant's Claim**
>
> 127. After giving careful consideration to the material before me in the claimant's adjudication application, I am satisfied that the value of the claimant's payment claim is consistent with and has been calculated in accordance with understandings reached between the parties as set out in the written contract.
>
> 128. The claimant has tendered documents and other material to show how it has arrived at the claimed amount and how it is entitled to the progress claim the subject of this payment dispute. As previously noted in this decision, I have confidence in the claimant's material.
>
> 129. Although the respondent has reviewed the payment claim and has disputed the payment claim in its entirety and has unreasonably raised, for example, the issue of jurisdiction when a reasonable interpretation of the contract contradicts the respondent's suggestion, I have no confidence in the respondents' material and have given numerous examples of my concern in this regard. As a payment dispute exists, I have been appointed to decide the value of the claimant's performances in view of the reasons given by the respondent in its payment schedule as expanded upon in the Adjudication Response. It is for this reason and for the reasons stated in the preceding paragraphs (reliability issues) that I have arrived at the adjudicated amount identified below in the following table.

		Claimed $	**Scheduled $**	**Adjudicated $**
Item 1	Pick ups	$101,032.48	$0.00	$101,032.48
Item 2	Variation	$49,423.17	$0.00	$47,066.66
Item 2	Standby & Demobilisation	$360,764.25	$0.00	$331,936.00
		$511,219.90	$0.00	$480,036.14

> 130. I am satisfied that, after careful consideration being given to the material before me, the amount of the progress payment (section 13 of the Act) and the value of the value of the construction work and related goods and services (section 14 of the Act) have been calculated in accordance with the Subcontract.
>
> 131. I therefore decide the value of the payment claim to be: $480,035.14 (including GST),

[45] Clearly then, on the face of the decision, the Adjudicator in fact allowed the total amount claimed by Warren Brothers as Item 1 but did not explain how one could add $51,964 to $39,883.71 (which Warren claimed to be inclusive of GST in the Payment Claim) and get a total of $101,032.48 inclusive of GST.

[46] Neither has the Adjudicator explained why he accepted the total load figures as initially submitted by Warren but before Warren conceded that the total load figures as argued by Thiess in it Response were in fact accurate and its calculations were incorrect.

[47] I note that in relation to Item 2 the Adjudicator does refer to "WBE's Response to Payment Schedule dated 17th January 2012 (sic)" and acknowledges the concession made by Halstead in relation to Item 2 and the reduction of the amount claimed by $1,947.54. In relation to Item 2 therefore the Adjudicator did 'consider' all the relevant submissions. He actively examined them and weighed them up when coming to a conclusion as to the amount to allow. He reduced the amount claimed and explained why.

[48] By comparison with Item 2, it seems to me that in relation to Item 1 no such active examination and weighing up took place at the point of decision making. Counsel for Warren Brothers submits that the Adjudicator did take those submissions into account but when he came to make a decision he simply 'forgot' them. In his letter to the Court the Adjudicator explains that he was "fully aware" of the submissions in this regard but that he failed to "remind" himself "during my deliberations and final drafting of the decision."

[49] Accordingly it is clear from an objective examination of the decision itself that the Adjudicator did not take the information in Halstead's statement in relation to Item 1 or the submissions in Thiess' Adjudication Response into account when he came to the point of "deciding the adjudication application". When one looks at the paragraphs of the Adjudicator's decision as set out above the reasoning process which he adopted is simply inconsistent with a process which involved an actual active analysis of Thiess' Adjudication Response or Warren Brothers' reduced calculations *at the time he made his decision.*

[50] Not only does an examination of the decision indicate that material was not taken into account at the time of the decision, the Court also has the Adjudicator's admission that he did not take the material into account when coming to his final decision. I accept the Adjudicator's explanation that at some point he read the submissions and subsequently forgot them.

[51] In my view, the Adjudicator did not 'consider' that material. I do not consider that reading a submission at some point is the same as 'considering' a submission at the point of decision making. The Adjudicator could not therefore at the relevant time have *considered* those submissions by Thiess or Warren Brothers' recalculation as he was required to do. Put simply, for the purpose of the adjudication decision the Adjudicator did not take them into account. The requirements of s 26(2) are very specific and require that "*In deciding an adjudication application, the adjudicator is to consider*", which means that the material has to be taken into account at the time the decision is actually made.

Is this failure by the Adjudicator a jurisdictional error?

[52] The question which needs to be determined is whether this clear failure by the Adjudicator to consider the submission and the recalculation is such that it constitutes jurisdictional error such that the decision can be declared void. Clearly a mistake of fact does not amount to jurisdictional error and many errors are not jurisdictional errors. Is this simply an accidental error or omission by the Adjudicator such that it is insufficient to constitute jurisdictional error?

[53] It is clear that in the present case there is no allegation of bad faith by the Adjudicator but simply a failure by him to take material into account when he made the decision he was required to make under the legislation. In terms of that decision making process, in *Northbuild* White JA discussed the requirement of "acting in good faith" as an implied condition for the validity of discretionary decisions. Her Honour referred to the two schools of thought which had emerged from recent cases and the dichotomy between "good faith" and "bad faith" but ultimately held that the enquiry should be whether the adjudicator has performed the function required to be performed under the act as follows:

> "[96] The discussion in *Minister for Immigration and Citizenship v SZMDS* concerning the relationship between jurisdictional error in respect of reasoning which is "clearly unjust", "arbitrary", "capricious" and "*Wednesbury* unreasonable" demonstrates that attaching these descriptors to the good faith debate possibly adds little more than did the original understanding of good faith in the review of statutory decision making that the power must be exercised honestly for the purpose for which it was given. As the New South Wales Court of Appeal did in *Holmwood*, *the enquiry should focus more on whether the adjudicator has performed the function demanded by the Payments Act* and less on pursuing elusive synonyms, keeping always in mind that the legislative intent dictates a person with recognised expertise in the area be selected for the task by an informed body and this, necessarily, facilitates the rapid decision making required." (my emphasis)

[54] Accordingly, given the requirement to focus on the provisions of the Act, I will adopt the approach taken by Atkinson J in *James Trowse*[14] after an analysis of White JA's decision in *Northbuild* and "consider whether there has been a jurisdictional error because of a failure to perform the function required of the adjudicator by BCIPA which includes relevantly for these proceedings, the duty to consider only the matters set out in s 26(2) of BCIPA and to accord natural justice in doing so."

[55] In this regard the oft-quoted judgments of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* ("*Brodyn*")[15] and *John Holland Pty Limited v Roads and Traffic Authority of New South Wales & Ors* ("*John Holland*")[16] are of particular relevance. In *Brodyn* his Honour held that what is required of an adjudicator is that he or she make a genuine attempt to understand and apply the relevant contract and to exercise the power in accordance with the Act. In *John Holland*, his Honour stated that the relevant requirement for the New South Wales equivalent to s 26 was:[17]

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

[56] The specific classes of considerations that the Adjudicator must address are set out in s 26(2). As I have already indicated, in my view the Adjudicator did not 'consider' the complete submissions of either Thiess or Warren Brothers in relation to Item 1. I accept that the Adjudicator may well have 'read' those submissions and that recalculation at some point in time but when it came to the actual point of decision making he did not 'consider' them because he did not actively take them into his reasoning process and weight them up along with the other evidence he was considering at that point in time.

[57] Is this failure sufficient to constitute jurisdictional error? Is this simply an insubstantial or inconsequential error by the Adjudicator or is it such that it amounts to a failure to actually perform his function as required by the Act? A recent analysis of the relevant law was undertaken by Peter Lyons J in

---

14 Above n 9 at [28].
15 (2004) 61 NSWLR 421.
16 [2007] NSWCA 19.
17 Ibid at 55.

QCLNG Pipeline Pty Ltd v McConnell Dowell Constructions (Aust) Pty Ltd and Consolidated Contracting Company Australia Pty Ltd & Anor:[18]

> "[116] At the hearing in the present case, reference was also made to *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* (*Trysams*). There, Hammerschlag J summarised principles to be derived from authorities dealing with provisions equivalent to those in the *BCIP Act*. One related to the requirement to consider the matters identified in the New South Wales equivalent of s 26(2). His Honour summarised this principle as follows:
>
> > 'If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been made, an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission is not sufficient to invalidate the determination. This is either because an accidental or erroneous omission does not amount to a failure to comply with s 22(2) so long as the specified classes of consideration are addressed or because the intention of the legislature cannot have been to invalidate the determination for this kind of mistake.'
>
> [117] These authorities appear to establish that the obligation to consider certain matters is derived from s 26(2). Otherwise, it might have been thought that the obligation to consider matters is derived from a combination of the provisions of the *BCIP Act* relating to the making, and content, of an adjudication application (s 21); the appointment of an adjudicator (s 23); the provision for giving an adjudication response to the adjudicator (s 24(1)); the provision relating to an inspection (s 25(4)(d)); and the requirement to decide an adjudication application (quickly) (s 25(3)). In that context, it might have been thought that s 26(2) limited the matters to be considered in deciding the adjudication application, rather than as providing a source of the obligation to consider matters.
>
> [118] The requirement to consider matters found in s 26(2) extends to the payment claim, the payment schedule, and, in each case, '*all submissions, including relevant documentation, that have been properly made' in support of the payment claim or payment schedule. The*

[18] [2011] QSC 292 (references omitted).

language of the section makes it difficult to conclude that a failure to consider a particular submission is not a breach of the section.

[119] However, a question then arises as to whether a particular breach would invalidate an adjudication decision.

[120] In *Trysams*, after his summary of principles, Hammerschlag J noted that their application involves a consideration of matters of fact and degree which exercise may not be a simple one. His Honour then said:

> '33 It is accordingly necessary to consider the nature, gravity and effect of the errors, if any, made by the adjudicator, and to assess, in the context of the purpose and operation of this particular statute, whether the adjudicator breached a basic and essential requirement of the *Act by not considering submissions duly made or by failing to make a bona fide attempt to exercise his powers under the Act, or whether the plaintiff was denied natural justice to a degree sufficient to void the adjudication*.
>
> 34 The required exercise is to determine whether what occurred worked 'practical injustice' on the plaintiff sufficient to vitiate the adjudication: *Re Minister for Immigration and Multicultural Affairs;*; (sic) *Ex Parte Lam* (2003) 214 CLR 1 at 13-14 per Gleeson CJ.'

[121] In *Brodyn Pty Ltd v Davenport*, Hodgson JA (with whom the other members of the Court agreed) held that for a document purporting to be an adjudicator's determination to have the strong legal effect for which the New South Wales equivalent of the BCIP Act provided, it must satisfy conditions laid down by the Act as essential for such a determination. His Honour then identified some "basic and essential require requirements" (recognising that his list might not be exhaustive); and noted that there were more detailed requirements, including those found in the equivalent of s 26(2). His Honour then said that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a valid adjudication decision, applying *Project Blue Sky Inc v Australian Broadcasting Authority*. *Project Blue Sky* endorsed the approach taken in *Tasker v Fullwood* which explicitly referred to the extent of the failure to observe a statutory requirement as being

> relevant in determining the validity of an act purportedly taken under the statute. In my view, this approach is consistent with the acceptance in oral submissions by Senior Counsel for MCJV that questions of fact and degree are involved.
>
> …
>
> [123] The submissions made in paragraphs 5.24.21-5.24.23 of the adjudication response are plainly of considerable significance. Depending upon the construction of cl 32.3(c), they might amount to a complete defence to what is a very substantial claim. Notwithstanding the limited time specified in the *BCIP Act* for an adjudicator to determine an adjudication application, it seems to me *that the failure to consider submissions which are of such significance constitutes a failure by the second respondent to comply with an essential requirement of the BCIP Act for a valid decision.* On that basis, I consider that the adjudication decision fails to comply with one of the 'basic and essential requirements' of the *BCIP Act*, and for that reason is not a valid adjudication decision." (my emphasis)

[58] Having considered the requirements of s 26(2) it would seem to me that the Adjudicator has not 'considered' at least one of the categories he was required to address. He has failed to take into account the submission of Thiess in its Adjudication Response in relation to Item 1. The failure to take into account Thiess' submission in relation to Item 1 as outlined in the Adjudication Response meant he has actually failed to take into account something he was required to take into account pursuant to s 26(2) of the BCIPA.

[59] As well as considering whether the requirements of s 26(2) have been satisfied, I also need to consider the extent of the failure and the nature, gravity and effect of the error made by the adjudicator. In this regard, counsel for Thiess noted the amount awarded by the Adjudicator in relation to Item 1 was ultimately three times the actual amount claimed and involved a figure in excess of $60,000. Of course by itself a large monetary figure would not be sufficient to constitute a significant failure but it is one of the factors.

[60] What is of significant concern to me, however, is the fact that the Adjudicator based his rejection of Thiess' submission in relation to Item 1 on that basis of his view that Thiess' submission was "generally unreliable and non-responsive to the real issues in dispute" and that Thiess' material "does not provide a picture of constancy and reliability but portrays one consisting of a procedure prone to human error factors." It would seem to me that if he had actually considered the Thiess submission and the Warren Brothers recalculation at the time he actually made his decision he would have seen that it was Warren's claim which was subject to human error and that it was Warren had in fact not responded to some of the issues in dispute. To proceed on a factually flawed basis is in my mind a significant failure. I consider that the consequence of the failure of the Adjudicator to genuinely attempt to exercise his power in accordance with the BCIPA is that the Adjudication Decision is void.

[61] There is no mechanism available to sever any part of a decision that is infected by jurisdictional error from an adjudicated amount. As Atkinson J held In *James Trowse*:[19]

> "[57] The statutory scheme in Queensland provides for an adjudication decision for one amount only. Pursuant to s 26 of BCIPA, an adjudicator is to decide the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount), the date on which any amount became or becomes payable, and the rate of interest payable on any amount.
>
> [58] The adjudicated amount is a statutorily created sum that once determined is final and binding upon the parties. Once determined, an adjudicated amount can be the subject of an Adjudication Certificate and thereafter a judgment registered with the Court and capable of enforcement against the respondent. The adjudicated amount founds the sum claimed in the judgment along with other sums for costs and interest.
>
> [59] Save a slip rule, there is no mechanism available to sever any unlawful finding from an adjudicated amount, in particular a part of the adjudicated amount that is infected by jurisdictional error as found in this case."

[62] That conclusion was recently endorsed by Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors,*[20] where his Honour held:

> "Jurisdictional error which affects one part of a decision will render the whole of it void. I need not consider certain Victorian authorities which, due in part to differences in legislation, have found an adjudication determination to be partly valid. BGC does not contend that there is any scope to declare only part of the decision invalid. Its position reflects the position stated by Atkinson J in *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* that severance is not available under the Queensland Act."

I would also note and endorse his Honour's view that the issue of legislative reform needs to be considered in relation to this aspect of the BCIPA regime.

Warren Brother's Application in BS No. 4471 of 2012

---

19 Above n 9 at [57]-[59].

20 [2012] QSC 346 at [58].

[63] Counsel for Warren Brothers, however, pursuant to its application argues that the final amount adjudicated by the decision can, however, be corrected by a 'slip rule' as essentially foreshadowed by Atkinson J in *James Trowse.*

[64] Section 28 of the BCIPA provides as follows:

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

[65] Counsel for Warren Brothers submits that the evidence of Mr Sive shows that he made an error arising from an accidental omission and that s 28 permits the adjudicator to correct the decision. He argued therefore that s 28 plainly contemplates that adjudicators may make mistakes. Counsel for Warren Brothers conceded that this is not a clerical error or a clerical mistake, pursuant to s 28(1), but submitted that this is a case falling within subsection (1)(b) which is an error arising from an accidental slip or omission. This is on the basis that it is contended that the adjudicator essentially said "I understood the point. I intended to follow it and I forgot".

[66] Counsel for Warren Brothers also submitted that rule 388 of the *Supreme Court Rules* 1999 (Qld) would also allow correction and does not depend on inadvertence. In particular, reliance is placed on the decision of Court of Appeal in *Queensland Pork P/L v Lott* ("*Queensland Pork*"),[21] where a judgment amount was able to be corrected pursuant to rule 388:

> "[13] The learned District Court Judge, having decided to grant the judgment, gave judgment in the respondent's favour on 21 November 2002 in the sum of $59,861.93.
>
> [14] It is not clear where His Honour obtained this figure from but it is clear that it was based upon a mistaken belief that the parties had agreed that in the event of the applicant succeeding, and after taking into account certain monies which were to be offset against the price of the pigs sold and a payment which had not

[21] [2003] QCA 271.

> been allowed for in the schedule to the pleading, the judgment amount should be $59,861.93.
>
> …
>
> [17] The effect then of what His Honour did was to correct the earlier judgment he had given by giving judgment for the figure that he was satisfied the respondent was entitled to on the evidence before him.
>
> [18] The appellant contends that His Honour had no power to alter the original judgment, the matter not falling within any of the powers of the court to correct the judgment whether under the slip rule (Rule 388) or the power conferred by Rule 667(2) or in the court's inherent jurisdiction.
>
> [19] It is said that His Honour's first judgment was the result of a deliberate decision and not inadvertence. Given that His Honour's judgment was based upon a plain misunderstanding of what the position was, I think this meets the language of the slip rule found in Rule 388(1)(b), namely "mistake or error (which) resulted from an accidental slip or omission". Furthermore I think that the contention of senior counsel for the respondent that the matter falls within Rule 667(2)(d) is also correct. This permits a court to set aside an order if the order does not reflect the court's intention at the time the order was made. Here it seems clear that His Honour at all times intended that judgment would be entered for the respondent in the sum for which the respondent had made out an entitlement after taking into account the credit and off-sets to which I have referred and was under the mistaken belief that the parties had agreed upon what that entitlement was and for reasons which cannot be now known arrived at the figure for which judgment was first pronounced."

[67] In my view, for the reasons I have previously set out, I consider that the Adjudicator came to a conclusion after a deliberate decision where he accepted the number of loads initially put forward by Warren Brothers and from that accepted a calculation based on a formula which changed according to the number of loads in each particular category of load.

[68] I do not consider that this was a mistake or error which resulted from an accidental slip or omission. Significantly, the correction of the error involves the acceptance of a different number of loads and a different mathematical formula as the relevant rate has now changed. This is not a case where a different final figure simply needs to be inserted as in *Queensland Pork* but rather the Adjudicator needs to accept that the methodology underlying the change to the final figure also needs to change. In any event I am not satisfied that the amount sought to be transposed pursuant to the declaration is in fact actually correct.

[69] In this regard I consider this case is indeed analogous to the decision of *Uniting Church in Australia Property Trust (Qld) v Davenport & Anor*[22] and that the Adjudicator here also proposes "upon further reflection, to adopt a completely different method of making the calculations of the amounts". Daubney J held that where an adjudicator has a complete change of reasoning that cannot be a 'miscalculation', as follows:

> "[26] It seems to me that the second respondent's attempt to draw an analogy between s 28 of the *BCIPA* and the slip rule under *UCPR* 388 is inapt. I have set out the terms of s 28 above. Rule 388 provides:
>
> "**388 Mistakes in orders or certificates**
>
> (1) This rule applies if -
>
> (a) there is a clerical mistake in an order or certificate of the court or an error in a record of an order or a certificate of the court; and
>
> (b) the mistake or error resulted from an accidental slip or omission.
>
> (2) The court, on application by a party or on its own initiative, may at any time correct the mistake or error.
>
> (3) The other rules in this part do not apply to a correction made under this rule."
>
> [27] Section 28(1) prescribes, in disjunctive terms, four discrete circumstances, any one of which may found an exercise of the adjudicator's discretion under s 28(2). Rule 388(1), on the other hand, contains two subparagraphs which must be read conjunctively such that, to the extent that there is similarity in wording between Rule 388 and s 28, the slip rule applies if "there is a clerical mistake in an order ... of the Court ... and ... the mistake ... resulted from an accidental slip or omission." In *Cawood v Infraworth Pty Ltd* [1990] 2 Qd R 114, Macrossan CJ, with whom Kelly SPJ agreed, said at 122:
>
> > "Inadvertence, as distinguished from an error or mistake resulting from deliberate decision, is the basis of the jurisdiction to correct under the slip rule."
>
> [28] When one looks at s 28 of the *BCIPA*, however, the only one of the discrete elements referred to in s 28(1) which imports the notion of inadvertence is that mentioned in s 28(1)(b), namely "an error arising from an accidental slip or omission".
>
> [29] It was not suggested that the mistake which the adjudicator would seek to correct in each decision was

---

22 [2009] QSC 134

a "clerical mistake"; on the common understanding of that term, it clearly was not, and is not sought to be painted as such. Nor were the adjudicator's mistakes suggested to be, nor could they sensibly be seen to be, defects of form. The questions, therefore, are whether:

(a) The adjudicator's original decisions contain errors arising from an accidental slip or omission, i.e. inadvertent errors; or

(b) Material miscalculations of figures or material mistakes in the description of a person, thing or matter mentioned in the decision.

[30] I observe that the adjudicator himself, by the terms of the letter of 2 February 2009, seems to consider that he "made a material miscalculation".

[31] The answers to these questions come, it seems to me, from a review of the adjudicator's process of reasoning under his original decisions and the process of reasoning which he has advertised he would now seek to adopt for the purposes of correcting his "material miscalculation"…

[36] The juxtaposition of the original methodology adopted by the adjudicator and that which he has indicated he proposes to adopt makes clear, in my view, that it cannot sensibly be said in this case either that:

(a) he made an inadvertent error in his original calculations, or

(b) his original calculations involved any sort of "miscalculation", let alone a "material miscalculation".

[37] Rather, it seems to me that the adjudicator proposes, upon further reflection, to adopt a completely different method of making the calculations of the amounts of the over-budget preliminaries which are attributable to the subject RFIs under each of Contracts 1 and 2 respectively. True it is, as the second respondent submits, that the adjudicator has not changed any of his substantive findings as to the length of delay attributable to the contracts either collectively or individually. Rather, the adjudicator proposes to apply a completely different chain of reasoning and calculation to those substantive findings to reach results which are quite different from those calculated under his original decisions.

> [38] My characterisation of what is proposed to be done by the adjudicator as a complete change of reasoning also points to a conclusion that there is no question of 'miscalculation' here; rather, the adjudicator proposes to substitute new calculations for his original calculations."

[70] Accordingly, I do not consider that s 28 or r 388 have any applicability. In any event it is clear that the Adjudicator's Certificate has issued and been filed in this Court.

[71] I therefore dismiss Warren Brother's application for a declaration that the Adjudicator be permitted to correct the error in his decision by issuing a fresh adjudication decision.

Exercise of power so unreasonable that no reasonable person could have so exercised the power: Alternative Item 1 submissions

[72] The matters which have been advanced above in relation to the failure by the Adjudicator to genuinely attempt to exercise his power in accordance with BCIPA are also relied upon, in the alternative by Thiess, as establishing the level of unreasonableness, illogicality or irrationality in the reasoning of the Second Respondent generally shown in paragraphs 127 to 129 of the Adjudication Decision, necessary to vitiate the Decision. In making that submission, Thiess accepts that the test is a high one, but submits that in the circumstances of this case that test has been satisfied.

[73] The argument by Thiess in this regard is, however, predicated on the fact that the Adjudicator actually 'considered' the submissions and made an unreasonable decision. As I have indicated I have concluded that the Adjudicator do not 'consider' the submission at all and accordingly it is not necessary to undertake an analysis of the argument by Thiess in this regard.

Jurisdictional dispute – no reference date for payment claim

[74] As I have already indicated I consider that the decision of the Adjudicator is void and should be set aside. Thiess however have also argued that there is a further basis for setting aside the decision of the Adjudicator. To the extent that it is necessary I shall record my views in this regard.

[75] On 4 January 2011 Thiess sent Warren Brothers a document terminating the contract. In its payment schedule in relation to this progress claim, Thiess submitted that the contract had been terminated pursuant to cl 16.1 and cl 32.5 of the contract. It would seem that the right of Thiess to terminate the contract under cl 16.1 for convenience was accepted by Warren Brothers. Thiess submitted that where there is a termination under cl 16.1 no subsequent reference date arises after the date of termination.

[76] Section 12 of the BCIPA provides:

> **"12 Rights to progress payments**

> From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

[77] In the Schedule 2 Dictionary -

> ***"progress payment*** means a payment to which a person is entitled under section 12, and includes, without affecting any entitlement under the section—
>
> (a) the final payment for construction work carried out, or for related goods and services supplied, under a construction contract; or
>
> (b) a single or one-off payment for carrying out construction work, or for supplying related goods and services, under a construction contract; or
>
> (c) a payment that is based on an event or date, known in the building and construction industry as a 'milestone payment'.
>
> …
>
> ***reference date***, under a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or (b) if the contract does not provide for the matter—
>
> (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later named month."

[78] It was accepted by the Adjudicator in his decision at paragraph 20 and it was common ground between the parties that there was an arrangement in place which permitted Warren Brothers to submit progressive claims with the work the subject of the claim being valued at a nominal rate. A more accurate quantity was then to be verified by survey at a later date. That survey, which was under Thiess' control, was completed in April 2011 and received by Warren on 10 April 2011. It is clear therefore that the payment claim by Warren was made within the 12 month period after termination as specified in s 17(4) as the Payment Claim was dated 31 December 2011 and the relevant termination event was conceded by both parties to be either in April or July 2011.

[79] Thiess submitted that in the circumstance of a termination under cl 16.1 there would be an entitlement under cl 16.2 of the contract for Warren Brothers to be paid certain amounts identified in that paragraph. Thiess, however, argues that as the contract is terminated, the BCIPA regime does not contemplate new and successive reference dates arising and continuing to arise following the

termination of the contract. Thiess points out that the phrase "reference date" in the definition is followed by the words "under a construction contract" and that therefore after the termination of a contract there is no longer a contract under which there might be a reference date.

[80] In this regard Thiess placed reliance in particular on the decision of *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors.*[23] Accordingly, it is argued that there is no ability for a further reference date.

[81] It is clear that each decision turns on the particular provisions of the contract in question. The relevant clauses provide as follows;

> "16.1 Without prejudice to any of the Company's other rights, entitlements or powers under the Subcontact, the company may at any time by written notice to the Subcontractor, effective upon its receipt or such other time as stated therein, terminate the Subcontract:
>
> 16.1.1 for any reason stated in Schedule 1; or
>
> 16.1.2 without prejudice to the Company's rights pursuant to clause 16.1.1, if for any reasons whatsoever the Head Contract is terminated or work under the Head Contract is terminated or suspended in whole or in part,
>
> and thereafter either itself or by a third party may complete the uncompleted part of the work under the Subcontract.
>
> 16.2 If the Company terminates the Subcontract under clause 16.1, the subcontractor will be entitled to payment of the following amounts as determined by the Company's Representative:
>
> 16.2.1 the unpaid value of all work completed in accordance with the Subcontract prior to the date of termination;
>
> 16.2.2 subject to clause 16.3, the cost of Materials or services reasonably ordered by the Subcontractor for incorporation in the subcontract Work but not included in the value of the work under clause 16.2.1 and for which it is legally bound to pay; and
>
> 16.2.3 subject to clause 16.3, the reasonable cost of removing from the Site all plant and equipment and other things used in the performance of the Subcontractor's obligations."

---

[23] [2011] QSC 67.

[82] Clause 26 of the Contract then outlines the provisions in relation to payment.

[83] It would seem that cl 16.2 expressly provides for the making of a claim which is a final payment claim and it necessarily contemplates that such a claim will indeed post-date the termination. The Survey by Thiess was completed in April 2011. Thiess argues that such a date cannot be a reference date. I am not convinced by Thiess' argument in this regard.

[84] Accordingly in my view Thiess has established an entitlement to a declaration that the decision of the Adjudicator dated 20 February 2012 in relation to Adjudication Application No 1064504-818 is void.

[85] As it may be necessary to consider consequential orders I will hear the parties in relation to the terms of orders and on the issue of costs. I would propose however that essentially there be orders that:

1. In BS No. 1975 of 2012: Declare the decision of the third respondent dated 20 February 2012 in relation to Adjudication Application 1064504-818 Void; and

2. In BS No. 4471 of 2012: The application is dismissed.