SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Ltd v Monadelphous Engineering Pty Ltd & Ors* [2015] QSC 307
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ACN 131 210 038 (applicant) **v** **MONADELPHOUS ENGINEERING PTY LTD** ACN 010 305 923 (first respondent) **MUHIBBAH CONSTRUCTION PTY LTD** ACN 073 412 012 (second respondent) **AUSTRALIAN BUILDING & CONSTRUCTION DISPUTE RESOLUTION SERVICE PTY LTD** ACN 165 369 077 (third respondent) **KENNETH SPAIN** (fourth respondent)
FILE NO/S:	SC No 10576 of 2014
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2015; Further written submissions 13 August 2015; 20 August 2015
JUDGE:	Philip McMurdo J
ORDER:	**The originating application is dismissed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the where the applicant challenged an adjudicator's decision under the *Building and Construction Industry Payments Act* 2004 (Qld) – applicant argued the adjudicator had no power to order the applicant to pay any sum of money to the respondents because the relevant construction work was excluded from the

operation of the Act by s 3(4) – whether the fabrication of equipment including a Shiploader and Tripper in Malaysia was a contract for construction work a type excluded from operation of the Act by s 3(4) – whether fabrication of the equipment fell within the definition of "construction work" in s 10 or "related goods and services" in s 11 – where the equipment was regarded as components to form part of the wharf structure, which was subject of another contract between the parties – close connection between the operation within s 10(1)(e) and construction work of a kind within s 10(1)(a), (b) or (c) – where even though the fabrication of equipment was carried out outside Queensland, the contract was providing for part of the construction of a structure in Queensland – where the operation of the Act was not displaced by s 3(4) and the adjudicator had jurisdiction – where the applicant argued, in the alternative, that the adjudicator failed to consider the applicant's submissions and evidence in a way that involved jurisdictional error – applicant argued the adjudicator wrongly concluded that applicant's adjudication response went beyond the reasons for withholding payment identified in its payment schedule – no finding that the adjudicator's treatment of the applicant's submissions and evidence involved a jurisdictional error but if there was an error it was not one which affected the validity of the adjudicator's decision – where the applicant was not denied natural justice by being deprived of an opportunity to explain why the evidence was properly included in its adjudication response

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant argued the adjudicator had no jurisdiction to order it to pay any sum to the respondents because the relevant construction work was excluded from the operation of the *Building and Construction Industry Payments Act* 2004 (Qld) by s 3(4) – where the operation of the Act was not displaced by s 3(4) and the adjudicator had jurisdiction – applicant argued the adjudicator failed to consider its submissions and evidence in a way that involved jurisdictional error – no finding that the adjudicator's treatment of the applicant's submissions and evidence involved a jurisdictional error but if there was an error it was not one which affected the validity of the adjudicator's decision

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS — whether the applicant was denied natural justice by being deprived of an opportunity to explain why the evidence was properly included in its adjudication response – where the applicant was not denied natural justice

Building and Construction Industry Payments Act 2004 (Qld), s 3(4), s 10, s 11, s 18, s 24, s 26
Building and Construction Industry Security of Payment Act 1999 (NSW)

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
John Holland Pty Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19, followed
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2015] 1 Qd R 350; [2014] QCA 232, applied
Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2014] QCA 330, considered
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140, followed
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2010] QSC 95, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, applied
Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd [2011] NSWSC 165, distinguished
Peter's of Kensington v Seersucker Pty Limited [2008] NSWSC 897, considered
Technical Products Pty Ltd v State Government Insurance Office (Qld) (1988) 167 CLR 45, cited

COUNSEL: A B Crowe QC, with M Hindman for the applicant
G A Thompson QC, with K E Downes QC for the first and second respondents
No appearance for the third or fourth respondents

SOLICITORS: Minter Ellison for the applicant
CDI Lawyers for the first and second respondents
No appearance for the third or fourth respondents

[1] This is a challenge to the decision of an adjudicator under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"), by which the applicant, which I will call WICET, was required to pay to the first and second respondents, which I will call MMM, the sum of $22,132,839.35. WICET argues that the adjudicator had no power to order any sum to be paid for what it says was the relevant construction work, because MMM's claim was for construction work which it had carried out outside Queensland and was thereby excluded from the operation of the Act by s 3(4). Alternatively, WICET challenges the adjudicator's decision as to certain discrete components of MMM's claim, arguing that the adjudicator failed to consider evidence and submissions which WICET had put to the adjudicator about those components, in a way which involved a jurisdictional error.

The equipment

[2] WICET is causing the Wiggins Coal Export Terminal near Gladstone to be constructed. That includes the construction of a jetty and a wharf, which is the subject of another contract between WICET and MMM. The contract which is relevant to this case concerns equipment called the Shiploader and an associated piece of equipment called the Tripper, which together will operate on the wharf to deliver coal into the hatches of ships which are docked there. The Shiploader is approximately 76 metres in length and 47 metres in height and the Tripper is approximately 47 metres in length.[1]

[3] Coal will be transported from the shore along a conveyor that runs the length of the jetty to the wharf, where it will be carried on the conveyor that runs along the wharf towards the Shiploader. The Tripper will facilitate the transfer of coal from the wharf conveyor belt to the Shiploader, upon which another conveyor will direct the coal into ships.

[4] The Shiploader and Tripper will travel back and forward along the length of the wharf for the operation of loading different hatches of a ship. They will travel together because the Tripper is towed by the Shiploader. They will each travel on rails fixed to the wharf. The Tripper is connected to the Shiploader by a towing mechanism and to the wharf by its confinement to the rails, electrical cabling and water hoses, the threading of the wharf conveyor belt through part of the Tripper (the wharf conveyor being attached to the wharf) and by a "storm lock" mechanism which engages in the event of a severe storm or strong winds to prevent the Tripper from moving. The Shiploader is attached to the wharf by its confinement to the rails, by water hoses and electrical cables, by its attachment to the Tripper and by a "storm lock".

The contract

[5] The contract, which is entitled "Wiggins Island Coal Export Terminal (WICET) PE95 Shiploader" is made up of several documents, the first of which is entitled Formal Instrument of Agreement and recites that:

> "At the invitation of the Principal [WICET], the Contractor [MMM] has submitted its tender for the PE96 Fabrication and Supply of Stacker and Gantry package on the Wiggins Island Coal Export Terminal project."

The parties incorporated the general conditions of contract described as AS2124-1992 with some amendments. They amended the definition of "work under the Contract" within those conditions so that the term was defined to mean:

> "… the work which the Contractor is or may be required to execute under the Contract and includes the design, manufacture, supply and Delivery of the Equipment …"

The term "Equipment" was defined as follows:

> "Equipment means the goods to be supplied by the Contractor under the Contract which are to be handed over to the Principal or a person designated by the Principal."

By cl 3.1 of the Conditions, the Contractor was to execute and complete the work under the Contract.

---

[1] Affidavit of B D Millar sworn 1 April 2015 [21].

[6] Clause 30.1 of the standard conditions was amended so as to read as follows:

> "The Contractor shall supply the Equipment and use the materials and standards of workmanship required by the Contract. …"

[7] Another of the contract documents was the Scope of Work, which described the "Construction package PE95" to include:[2]

> "… All works associated with the supply, manufacture, protective treatment, workshop testing, offsite pre-assembly and commissioning, delivery to site, onsite installation/hook-up and completion of commissioning for shiploader SL1 and its towed tripper."

[8] Clause 27.1 of the standard conditions was amended so that it was as follows:

> "27.1 Possession of Site
>
> The Principal shall … give the Contractor possession of the Site or sufficient of the Site to enable the Contractor to commence work under the Contract that it is required to perform on Site. …"

That clause was one of several provisions which made it clear that the equipment was to be fabricated at a different place from the Site which (according to the standard conditions) meant the lands or other places to be made available to the contractor by the principal for the purpose of the contract. Another of those provisions was cl 30A which provided for the shipping of the equipment from "its place of fabrication". It provided that the contractor was to make the equipment available for inspection at the place of fabrication by the principal and for a sequence of steps by which any defects identified by the inspection would be rectified prior to shipment. By cl 30A.1B, the contractor was to then deliver the equipment to "the Place for Delivery …".

[9] Another part of the contract documents were described as "Contract Schedules", within which there was a document described as "WICET Shiploader Draft Schedule". It set out a program of works. Part of that schedule consisted of work which was described as work to be undertaken in Malaysia. In particular, it described the steps of the "construction of the Shiploader in Malaysia" as well as the "Pre-Commissioning in Malaysia".

[10] The argument for MMM concedes that the contract thereby provided that the equipment was to be fabricated not only offsite, but outside Queensland.

The adjudicator's jurisdiction

[11] By s 3(1) of the Act, it applies to "construction contracts", subject to the qualifications expressed within s 3(2), (3) and (4).

[12] By Schedule 2 to the Act, a "construction contract" is defined to mean:

> "a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party."

---

[2] Clause 1.2.

[13] The term "construction work" is defined in s 10 in terms which include the following:

> "(1) *Construction work* means any of the following work -
>
> (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;
>
> (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;
>
> (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, airconditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
>
> (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
>
> (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including -
>
> (i) site clearance, earthmoving, excavation, tunnelling and boring; and
>
> (ii) the laying of foundations; and
>
> (iii) the erection, maintenance or dismantling of scaffolding; and
>
> (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
>
> (v) site restoration, landscaping and the provision of roadways and other access works; …"

[14] The term "related goods and services" is defined by s 11 relevantly as follows:

> "(1) *Related goods and services*, in relation to construction work, means any of the following -
>
> (a) goods of the following kind -
>
> (i) materials and components to form part of any building, structure or work arising from construction work;

> (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work; …"

[15] The relevant exception to the application of the Act to construction contracts is that stated in s 3(4) as follows:

> "(4) This Act does not apply to a construction contract to the extent it deals with construction work carried out outside Queensland or related goods and services supplied for construction work carried out outside Queensland."

[16] WICET's submission to the adjudicator and here was and is that the Act did not apply to this contract to the extent that it dealt with construction work carried out in Malaysia and that all of the work for which MMM had made the relevant claim had pre-dated the delivery of the equipment to Queensland. And to the extent that MMM had claimed for the supply of related goods and services, those goods and services had been supplied for the construction work carried out in Malaysia. Its argument to the adjudicator and its principal argument here was and is that the fabrication of the equipment in Malaysia constituted construction work as defined in s 10(1)(a). WICET's alternative argument here is that the fabrication of the equipment was construction work within s 10(1)(e)(iv).

[17] The Shiploader arrived at Wiggins Island about four weeks after the payment claim was made so that it is clear that the entire claim related to what MMM had done outside Queensland.

[18] MMM's argument, which the adjudicator accepted, was and is that the Act applied in this way: the PE95 contract provided for the supply of components, namely the Shiploader and the Tripper to form part of a structure, namely the wharf, which was to arise from construction work at Wiggins Island. Accordingly, the contract was a construction contract because it was for the supply of related goods to be used for construction work in Queensland. Therefore, neither of the exceptions within s 3(4) applied.

[19] The essence of the adjudicator's conclusion in this respect was set out in this paragraph of his decision:

> "33. Section 11(1)(a)(i) refers to material or components to form part of any building structure or work arising from construction work. I consider that the Shiploader is a component of the wharf upon which it is to operate and is provided in respect of construction work carried out within Queensland. I am therefore satisfied that the Shiploader is related goods supplied for construction work."

WICET argues that this was erroneous reasoning because the Shiploader, upon its installation upon the wharf, is not a "component of the wharf" or part of the structure which is the wharf.

[20] An alternative reason for the adjudicator's decision that he had jurisdiction was expressed as follows:

> "34. In addition, as noted above, I am satisfied that the contract was formed in Queensland for work to be carried out in Queensland. I am also

> satisfied that the Act does not seek to split components out of a contract in respect of components that may be procured outside of Queensland for work that is undertaken in Queensland. I consider that the decision of Ball J in the case of *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* supports this view. I am satisfied that the shiploader was supplied in respect of construction work carried out inside Queensland at the Port of Gladstone."

The reasoning in that paragraph was foreshadowed by this earlier paragraph of the adjudicator's reasons:

> "28. It is common practice for works within a contract which deals with Queensland based construction works to have a component of the works that may be sourced or manufactured outside of Queensland. I am satisfied that section 3(4) of the Act does not contemplate excising out sections of a contract just because parts of the scope of works were procured outside of Queensland. I have reviewed the decision of Ball J in *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* and I am not satisfied that the decision of Ball J supports the respondent's position. Rather I find that the decision of Ball J is supportive of the claimant's position."

[21] The adjudicator there referred to the judgment of Ball J in *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd*.[3] In that case, the relevant contract was for the refurbishment of a building in the territory of the Commonwealth known as the Jervis Bay Territory. The plaintiff made a claim and an adjudication application under the corresponding legislation in New South Wales, the *Building and Construction Industry Security of Payment Act* 1999 (NSW). That Act contains an exception in substantially identical terms to s 3(4). Ball J held that the adjudicator had correctly decided that he lacked jurisdiction. The plaintiff had engaged a number of subcontractors and its claim included amounts payable by it to them. The subcontractors were based in New South Wales and a substantial amount of the work which they had performed under their subcontracts was performed in New South Wales.[4] Ball J reasoned as follows:[5]

> "27 In my opinion, the contract between Olympia and Hansen Yuncken dealt with construction work outside New South Wales or at least with related goods and services supplied in respect of that construction work. Under the contract, Olympia was to refurbish a building in the Jervis Bay Territory. Necessarily, the work had to be performed in that territory. The fact that goods were sourced in New South Wales and work was carried out in New South Wales in connection with the contract does not mean that the contract between Olympia and Hansen Yuncken *dealt with* construction work in New South Wales. At most, all that could be said was that the contract for the construction work dealt with related goods and services which were supplied in New South Wales because the contract left it open - or, indeed, given the location of the Jervis Bay Territory, contemplated - that goods and services of that description would be supplied. The goods and services actually

---

3 [2011] NSWSC 165.
4 Ibid 14 [26].
5 Ibid 14-15 [27].

> supplied in New South Wales were related goods and services to construction work carried on in the Jervis Bay Territory because the goods and services consisted of materials and components which formed part of the work on the Geelong building or the provision of labour in connection with the fabrication of those materials and components. The SOP Act does not apply to those related goods and services by reason of s 7(4)(b) of the Act."

[22] That judgment is of limited relevance to the present case, at least because the operation of the exception within s 3(4) will depend upon the relevant facts and circumstances, most importantly the terms of the relevant contract, of each case. The comment by Ball J that "the provision of labour in connection with the fabrication of those materials and components [in New South Wales]" constituted "related … services" in respect of construction work carried out outside New South Wales might be thought to provide some support for MMM's position. However, it was apparently not contended in that case that the fabrication of any materials itself constituted construction work, so that any of the subcontractors' work was construction work carried out within New South Wales. Therefore the case is of limited assistance here.

[23] As already mentioned, WICET disputes the finding by the adjudicator that the Shiploader and Tripper were "components" or they (otherwise) formed part of the structure which was the wharf. WICET argues that the Shiploader together with the Tripper formed a distinct structure which, upon installation on the wharf, formed part of the land. WICET's argument likens the Shiploader and Tripper to a prefabricated water tank to be installed at a building. WICET says that like a water tank, this equipment was not to be "incorporated into the construction work" of the wharf in the sense of becoming "an inseparable and indistinct part of it".[6]

[24] WICET's submission is inconsistent with what was said about this contract in another case between the parties which was decided by the Court of Appeal last year: *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*.[7] That case did not involve a payment claim under the Act. Rather the question there was whether s 67J of the *Queensland Building and Construction Commission Act* 1991 (Qld) precluded WICET from having any recourse to guarantees with which it had been provided for the performance of the present contract and the distinct contract between these parties for the construction of the jetty and wharf. It was held that s 67J did not apply to the (presently relevant) PE95 contract, because all of the work under this contract was of a kind excluded by regulation from the definition of "building work" under that statute. In particular, it was held that the work under this PE95 contract was within the description of "work on harbours, wharfs and other maritime structures".[8] In other words, it was held that for the purposes of that legislation, the Shiploader was part of the wharf. Fraser JA, with whom Muir and Morrison JJA agreed, said:

> "[20] The location of the shiploader on a rail on the site of the wharf adjacent to the water and its function compel the conclusions that it is or forms part of a 'maritime structure' within the meaning of item 19 …"

---

6 WICET's written submissions [51].
7 [2014] QCA 330.
8 *Queensland Building and Construction Commission Regulation* 2003 (Qld) Sch 1AA, Item 19.

Similarly, Fraser JA remarked that "the shiploader has the same function and may even be regarded as being part of the wharf upon which it moves on fixed rails …".[9]

[25] Of course that case involved the application of different legislation. But the court's characterisation of the Shiploader as part of the wharf provides substantial support for the adjudicator's reasoning and MMM's present case.

[26] To engage s 3(4), the submissions for WICET must establish relevantly two things. The first is that the fabrication of the equipment constituted "construction work". The second is that by its provision for the fabrication of the equipment, the contract "deals with construction work carried out outside Queensland".

[27] WICET's primary argument is that the Shiploader and its associated Tripper constituted a structure or structures "to form part of land". Inherent in this argument is the notion that when installed on the wharf, the equipment will constitute a distinct structure from the wharf. That characterisation, argued by the suggested analogy of a water tank, is not so clearly correct. The equipment is to become attached to the land, and to thereby form part of land, only by the equipment's attachment to the wharf structure. That tends to indicate that for the purposes of s 10(1)(a), the equipment, when installed on the wharf, does not constitute a distinct structure.

[28] However, the alternative basis for concluding that the fabrication of the equipment constituted construction work is the operation of s 10(1)(e)(iv). If the equipment is characterised as "components to form part of any … structure or works" (namely the wharf) then its fabrication would fall within that part of the definition of construction work.

[29] The relevant expression in s 10(1)(e)(iv) is "components to form part of any building, structure or works". The almost identical expression in s 11(1)(a)(i) is "components to form part of any building, structure or work". In s 11, the reference is to "materials and components". WICET's submission that this expression is limited to "goods that are assimilated into the construction work in the sense that they … become an inseparable and indistinct part of it" is easier to accept for "materials" than for "components". There is no basis, according to the ordinary meaning of "component", to limit it to goods of that kind. In my view, the Shiploader and Tripper, once installed on the wharf, are properly characterised as components of the wharf. The equipment is fixed to the wharf in the ways which I have described. It is to operate only upon the wharf. It is to constitute part of a structure which facilitates the loading of coal into ships. Although the other litigation between these parties about this contract concerned different legislation, the characterisation in the judgment of Fraser JA, that this equipment was part of the wharf, is instructive. And that characterisation is not precluded by the fact that there was a distinct contract for this equipment from that for the construction of the jetty and the remainder of the wharf.

[30] In *Peter's of Kensington v Seersucker Pty Limited*,[10] McDougall J discussed the potential overlap of the New South Wales equivalents of s 10(1)(e) and s 11(1)(a)(i). His Honour remarked on the degree of connection between the "operation" (within paragraph (e)) and works within paragraphs (a), (b) and (c).[11] Under (the equivalent of) s 10(1)(e), the

---

9 [2014] QCA 330, 9-10 [21].
10 [2008] NSWSC 897.
11 Ibid [39].

relevant operation had to form "an integral part of", be "preparatory to" or be "for completing work of the kind referred to in paragraph (a), (b) or (c)". Under (the equivalent of) s 11, the relevant components had only to be supplied "in relation to" the construction work, which McDougall J observed indicated "a very broad or wide degree of connection".[12]

[31] But in my view, there is a further difference between s 10(1)(e), and s 11 which is materially relevant. It is the difference between performance of work and the supply of goods. A construction contract, as defined in Schedule 2 of the Act, means either a contract, agreement or other arrangement under which a party undertakes to carry out construction work or one under which it undertakes to supply related goods and services. A contract of the latter kind need not involve any undertaking to perform construction work. It requires only an undertaking to supply goods and services of a certain kind, namely those which have a connection to construction work as described in s 11.

[32] In the present case, MMM's undertaking was more than to supply a shiploader and tripper. There were extensive provisions of the contract by which it was to fabricate this equipment. This means, in my view, that if the equipment is properly characterised as components of the wharf structure, this was a contract for the carrying out of construction work rather than a contract for the supply of related goods and services. In that respect, I disagree with the reasoning of the adjudicator and MMM's submission in support of it.

[33] Because I regard the Shiploader and Tripper as components to form part of the wharf structure, rather than as a distinct structure "to form part of land", it is my view that the fabrication of the equipment is within s 10(1)(e) rather than, as WICET mainly argues, s 10(1)(a).

[34] Returning then to s 3(4), is this a construction contract that "deals with construction work carried out outside Queensland"?

[35] An essential characteristic of work which is within paragraph (e) of s 10(1) is its association with construction work within paragraphs (a), (b) or (c). To fall within paragraph (e), the relevant operation must form an integral part of such construction work, be preparatory to it or be performed for the completion of that construction work.

[36] In many cases, operations described within paragraph (e) would constitute construction work of a kind within paragraphs (a), (b) or (c) without the clarification provided by paragraph (e). For example, the "laying of foundations" for a building would comfortably fall within the expression "construction of a building". Similarly, the prefabrication of components to form part of a building might well be considered to be part of the construction of that building, without the inclusion of paragraph (e). What is important here, is as McDougall J described it in *Peter's of Kensington*,[13] the close connection between an operation within paragraph (e) and construction work of a kind within paragraphs (a), (b) or (c). An operation falls within paragraph (e) only because of the part it plays in construction work which, according to the terms of paragraphs (a), (b) and (c), involves a connection with certain land. In the present case, the fabrication of the Shiploader and Tripper have the necessary close connection with the construction of the wharf in which they will form an essential part as the wharf is intended to be used. This

---

[12] Ibid [22], citing *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1988) 167 CLR 45, 47.

[13] [2008] NSWSC 897 [39].

equipment would lack the necessary connection with land for its construction to constitute construction work as defined, absent the connection between the equipment and the wharf.

[37] The evident purpose of s 3(4) is to confine the operation of the Act to circumstances which have a relevant association with Queensland. It is of the essence of construction work, as defined, that it involves work in relation to certain land. It is therefore logical that the Act would be given a territorial limitation which is defined according to whether the relevant land is in Queensland.

[38] For the supply of related goods and services, the required association is that they be supplied in relation to construction work carried out in Queensland. In that context, the place of manufacture of a component is irrelevant. The essential association with Queensland is the part which the supply of those goods plays in the construction of something upon Queensland land. It would be logical to interpret s 3(4), in the case of a contract for construction work, as providing for the same kind of association with Queensland, namely that the work should play a part in the construction of something upon Queensland land. If not, then as MMM submits, there could be curious results. The supplier of components constituting related goods within s 11 would have the benefit of the Act, whereas the fabrication of other components of the same structure would not.

[39] WICET submits that s 3(4) anticipates that some part of the construction of a certain building or structure could fall outside the operation of the Act, by s 3(4) providing that the Act will not apply *to the extent* that it deals with work carried out outside Queensland. But that partial non-application of the Act to a contract could exist in other ways, such as where the one contract requires construction work to be carried out at different places, some inside and some outside Queensland.

[40] The work of the fabrication of this equipment was carried out outside Queensland. But that work was construction work only because it was an integral part of construction work undertaken inside Queensland. In my view, that fabrication could not be relevantly characterised both as construction work carried out outside Queensland and an integral part of construction work carried out within Queensland.

[41] In requiring the fabrications of this equipment, the contract was providing for part of the construction of a structure in Queensland and was, in the sense of s 3(4), "dealing with" construction work carried out in Queensland. It follows that the application of the Act was not displaced by s 3(4).

[42] The adjudicator's conclusion that the Act did apply was thereby correct and he had jurisdiction.

Extension of time claims

[43] WICET's alternative challenge is to that part of the adjudicator's decision which allowed an amount of $5,259,362.11 for what was described as MMM's Delay Cost Claim VO195. This was for the costs of delays which were the subject of so-called Extensions of Time ("EOT") numbered 1, 4 and 25. The claimed amount for VO195 was $12,780,885.43 and the scheduled amount was $3,780,496.43.

[44] WICET's complaints are that the adjudicator did not consider some of its evidence and submissions to the adjudicator, because he wrongly concluded that they went beyond the reasons for withholding payment which WICET had provided in its payment schedule. On his view, the material should not have been included, according to s 24(4) of the Act. WICET further complains that it was denied procedural fairness because it was not alerted to the prospect that the adjudicator would reason in that way and thereby disregard the relevant parts of its evidence and submissions.

[45] Section 18 of the Act provides as follows:

> "18 Payment schedules
>
> (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
>
> (2) A payment schedule -
>
> (a) must identify the payment claim to which it relates; and
>
> (b) must state the amount of the payment, if any, that the respondent proposes to make (the *scheduled amount*).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment."

[46] Section 24 provides for an adjudication response. By s 24(2) the respondent to an adjudication application may give the adjudicator a response if, as here, the respondent had served a payment schedule on the claimant within the required time. Section 24(3)(c) permits a respondent to include within the adjudication response "the submissions relevant to the response the respondent chooses to include". However, there is a limitation upon that response which is provided by s 24(4) as follows:

> "(4) If the adjudication application is about a standard payment claim, the adjudication response can not include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant."

[47] The limitation in s 24(4) is expressed by reference to the "reasons for withholding payment [which] … were included in the payment schedule …". Section 18 requires a respondent to state why the schedule amount is less than the claimed amount and, if that is because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment. WICET argues that the limitation imposed by s 24(4) does not apply to the reason or reasons for the schedule amount being less than the claimed amount. It argues that the limitation is relevant only to a case where, beyond a respondent's case as to the quantum of the scheduled amount, a respondent has some other reason for withholding payment.

[48] That is not how the adjudicator interpreted the limitation from s 24(4). In considering an expert's report which WICET had presented as part of its adjudication response (the so-called Evans & Peck Report), the adjudicator said that a certain part of that report had assessed what the adjudicator described as "new extension of time periods" and went beyond "reasons set out in the payment schedule" and as such were not "properly made".

[49] WICET argues that the adjudicator misunderstood the Evans & Peck Report in that respect because, it says, it involved no departure from WICET's quantification of the relevant time periods for this claim as it had submitted in its payment schedule. But if it did involve some further case as to why MMM should receive less than the claimed amount, WICET says that this was not precluded by s 24(4) because it was not a reason for "withholding payment".

[50] As counsel for WICET agreed in their oral submissions, WICET's submission as to the effect of s 24(4) is inconsistent with several judgments in New South Wales. In *Multiplex Constructions Pty Ltd v Luikens*,[14] it was argued that the reference to a respondent's "withholding payment for any reason", in the New South Wales equivalent of s 18(3), was to a case where a respondent was holding back a payment, otherwise due under the contract, by reason of a cross-claim or set-off. Consequently, it was said, this confined the limitation imposed by the New South Wales equivalent of s 24(4) in the way for which WICET argues. This argument was rejected by Palmer J as follows:

> "[68] Section 14(3) requires that if the respondent to a payment claim has '*<u>any</u> reason*' for '*withholding payment*', it must indicate that reason in the payment schedule. To construe the phrase '*withholding payment'* as meaning 'withholding payment only by reason of a set-off or cross claim' is to put a gloss on the words which their plain meaning cannot justify. The phrase, in the context of the subsection as a whole, simply means 'withholding payment of all or any part of the claimed amount in the payment claim'. If the respondent has any reason whatsoever for withholding payment of all or any part of the payment claim, s 14(3) requires that that reason be indicated in the payment schedule and s 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s 22(d) requires the adjudicator to have regard only to those submissions which have been '*duly made*' by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s 14(3)."

[51] This interpretation by Palmer J (of the equivalent of s 18(3)) was accepted by Hodgson JA (with whom Beazley JA agreed) in *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*.[15] The distinction between "why the scheduled amount is less" and "the respondent's reasons for withholding payment" within the equivalent of s 18(3) did not, in the opinion of Hodgson JA, "justify a narrower view as to what amounts to reasons for withholding payment".[16] Hodgson JA said:[17]

> "If a respondent does not propose to pay any amount included in the payment claim for any reasons said to justify non-payment of that amount, then in my opinion that is withholding payment and the reasons are reasons for withholding payment. It does not matter whether the reasons relate to non-performance of work, bad work, set-offs, or cross-claims of any kind, contractual provisions limiting the claimant's right to payment or statutory

[14] [2003] NSWSC 1140.
[15] [2007] NSWCA 19.
[16] Ibid [33].
[17] Ibid.

> provisions limiting the claimant's right to payment, or indeed any other suggested justification. Any other view would do violence to the language 'withholding payment for any reason', and be contrary to the plain purpose of s 20(2B) to avoid new submissions being introduced late in a process going ahead on a brief and strict timetable. I agree with what Palmer J said on this matter in *Multiplex Constructions Pty Ltd v Luikens*…".

[52] For WICET it was said that these judgments are incorrect and that I should not follow them. But beyond that statement, the submission was not developed. In my respectful view, these judgments should be followed here. The evident intent of s 24 is to prevent the unfairness to a claimant which could follow from a respondent being allowed to contest its alleged liability for a reason which it had not advanced ahead of the adjudication application. If WICET's argument was accepted, that beneficial operation of s 24(4) would be confined to one kind of reason for non-payment which would have no logical distinction from another.

[53] The next submission for WICET is that its adjudication response did not exceed the limitation imposed by s 24(4), because it was relevantly the same case which it had advanced in its payment schedule. Therefore, WICET submits, its submissions, including the relevant documentation constituted by the Evans & Peck Report, were submissions which were "properly made by the respondent in support of the schedule" in the terms of s 26(2)(d) of the Act. Section 26(2) provides that in deciding an adjudication application, an adjudicator is to consider only the matters which are set out in that subsection, including:

> "(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."

WICET accepts that any submission or documentation which went beyond the limitation imposed by s 24(4) would not be "properly made" under s 26(2)(d). But it argues that the Evans & Peck Report and the submissions in reliance upon it did not exceed the limit imposed by s 24 so that the adjudicator was entitled and indeed bound to consider this material.

[54] The relevant reasoning of the adjudicator was as follows:

> "338. Both parties have provided specialist consultant reports to assist in supporting their respective positions in respect of the extension of time claims:
>
> - The claimant has provided a report from Hill International titled 'Assessment of EOT Claims 1, 3, 4 Rev 1, 25 Rev 1 and 40', dated 17 September 2014. The report is contained in the adjudication application.
>
> - The respondent has provided a report by Evans & Peck titled 'Review of Hill Report on Contract PE95 EOT Claims Made by MMM', dated 25 September 2014. The report is contained in the adjudication response.
>
> 339. The report prepared by Evans & Peck was prepared on 25 September 2014 which post dates the date that the payment schedule was served.

> The report is not referred to in the payment schedule and any new reasons stated for withholding payment in the Evans & Peck report, upon which the respondent relies in the adjudication response, have not been 'properly made' and will not be considered in the adjudication decision.
>
> 340. With reference to section 1.2 of the Evans & Peck report and subsequently at section 4 of the report, the author provides comments as to the suitability of the methodology adopted in the Hill report, that wrong conclusions have been draw, that the Hill report is not independent and that the Hill report is a cursory verification of the claimant's submissions.
>
> 341. The Hill report is based on the 'Impacted as Planned Method' of assessment. This method assessment is an accepted methodology for analysing extension of time claims by the Society of Construction Law. In addition, I consider that the 'Impacted as Planned Method' is consistent with the contract requirements for assessing programme related issues as set out in 'Special Condition of Contract, F2 - Construction Program and Progress Requirements'. I am satisfied that the 'Impacted as Planned Method' is an acceptable methodology for assessing the extension of time claims."
>
> 342. I consider the Evans & Peck report's author's comments that the Hill report's reliance on the claimant's documentation has led to wrong conclusions to be subjective.
>
> 343. The Evans & Peck report's author's comments regard[ing] the Hill report's independence are noted. I am satisfied that Hill complied with the brief they were requested to address and that their report is independent.
>
> 344. As to Evans & Peck's comment that the Hill assessment is a cursory verification I am satisfied that the Hill report is concise and logical and provides reasons for its conclusions that could only have been arrived at by a proper examination of the material provided to Hill.
>
> 345. The Evans & Peck report has been prepared to provide an opinion in respect of the Hill report. I have read the Evans & Peck report and I am satisfied that the issues raised by the author of the Evans & Peck report in respect of the Hill report, do not need to be addressed any further than they already have been in the adjudication decision. In addition, I do not consider the new extension of time periods set out in the Evans & Peck report to be reasons set out in the payment schedule and as such they are not properly made."

[55] It can be seen from these reasons that the adjudicator did consider the Evans & Peck Report. In his view, the criticisms within that document of a report presented in the claimant's case were unpersuasive. Within this proceeding, no complaint could be or is made about that part of the adjudicator's reasoning.

[56] WICET's complaint is about the last sentence of paragraph 345, read with the reference to "any new reasons stated for withholding payment in the Evans & Peck report" in

paragraph 339. WICET submits that there were no "new extension of time periods set out in the Evans & Peck Report". MMM submits otherwise. As I will discuss, there are some differences between the payment schedule and the Evans & Peck Report in the specification of relevant periods of delay. However, ultimately those differences had no consequence for WICET's case about the overall amount of delay which should be allowed in MMM's favour and therefore for its extension of time claims. A fine question thereby arose for the adjudicator, as to whether the Evans & Peck Report did advance some new reason for withholding payment which had not been included in the payment schedule. But any determination of that question in this proceeding would not decide the outcome of WICET's challenge to this part of the adjudicator's decision. That is because WICET must do more than establish an error on the part of the adjudicator. It must establish that this suggested error was a jurisdictional error.

[57] In its payment schedule, WICET allowed an amount for VO195 which had relevantly four components. The first was that described as EOT1, for which it allowed $360,325.97 on the basis of a period of delay which it conceded was 42 days. That period was identified as commencing on 6 March 2012 and finishing on 16 April 2012.[18]

[58] Another component was described as EOT4, for which WICET allowed $977,347.66 on the basis of a period of delay which it conceded was 31 days. That period was identified as commencing on 4 July 2012 and finishing on 3 August 2012.

[59] A third component was described as EOT5 for which WICET conceded an amount of $1,272,632.17 based upon a delay of 28 days. The other component was an amount of $1,170,190.62 about which it was said that the Principal's Representative had made this assessment "as a payment on account pending proper substantiation of delay costs …".[19]

[60] In the Evans & Peck Report, a period of 42 days was assessed for EOT1 and a period of 31 days was assessed for EOT4. However, the particular periods of time differed because according to the Evans & Peck Report, the relevant delay was to be "measured from the planned start of fabrication of 22 May 2012" to "when fabrication was first observed" which was 3 August 2012.[20] That resulted in an extension of the date of practical completion by 73 days. But they were not the same 73 days as comprised the two periods of 42 days and 31 days respectively as set out in the payment schedule.

[61] WICET argues that there were no new reasons within the Evans & Peck Report because in its adjudication response, it did not suggest that the amount or amounts which WICET had conceded in its payment schedule, for this component of the claim, should not be allowed. Moreover, WICET says that the correlation between its payment schedule and the Evans & Peck Report, in relation to two periods of 42 and 31 days in length, demonstrates that there was nothing relevantly new in the adjudication response.

[62] MMM points to the differences in the periods as identified by Evans & Peck from those as set out in the payment schedule. It submits that those differences demonstrate the correctness of the adjudicator's observation that there were "new extension of time periods set out in the Evans & Peck Report" and that they constituted reasons which had not been set out in the payment schedule and were not therefore "properly made".[21]

---

[18] WICET's payment schedule, Attachment A, 21.
[19] Ibid.
[20] Evans & Peck Report [130].
[21] Adjudicator's decision [345], set out above at [54].

[63] The evidence of the payment claim, payment schedule, adjudication application and adjudication response is voluminous, even considering only that which is relevant to VO195. In the way in which this case was litigated, without oral evidence or much reference to the relevant documentation beyond what I have already summarised, I am not in a position to reach a fair opinion about whether, by the Evans & Peck Report in respect of the assessment of the relevant periods of time, WICET did include reasons for withholding payment which were not included in its payment schedule. In saying that, I am not critical of the parties for the way in which the case was conducted. This is not an arbitration of what should be allowed for VO195. It is a challenge to the validity of the adjudicator's decision upon the basis that there was a jurisdictional error.

[64] The question under s 24(4) is different from one of simply whether there is any evidence presented with the adjudication response which was not within the payment schedule. It requires a comparison of what was argued in the payment schedule with that argued in the adjudication response, which necessarily involves an assessment of what might be described as the qualitative difference between the two arguments. In that comparison, the evident purpose of s 24(4) must be kept in mind. That comparison could not be fairly made in this judgment. It would require an understanding of the evidence which could not be gained from the way in which this case was conducted. Of course, this court does not have the advantage of the professional expertise of the adjudicator.

[65] The upshot is that I am unable to find, as a fact, that the Evans & Peck Report did not raise a reason for withholding payment which had not been included in the payment schedule. In other words, I am unpersuaded that there was an error by the adjudicator in this respect.

[66] But if there was an error, it was not one which affected the validity of the adjudicator's decision. In *John Holland Pty Ltd v RTA*,[22] there was also consideration within the judgments of the effect or otherwise upon the validity of an adjudicator's decision of an omission to consider some part of a submission, the evidence or indeed a provision of the Act. Section 26 of the [Queensland] Act provides that the adjudicator is to consider, amongst other things, all "submissions, including relevant documentation, that have been properly made by the respondent in support of the [payment] schedule". The equivalent in New South Wales is s 22(2) of that Act about which Hodgson JA (with whom Beazley JA agreed) said:

> "54 In my opinion, there may be a sense in which s 22(2) is breached if there is any relevant provision of the Act or provision of the contract which is not considered by the adjudicator, or indeed if there is any one of what may be numerous submissions duly made to the adjudicator which is not considered. However, in my opinion a mere failure through error to consider such a provision of the Act or of the contract, or such a submission, is not a matter which the legislature intended would invalidate the decision.
>
> 55 The relevant requirement of s 22(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made,

[22] [2007] NSWCA 19.

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

[67] Hodgson JA said that those views were essentially the same as he had expressed in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*[23] as follows:

> "It was said in the passage in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, quoted by McDougall J that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in *Craig v South Australia* (1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s 22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s 22(2), especially in pars (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is 'duly made' by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (s 20(1) and s 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered."
>
> (footnote included)

[68] In *John Holland Pty Ltd v RTA*, Basten JA said that the respondent's argument in that case was based upon a false premise:[24]

> "… that the scope of the payment schedule and the identification of submissions 'duly made' by the Respondent in support of the schedule are

---

[23] (2004) 61 NSWLR 421, 442 [56]; [2004] NSWCA 394 [56].
[24] [2007] NSWCA 19 [71].

> matters to be objectively determined by this Court. In my view they are not: they are matters to be determined by the adjudicator. If, as appears to be accepted by both parties, the adjudicator did not address the second response, it may have been for one of a number of reasons, namely:
>
> (a) he did not think it fell within the scope of the payment schedule and that to be taken into account it should have done;
>
> (b) it did not need to fall within the scope of the payment schedule, but for some other reason it was not 'duly made';
>
> (c) The submission was inconsistent with the scheme of the Building Payment Act, which required the adjudicator to determine what work had been undertaken under the contract and what was the value of the work."

Basten JA continued:

> "[71] … So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.
>
> [72] As I sought to explain in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [43]-[48], in my view the power to resolve these questions has been conferred on the adjudicator."

[69] The judgments in *John Holland Pty Ltd v RTA* have been cited with approval in Queensland: in particular in the Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*[25] and *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd*.[26] In *Northbuild*, White JA said that there could be no criticism of this statement by the primary judge in that case:[27]

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

[70] In the present case, if the adjudicator did err in the use which he did or did not make of the Evans & Peck Report, that was an erroneous omission in the course of an apparently genuine attempt to understand the evidence and the submissions. There was no suggestion by WICET that the adjudicator was not genuinely attempting to consider the evidence and submissions according to the requirements and confines of s 26(2). In my view, if there was an omission, it was erroneous in the sense discussed by Hodgson JA. The adjudicator was clearly alert to the question of whether he could act on this part of the Evans & Peck Report. He decided that he could not do so. He did not simply overlook the existence of this evidence. In terms of the requirements of s 26(2)(d), he did consider all submissions, including relevant documentation, which he decided had been properly

---

[25] [2012] 1 Qd R 525, 564 [107]; [2011] QCA 22, 33 [107] (White JA, with whom McMurdo P agreed).

[26] [2015]1 Qd R 350, 381-383 [89]-[92]; [2014] QCA 232, 25-28 [89]-[92] (Morrison JA).

[27] *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2010] QSC 95, 6 [11], cited by White JA in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525, 564 [107].

made by WICET. As Basten JA said in *John Holland v RTA*, what was properly before the adjudicator was a matter to be determined by the adjudicator. In terms of the judgment of Hodgson JA, the adjudicator did address "those of the submissions that he … believe[d] to have been duly made".

[71] For these reasons, I am unpersuaded that the adjudicator's treatment of the Evans & Peck Report and the submissions based upon it involved a jurisdictional error so as to invalidate his decision or any part of it.

[72] The remaining argument is that WICET was denied natural justice by not being provided with an adequate opportunity to persuade the adjudicator that this part of the Evans & Peck Report was properly within the adjudication response. That issue was the subject of some correspondence which preceded the adjudicator's decision. On 1 October 2014, the solicitors for MMM wrote a long letter to the adjudicator, which was copied to the solicitors for WICET, complaining that WICET had raised new reasons for withholding payment within its adjudication response. Part of that letter contained a complaint that MMM had not seen the Evans & Peck Report before receiving the response and so had been denied an opportunity to respond to the arguments within it. It complained that the Evans & Peck Report was based upon reasons for withholding payment that were not in the payment schedule. In particular, it was said that the report raised new reasons in respect of the assessment of relevant periods for extensions of time.

[73] On the same day, the solicitors for WICET wrote to the adjudicator to complain of this letter from MMM's solicitors to him, which they described as the unsolicited submissions. In their letter, they said that the Act did not permit submissions to be made by either party following the submission of an adjudication response, unless those submissions had been sought by the adjudicator. They asked whether the adjudicator intended to read the submissions and to have regard to them.

[74] On 7 October 2014, a representative of the adjudicator wrote to the parties and their solicitors acknowledging receipt of those two letters and stating that the adjudication decision would have regard only to the matters set out in s 26(2). The letter did not answer the query by WICET's solicitors as to whether the adjudicator would have regard to the so-called unsolicited submissions.

[75] On 10 October 2014, a representative of the adjudicator wrote again to the parties and their solicitors, requesting written submissions on the issue of the operation or otherwise of s 3(4). The letter advised that the parties were to restrict their submissions to that issue and that submissions made outside that issue would not be considered as properly made.

[76] It is argued for WICET that this correspondence was conducive to a belief that the adjudicator would not have regard to the so-called unsolicited submissions and, in particular, a submission that the Evans & Peck Report raised new reasons for withholding payment. WICET argues that natural justice required the adjudicator to revert to WICET, seeking submissions on this question if the adjudicator was minded to conclude as he did.

[77] WICET's solicitors had asked the adjudicator to assure them that the adjudicator would not in any respect act upon the so-called unsolicited submissions. The adjudicator had not given the assurance which was sought. In those circumstances, WICET could have made a further submission in response to the unsolicited submissions for MMM. The unsolicited submissions had raised the question of whether the Evans & Peck Report

presented new reasons for withholding payment, such that if the adjudicator had not previously been alert to the point, he was obliged to consider it because he was obliged to consider whether any part of the adjudication response was not properly presented to him in that it was in non-compliance with s 24. There was no reasonable basis for WICET to assume that the adjudicator would detect no new reasons within the Evans & Peck Report.

[78] In my conclusion, WICET was not deprived of an opportunity to explain why, on its case, the Evans & Peck Report was properly included in the adjudication response. Therefore, this final argument for WICET cannot be accepted.

Conclusion

[79] Each of the arguments for WICET is unsuccessful and its challenge to the adjudicator's decision, in whole or in part, fails. The originating application is dismissed.