SUPREME COURT OF QUEENSLAND

CITATION:	*S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307
PARTIES:	**S.H.A. PREMIER CONSTRUCTIONS PTY LTD** ACN 056 777 318 (applicant) **v** **NICLIN CONSTRUCTIONS PTY LTD** ACN 614 074 065 (first respondent) **KENNETH SPAIN, ADJUDICATOR J55780** (second respondent) **THE ADJUDICATION REGISTRAR, QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (third respondent)
FILE NO/S:	BS 3728 of 2020
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	2 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2020; 29 May 2020
JUDGE:	Bond J
ORDER:	**1. The amended originating application filed 28 May 2020 is dismissed.** **2. I will hear the parties 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 – where the applicant and first respondent were parties to three related contracts for the construction of petrol stations – where the contracts were terminated and the first respondent commenced court proceedings and also pursued relief under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) – where the first respondent adopted inconsistent positions in each forum regarding whether the defects liability periods had been validly extended – where the applicant contends the adjudicator erred in deciding that the first respondent's adjudication applications were not vexatious – whether the exercise of the adjudicator's jurisdiction is conditioned on an adjudication application being not vexatious as a matter of fact, or on the adjudicator

deciding that the application was not vexatious – whether the adjudicator misconceived his function by determining that the first respondent was entitled to claim for retention moneys as a component of its final payment claim – where the adjudicator recognised he was required to value the work by having regard to the estimated cost of rectifying certain defects, but neglected to value certain defects – whether such an error was a jurisdictional error or an accidental or erroneous omission within jurisdiction

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 71, s 72, s 75, s 84, s 88

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd [2020] QSC 133, applied
BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346, considered
Gedeon v Commissioner of the New South Wales Crime Commission (2008) 236 CLR 120; [2008] HCA 43, cited
John Holland Pty Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19, cited
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; [1933] HCA 25, cited
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2015] 1 Qd R 350; [2014] QCA 232, cited
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: T P Sullivan QC, with H Clift, for the applicant
P Dunning QC, with B Whitten, for the first respondent
No appearance for the second or third respondents

SOLICITORS: Thomson Geer for the applicant
CDI Lawyers for the first respondent
No appearance for the second or third respondents

Introduction

[1] The applicant (**SHA**) was the named principal and the first respondent (**Niclin**) the named contractor in three contracts entered into on about 6 November 2017, each of which provided for the design and construction of a petrol station. One station was to be constructed in Nanango, one in Charleville and one in Tinana. Except for project-specific information, the three contracts were in identical terms.

[2] Practical completion under each contract was achieved, and a 12-month defects liability period commenced, as follows:

(a) for the Nanango contract, on 9 July 2018;

(b) for the Tinana contract, on 23 July 2018; and

(c) for the Charleville contract, on 2 August 2018.

[3] For each contract, the defects liability period was extended by defects notices issued under the contracts as follows:

(a) for the Nanango contract, by notice dated 8 July 2019, the defects liability period was extended to expire on 15 July 2020;

(b) for the Tinana contract, by notice dated 22 July 2019, the defects liability period was extended to expire on 23 July 2020; and

(c) for the Charleville contract, by notice dated 25 July 2019, the defects liability period was extended to expire on 2 August 2020.

[4] The parties fell into dispute.

[5] By email dated 20 November 2019, Niclin purported to terminate all three contracts in reliance on alleged repudiation and fundamental breach by SHA. Two days later, Niclin commenced Supreme Court proceeding 13025/19 in relation to each of the contracts.[1] Amongst other things, Niclin claimed –

(a) declarations that the defects notices which, if valid, had brought about the extension of the defects liability periods, were in fact invalid, void and unenforceable;

(b) declarations that, on the proper construction of each of the contracts, final certificates under the contracts should issue and SHA should release remaining retention monies;

(c) injunctions or orders compelling release of remaining retention monies;

(d) damages for breach of the contracts; and

(e) monies due and owing under the contracts.

[6] On 12 December 2019, SHA itself purported to terminate each contract in purported exercise of power pursuant to cl 39.4(b) of the contract, consequent upon what it contended was Niclin's failure to show cause why SHA should not exercise that right.

[7] The result is that, as at 12 December 2019, it had become common ground that the three contracts had been terminated.

[8] In addition to seeking relief in Court, Niclin also pursued relief under the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) (**the Act**). Thus:

(a) Niclin sent final payment claims for the Nanango and Tinana contracts on 16 December 2019 and sent a final payment claim for the Charleville contract on 18 December 2019.

(b) SHA delivered payment schedules in response on 23 January 2020.

(c) Niclin lodged adjudication applications with the third respondent (**the registrar**) on 3 February 2020 for the Nanango and Charleville final payment claims and on 12 February 2020 for the Tinana final payment claim.

(d) SHA lodged adjudication responses in response –

(i) on 19 February 2020 for the Nanango final payment claim;

(ii) on 21 February 2020 for the Charleville final payment claim; and

(iii) on 27 February 2020 for the Tinana final payment claim.

(e) The parties consented to short extensions to the time within which the second respondent (**the adjudicator**) was obliged to issue his adjudication decisions. He

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[1] The proceeding also dealt with a dispute concerning a fourth contract, but that is not presently relevant.

then issued adjudication decisions for the Nanango and Charleville final payment claims on 27 March 2020, and for the Tinana final payment claim on 11 April 2020.

(f) The results of the adjudication decisions were that Niclin's claims succeeded to the following extent:

(i) Charleville: Niclin claimed $372,005.14 and the adjudicator awarded $327,258.26;

(ii) Nanango: Niclin claimed $275,106.11 and the adjudicator awarded $194,656.50; and

(iii) Tinana: Niclin claimed $624,773.78 and the adjudicator awarded $355,171.91.

[9] By an amended originating application, SHA sought declarations that each of the adjudication decisions "is affected by jurisdictional error and void". Although the adjudicator and the registrar have been joined to this proceeding, they have not actively participated in it.

Jurisdictional error under the Act

[10] In *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* [2020] QSC 133 at [32] to [42], I analysed various bases on which the decision of an adjudicator under the Act might be set aside for jurisdictional error. Neither party sought to persuade me to the contrary of any part of that analysis. Accordingly, I will apply the law as there expressed.

[11] SHA advanced its case for jurisdictional error by reference to three grounds which it described in the following way:

(a) Ground 1: misconception of the nature of the adjudicator's function and misapprehension of the limits of his functions or powers;

(b) Ground 2: failure to undertake the statutory task; and

(c) Ground 3: the adjudication applications were vexatious, coupled with the absence of a necessary precondition.

[12] I will address each of the grounds under separate headings below. Because ground 3 deals with threshold issues, I will deal with it first.

Ground 3: Adjudication applications were vexatious, coupled with the absence of a necessary precondition

[13] Upon analysis, SHA's argument under this ground advanced two distinct categories of alleged jurisdictional error.

[14] First, SHA contended that the adjudicator erroneously failed to determine that Niclin's adjudication applications were vexatious within the meaning of s 84(2) of the Act. Second, SHA contended that the adjudicator erroneously failed to conclude that Niclin's final payment claims were not given within the timeframe made applicable by s 75(3) of the Act.

[15] I will consider each alleged error separately.

The alleged failure to conclude the adjudication applications were vexatious

[16] Once the registrar has received a claimant's adjudication application, the registrar must refer the application to an adjudicator: s 79(4). If the adjudicator accepts the referral, written notice of the acceptance must be served on the claimant, the respondent and the registrar, and the adjudicator will then be taken to have been appointed to decide the application: ss 81(2) and (7).

[17] Section 84 governs what the adjudicator must do consequent upon his or her appointment. It provides:

> **84 Adjudication procedures**
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> (1) Subject to the time requirements under section 85, an adjudicator must decide the following as quickly as possible—
>
> (a) an adjudication application;
>
> (b) applications for extensions of time under section 83.
>
> (2) For a proceeding conducted to decide an adjudication application, an adjudicator—
>
> (a) must decide—
>
> (i) whether he or she has jurisdiction to adjudicate the application; and
>
> (ii) whether the application is frivolous or vexatious; and
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> (b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and
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> (c) may set deadlines for further submissions and comments by the parties; and
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> (d) may call a conference of the parties; and
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> (e) may carry out an inspection of any matter to which the claim relates.
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> (3) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation unless allowed by the adjudicator.
>
> (4) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

[18] In each of its adjudication responses, SHA had asserted before the adjudicator that the adjudication application was frivolous or vexatious, but the adjudicator rejected that argument.

[19] Before me, SHA focussed its argument on the fact that, in the Supreme Court proceeding, Niclin had pleaded that the various extensions of the defects liability periods were invalid, but in the adjudications Niclin reversed its position and accepted that the extensions were validly made. In its adjudication applications, Niclin accepted that it had pleaded a contrary position in the Supreme Court, but contended that it was considering amending its pleading in the Supreme Court and "unreservedly" committed itself to the admission that the defects liability periods had been validly extended. Without this reversal of position, Niclin would have found it difficult to contend that the payment claims were delivered within the timeframe made mandatory by s 75(3). I will return to the operation of that section.

[20] The present point is that SHA contended that the apparent reprobation and then approbation of the validity of the extensions to the defects liability periods demonstrated the vexatious nature of the adjudication applications. Although Niclin eventually made some amendments to the pleadings in the Supreme Court proceeding, SHA contended that there was still some relevant inconsistency between the position Niclin took in the adjudication applications with a view to obtaining adjudication decisions in its favour, and its current pleaded position in the Supreme Court proceeding.

[21] SHA contended that the existence of an adjudication application which is not frivolous or vexatious should be regarded as a jurisdictional fact, with the result that an error in determining that fact would amount to jurisdictional error. It contended that in respect of each of the three adjudication applications, the adjudicator should have decided that the application was vexatious and, accordingly, his error went to jurisdiction. It sought to have

me examine for myself the merits of the question whether the adjudication applications were frivolous or vexatious.

[22] In couching its submissions by reference to the expression "jurisdictional fact", SHA has used an expression the meaning of which was explained by the High Court in *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at [43] per Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ:

> Generally the expression is used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. If the criterion be not satisfied then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker.

[23] Reference to a jurisdictional fact may be a reference to the existence of some objective fact or condition. Alternatively, it may be a reference to a repository of power having a particular state of mind, for example, having reached a particular state of satisfaction or having made a particular determination. Leeming JA, writing extra-judicially, has distinguished between a precondition to the exercise of power which turns on "the existence of a fact in the real world" and a precondition which requires the repository of power to have a particular "state of mind".[2] Derrington J, also writing extra-judicially, made the same distinction by reference to the terms "objective jurisdictional facts" and "subjective jurisdictional facts".[3] I will adopt the latter taxonomy.

[24] The determination whether a precondition to an exercise of power is the existence of an objective jurisdictional fact, or the existence of a subjective jurisdictional fact, is significant.

[25] If the precondition to an exercise of power is the existence of an objective jurisdictional fact, then, if a challenge is brought to the existence of the jurisdictional fact, the Court's function is to determine *de novo* whether the objective fact existed.[4] The Court determines the question upon the evidence before it, without being limited to the probative material before the repository of power.[5] This is the course which SHA invited me to take.

[26] On the other hand, if the precondition to the exercise of the power is that the repository of power has formed a particular state of mind, then, if a challenge is brought to the existence of the subjective jurisdictional fact, the Court's function is limited to determining whether the repository of power arrived at the state of mind in the way contemplated by the legislature. In *Minister for Immigration and Citizenship v SZMDS*, the High Court acknowledged that "the principles applicable where the jurisdictional fact is a state of satisfaction or opinion are traced back to the use by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* of the terms 'arbitrary, capricious, irrational' as well as 'not bona fide' to stigmatise the formation of an opinion upon which a statutory power was enlivened".[6]

[27] The answer to whether the valid exercise of a particular statutory power is conditioned in either of these ways turns on the proper construction of the statute concerned: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] to [93]; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37];

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2 M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) para 3.5 at p 67.

3 R Derrington, "Migrating towards a Principled Approach to Reviewing Jurisdictional Facts" (2020) 27 *Australian Journal of Administrative Law* 70 at 73.

4 *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [38], [50]–[51]; *Bhusal v Catholic Health Care* [2017] NSWSC 838 at [53].

5 *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [50].

6 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [23] per Gummow ACJ and Kiefel J.

Australian and International Pilots Association v Fair Work Australia (2012) 202 FCR 200 at [147].

[28] What then can be said about the proper construction of the Act in this regard?

[29] Section 85(1) of the Act provides that the adjudicator must decide an adjudication application either 10 or 15 business days after the adjudication response, depending on whether the payment claim is standard or complex. The Act does not provide for what an adjudicator must do if the adjudicator determines that the application is frivolous or vexatious. However, I think it is obvious enough from the association of ss 84(2)(a)(i) and (ii) that the legislature must be taken to have contemplated that the adjudicator should only proceed further to determine the adjudication application within those tight time limits if the adjudicator has (1) decided that he or she has jurisdiction and (2) decided that the adjudication application is not frivolous or vexatious.

[30] Section 85(3) seems to contemplate that course because it prohibits the adjudicator from deciding an adjudication application before receiving the adjudication response, but provides an exception where the adjudicator has decided that he or she has no jurisdiction or that the application is frivolous or vexatious. Similarly, ss 91(2)(b) and (c) provide that, in such cases, the registrar is not required to provide an adjudication certificate. And s 95(7) provides that the adjudicator is not regarded as having failed to make a decision (which would disentitle the adjudicator to payment of his or her fees) only because of a decision that he or she had no jurisdiction or that the application was frivolous or vexatious.

[31] All of this suggests that the legislature did intend that it was an essential part of the adjudicator's task that the adjudicator address, as a threshold question, the question referred to in s 84(2)(a)(ii), albeit within the tight timetable provided for by the Act. Accordingly, it seems to me that just as –

(a) the valid exercise of an adjudicator's jurisdiction is conditioned on the decision having complied with certain "basic and essential" statutory requirements already recognised in the case law (as to which, see *Acciona* at [34]); and

(b) the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having arrived at his or her conclusion by a process which considers the matters set out in s 88(2) (as to which, see *Acciona* at [35]);

the legislature must also be taken to have contemplated that the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having performed the task of deciding, as a threshold question, whether the application was frivolous or vexatious. The subjective jurisdictional fact is the adjudicator having a particular state of mind, namely, the state of mind of having decided that the application is not frivolous or vexatious.

[32] In the event of a challenge to the existence of that subjective jurisdictional fact, the party advancing the challenge will usually[7] have to persuade the Court that the state of mind did not exist because it was not reached in the way contemplated by the legislature. In approaching that question, it is necessary to have at the forefront of one's mind the observations made by White JA in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 (emphasis added):[8]

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7 The possibility exists that an adjudicator might overlook the question completely. This might make it easier to persuade a court that the subjective jurisdictional fact did not exist.

8 At [96], Chesterman JA agreeing at [15]. For other statements to similar effect concerning the contemplation of statutes *in pari materia*, see *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [44] and *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 at [5]–[6].

> … **the enquiry should focus more on whether the adjudicator has performed the function demanded by [the 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**.

[33] The foregoing analysis leaves no room for SHA's argument. I reject as misconceived SHA's invitation to consider *de novo* the question of whether the adjudication applications concerned were frivolous or vexatious. It is not relevant for me to express a view on that issue. The only relevant question for me is whether the adjudicator performed the function demanded by s 84(2)(a)(ii) in the way contemplated by the legislature. In each of the adjudication decisions the subject of the present proceeding, the adjudicator did specifically address the question whether the application before him should be regarded as frivolous or vexatious. He addressed and sought to apply the law on that question which had been drawn to his attention. The law so drawn to his attention was apposite to the task. He addressed the arguments which had been advanced before him. He then decided that the applications were not frivolous or vexatious. SHA made no attempt to develop an argument that his decision was not properly formed, or that there was any particular reason he should not be regarded as having performed the function demanded by s 84(2)(a)(ii) of the Act.

[34] This ground fails.

[35] For completeness, I observe that if, as SHA contends, there is still some relevant inconsistency between the position Niclin took in the adjudication applications with a view to obtaining adjudication decisions in its favour, and the position Niclin continues to assert in the Supreme Court proceeding, then that inconsistency is capable of being raised by SHA as a basis for strike out or in its defence. I express no view on the merits of SHA's contention.

<u>The alleged failure to conclude that the payment claims were made out of time</u>

[36] As I have already mentioned (see [31](a) above), the valid exercise of an adjudicator's jurisdiction is conditioned on the decision having complied with certain "basic and essential" statutory requirements already recognised in the case law. One of those requirements is that a claimant has served on the respondent a valid payment claim as required by ss 68 and 75 of the Act.

[37] It was common ground here that the payment claims which were the subject of the adjudication applications were all payment claims which related to final payments. Section 75(3) provides:

> (3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
>
> (a) the period, if any, worked out under the relevant construction contract;
>
> (b) 28 days after the end of the last defects liability period for the construction contract;
>
> (c) 6 months after the completion of all construction work to be carried out under the construction contract;
>
> (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.

[38] SHA submitted, and I agree, that on the proper construction of the Act, the valid exercise of an adjudicator's jurisdiction is conditioned on the claim having been given before the end of the longest of the periods provided by s 75(3).[9] Whether or not that has occurred is an objective fact. In the taxonomy I have adopted, it would be an objective jurisdictional

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[9] *Maxcon Constructions v Vadasz (No 2)* (2017) 127 SASR 193 at [119]–[120] per Blue J (with whom Lovell J agreed); *Fitz Jersey v Atlas Construction Group* [2017] NSWSC 340 at [25]–[27] per McDougall J.

fact. I have already explained that when a challenge is brought to the existence of an objective jurisdictional fact, the Court's function is to consider the question *de novo* on the evidence before it at the time the challenge is advanced.

[39] SHA's argument focussed on what it contended were logical incongruities in the way in which the adjudicator dealt with the possible application of s 75(3). But that was not to the point. SHA sought a declaration that the adjudication decision was void because the valid exercise of his jurisdiction was conditioned on the existence of a jurisdictional fact and that jurisdictional fact did not exist. To succeed under this ground, it was SHA who carried the onus of proof. It needed to persuade me that the jurisdictional fact did not exist by demonstrating to me, relevantly, that each relevant payment claim was in fact given after the end of the longest of the periods provided by s 75(3).

[40] SHA did not develop any coherent argument which could persuade me to reach that conclusion.

[41] There were only two candidates for the longest of the periods provided by s 75(3) mentioned in argument before me, namely the periods referred to in s 75(3)(b) and s 75(3)(c).

[42] If s 75(3)(b) were the longest period, Niclin argued that the payment claim was served within 28 days after the end of the last defects liability period because, for each contract, the last defects liability period was brought to an end by termination of the contract. Each of the three relevant final payment claims was delivered within 28 days of that time. SHA did not develop any argument against this proposition, save its argument under the preceding heading. For reasons I have explained, the argument under that heading fails. If the period provided by s 75(3)(b) is the longest period, then SHA's argument that the payment claims were given after the end of this period fails.

[43] In any event, it is doubtful that the s 75(3)(b) period was the longest of the periods referred to in s 75(3). In assessing the period provided by s 75(3)(c), the question is on what date was "the completion of all construction work to be carried out under the construction contract"? As to that question, I make the following observations:

(a) Prior to termination, practical completion had been achieved for each of the subject contracts but extended defects liability periods were still running.

(b) Whilst the contracts were still on foot, there was, at least potentially, construction work to be carried out under them, given the possibility of further rectification work being required. That was so because rectification work constitutes "construction work" and the defects liability periods had not expired.

(c) But once the contracts had been terminated, Niclin had neither the obligation nor the entitlement to carry out any construction work under the contracts. Accordingly, once the contracts had been terminated, the proper assessment of the relationship between the parties in relation to each contract was that there was no longer any further construction work "to be carried out under the construction contract". In every real sense, termination brought about the "completion" (in the sense of "conclusion"[10]) of all construction work to be carried out under the construction contracts. The final payment claims were given within six months of that date.

(d) It could, at least theoretically, be demonstrated that all construction work to be carried out under the contracts had been completed at an earlier date than the date of termination. Theoretically, a tribunal of fact might be persuaded that, on a particular earlier date, it was not possible that any further work was to be completed under the

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10 "Conclusion" is one of three meanings given to the noun "completion" by the Macquarie Dictionary.

construction contracts because the works had been completed without defects. Thus, the six-month period might have commenced on an earlier date. But SHA did not advance any such argument.

(e) If the period provided by s 75(3)(c) is the longest period and termination brought about the completion of all construction work, then SHA's argument that the payment claims were given after the end of this period fails because all the payment claims were brought within the relevant six-month period.

[44] SHA has failed to persuade me to find that each relevant payment claim was in fact given after the end of the longest of the periods provided by s 75(3).

[45] This ground fails.

Ground 1: Misconception of the nature of the adjudicator's function and misapprehension of the limits of his functions or powers

[46] Under this ground, SHA undertook to demonstrate, by analysis of the way the adjudicator made and expressed his justification for various conclusions which he reached, that I should reach the conclusion that he must have misconceived the nature of his task or misapprehended the limits on it.

[47] SHA's argument relied on observations made by Applegarth J in *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346 at [56], where his Honour described a particular jurisdictional error in these terms:

> The adjudicator did not identify a contractual entitlement to be reimbursed the relevant costs. Instead, his reasons appear to assume an entitlement to be paid for costs incurred prior to the reference date. He failed to identify the contractual or other legal basis of the entitlement, and therefore to find an entitlement that arose prior to the reference date. By including sums which, as at the relevant date, BGC had no entitlement to be paid, and for which BGC had not shown an entitlement to be paid, the adjudicator ignored a limit on his jurisdiction and exceeded his jurisdiction. The fact that costs were incurred before the reference date was not sufficient to create an entitlement to be paid for those costs. In failing to identify and find a legal source for that entitlement the adjudicator made a jurisdictional error. The legislation requires the source of an entitlement to be paid to be found. In failing to consider and find the source of the entitlement, the adjudicator failed to take into account a matter he was required to take into account and thereby fell into jurisdictional error. Another way of characterising the jurisdictional error is to say that in finding that an entitlement to be paid existed simply because BGC incurred costs before the reference date, the adjudicator misconceived the nature of the functions he was performing or misapprehended the limits on his functions or powers.

[48] In my view, his Honour's observations were not intended to be construed as though they set up an all-purpose and absolute test for jurisdictional error. In truth, his Honour's decision is but one exemplar of the proposition to which I have earlier adverted (as to which see [31](b) above), namely that the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having arrived at his or her conclusion by a process which considers the matters set out in s 88(2) of the Act. If the adjudicator has not done so, the condition fails and the apparent exercise of jurisdiction is not valid.

[49] Section 88 is in these terms:

> **88 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 chapter and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;

(b) the provisions of the relevant construction contract;

(c) the payment claim to which the application relates, together with all submissions, including relevant documents, 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 documents, 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) However, the adjudicator must not consider any of the following—

(a) an adjudication response, to which the adjudication application relates, that was not given to the adjudicator within the time required under section 83;

(b) a reason included in an adjudication response to the adjudication application, if the reason is prohibited from being included in the response under section 82.

(4) Also, the adjudicator may disregard an adjudication application or adjudication response to the extent that the submissions or accompanying documents contravene any limitations relating to submissions or accompanying documents prescribed by regulation.

(5) 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.

(6) The adjudicator must give a copy of the decision, and notice of the fees and expenses to be paid to the adjudicator for the decision, to the registrar at the same time the adjudicator gives a copy of the decision to the claimant and respondent.

[50] One sees from s 88(1) that the adjudicator's task is to decide the amount of the "progress payment" and, in deciding that amount, the adjudicator is to consider only the matters specified in s 88(2), is not to consider any of the matters specified in s 88(3), and must comply with s 88(5) concerning reasons.

[51] There were two ways in which SHA developed its attack on the subject adjudication decisions. Each may be analysed using the decision in relation to the Charleville contract as the appropriate example.

[52] First, SHA impugned the reasoning by which the adjudicator determined that Niclin should receive retentions under the contracts. It contended that the adjudicator could not identify any contractual basis for making that determination and must be taken to have allowed that part of Niclin's claim upon some other (impermissible) basis. In this regard, in *Acciona* at [35], I observed that the following important matters must be noted in relation to this ground of jurisdictional error (footnotes omitted, emphasis added):

(a) The valid exercise of an adjudicator's jurisdiction is not conditioned on the adjudicator reaching what is objectively the correct conclusion on all of the questions of fact or law required by the consideration of the matters set out in s 88(2). Or, to put it another way, **there are many errors of fact and law which might be made by an adjudicator which would not be regarded as going to jurisdiction**.

(b) On an application to set aside an adjudicator's decision for jurisdictional error, the question is not whether the Court would have come to the same conclusion as the adjudicator. Rather, t**he question is whether the adjudicator arrived at his or her conclusion by a process which failed to consider the matters set out in s 88(2)**.

(c) This point was succinctly made in *Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd* [2015] 1 Qd R 463 at [29], where McMurdo J pointed out … :

> To determine an application, **an adjudicator must identify the relevant terms of the contract upon which the claim is made and then apply the facts, as he or she finds them to be, to those terms upon their proper interpretation. The identification of the terms and the interpretation of those terms are thereby questions which the adjudicator must answer in the exercise of his jurisdiction. It follows that an error in the identification of the terms or in their interpretation will not be a jurisdictional error** …

(d) His Honour distinguished between that sort of error – which was not jurisdictional error – and that which was, in the following passage:

> However, **where it appears that an adjudicator is not meaning to apply the contract, as he or she interprets it, but is instead allowing the claim upon some other basis, the position is different, because the adjudicator is thereby misunderstanding the scope of the adjudicator's jurisdiction**.

(e) Adjudicators under [the Act] do not have to get the answer right, but if it is demonstrated that they have not gone about their task by carrying out the active process of intellectual engagement with the issues and the submissions before them that [the Act] requires, then they will have fallen into jurisdictional error because they will not have done the very thing s 88(2) of [the Act] required them to do.

[53] Alternatively, SHA contended that the adjudicator's reasons were so deficient in this regard that the same conclusion must be reached. As I explained in *Acciona* at [37] to [40], this basis of attack has a similar dividing line to that which exists in the previous basis for attack, namely, a line between a deficiency of reasons which demonstrates that the adjudicator has not discharged his or her task as contemplated by s 88, and that which does not go so far.

[54] In order to consider whether the subject adjudication decisions may be impugned in either of these ways, it is necessary, first, to note some matters concerning the relevant contractual terms and, second, to examine how the adjudicator reached his decision.

[55] The relevant conditions were an amended form of Australian Standard general conditions of contract for design and construct AS4902–2000.

[56] Clause 37 provided for progress claims by Niclin in respect of work it had done under the contract. That clause provided for successive progress claims to be made, and for a Superintendent to issue in response to each claim a progress certificate certifying the amount due pursuant to the claim and also a certificate evidencing the Superintendent's assessment of "retention moneys". SHA was entitled to deduct the amount certified for retention moneys from the amount otherwise certified to be due for work which had been performed.

[57] The contractual contemplation was that any retention moneys so deducted from amounts which would otherwise have been payable for work done would be held as security pursuant to cl 5.[11] Clauses 5.2 and 5.4 dealt with the circumstances in which SHA (as Principal) was entitled to have recourse to security and the circumstances in which SHA was obliged to reduce or release security in these terms:

> **5.2 Recourse**
>
> *Security* shall be subject to recourse by the *Principal* when:
>
> (a) the *Principal* remains unpaid after the time for payment of a claim for moneys;
>
> (b) the *Superintendent* has certified that monies are due and payable to the *Principal*;

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[11] There was an incongruity between the language of the contract (which in Annexure Part A identified that Niclin would provide insurance bonds as security, rather than cash retention) and what actually happened (namely, that security was actually provided in the form of cash retentions, and not by way of insurance bonds). But it was common ground that this had happened and that cash retentions were accepted as security for the purposes of cl 5.

(c) the *Principal* has or asserts an entitlement to payment of money (including by way of set off) by the *Contractor* in connection with this *Contract* or *otherwise at law*;

(d) the *Principal* asserts that the *Contractor* is in breach of any of its obligations in connection with this *Contract* (whether or not the financial consequences to the *Principal* of any such breach have been ascertained) in all such cases as if the *security* were a sum of money due or to become due to the *Principal* by the *Contractor*; or

(e) the *Contractor* is insolvent within the meaning subclause 39.11.

…

5.4 Reduction and release

Upon the issue of the *certificate of practical completion* the *Principal's* entitlement to *security* … shall be reduced by the percentage or amount in *Item* 14(f) as applicable, and the reduction shall be released and returned within 14 days to the *Contractor*.

…

The *Principal's* entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon the *Principal's* entitlement to *security* ceasing, the *Principal* shall release and return forthwith the *security* to the *Contractor*.

[58] If recourse was not had to the cash retentions pursuant to cl 5.3, then SHA would be obliged to return 50% of the retentions once practical completion was achieved and could hold the balance until 14 days after the final certificate. The process of claiming for and obtaining a final certificate was set out in cl 37.4. The effect of that clause was that Niclin could lodge a final payment claim within 28 days after the expiry of the last defects liability period, and the Superintendent was obliged to issue a final certificate within 42 days after the expiry of the last defects liability period.

[59] However, the contract did provide for what would happen to contractual rights if the contract was terminated in the way in which SHA had purported to terminate it. Clause 39.10 of the contract provided:

> If the *Contract* is terminated pursuant to subclause 39.4(b) or 39.9, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages.

[60] Unless an entitlement to be paid the amount of the retention moneys which had been withheld from previous progress payments had already accrued under the contract prior to its termination, then, as a matter of orthodox contract law, Niclin could not advance a claim that those moneys were contractually due and owing under the contract: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476–7. Niclin would have to express its claim by reference to some other cause of action.

[61] The adjudicator acted on these propositions:

(a) Moneys had been retained by SHA by operation of cl 37.[12]

(b) Practical completion was achieved on 2 August 2018, and a 12-month defects liability period commenced on that date.[13]

(c) However, the defects liability period was extended by a defects notice dated 25 July 2019, with the result that the defects liability period was to expire on 2 August 2020.[14]

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12 Charleville adjudication decision at [133]–[134]; [152]; [457]–[466]; [625].
13 Charleville adjudication decision at [14].
14 Charleville adjudication decision at [17].

(d) Pursuant to cl 39.4 of the contract, SHA terminated the contract on 12 December 2019.[15]

(e) Pursuant to s 67(2) of the Act, a reference date arose on 12 December 2019 when the contract was terminated.[16]

[62] The adjudicator noted the terms of cl 37.10 and concluded that the progress payment provisions of the contract did not "survive termination",[17] with the result that Niclin could not submit a claim for payment under the contract and could not advance a claim for the release of retentions under cl 37.4 of the contract.[18] He then observed:[19]

> Therefore, in order to claim any money which [Niclin] claims is due under the contract from [SHA], including retention money, [Niclin] must submit its payment claim, for all amounts it claims is due, following termination.

[63] He reasoned that, pursuant to s 67(2), Niclin had a right to advance a final payment claim under the Act.[20] He reasoned that Niclin was authorised by the Act to include in that final payment claim all moneys it said were due and payable under the contract.[21] He then concluded that the existence of a right to a final payment claim was a sufficient basis to warrant the conclusion that Niclin had the right to include the amount of the cash retentions in the amount that it claimed was payable by SHA.[22] Two aspects of his reasoning should be quoted.

[64] First, from the "Jurisdiction" section of his reasoning:

> 152. I am satisfied from the information before me as follows:
>
> - That the payment claim does not include for any costs incurred in rectifying defects;
> - That the payment claim includes for the completion of contract works;
> - That the payment claim includes for the release of cash retention;
> - That [Niclin] has carried out the rectification of the defects set out in [SHA's] defects notice dated 25 July 2019;
> - That [SHA] was aware that the rectification work had been carried out; and
> - That having completed the defects included in the defects notice and pursuant to section 68(1)(b) of the Act, [Niclin] is entitled to include the release of the cash retention in the amount [Niclin] says is payable by [SHA].

[65] Finally, his reasoning was ultimately expressed in these terms:

> 461. As noted in the 'Jurisdiction' section of this adjudication decision, the parties agree that the contract has been terminated and I am satisfied that the contract has been terminated. In addition, I am satisfied that the defects liability period is no longer on foot. I am also satisfied that pursuant to section 75(6) of the Act, the payment claim is a progress claim for the final payment for the construction work carried under the contract.
>
> 462. I am therefore satisfied that [Niclin] is entitled to the release of the final security held by [SHA].

[66] In my view, the criticisms which SHA made of the adjudicator cannot be accepted. It was evident from his reasoning that he had performed his task in the manner contemplated by the Act. He appreciated that the contract did not give a right to recover the value of the retention sums. He reasoned that once Niclin had established a right to make a final

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15 Charleville adjudication decision at [21]; [128].
16 Charleville adjudication decision at [136]; [195].
17 Charleville adjudication decision at [131]; [140].
18 Charleville adjudication decision at [133].
19 Charleville adjudication decision at [134].
20 Charleville adjudication decision at [135]–[137].
21 Charleville adjudication decision at [148].
22 Charleville adjudication decision at [148]–[152]; [461]–[462].

payment claim, the provisions of the Act were such that the final payment claim could be calculated in such a way that permitted an effective recovery of retentions (or, using his words, having completed the works and defects, Niclin was "entitled to include the release of the cash retention in the amount [Niclin] says is payable"). That was so because of the nature of a final payment claim, and of cash retentions (which represent a withholding of payment from the value of work which has already been completed).

[67] For the reasons which follow, the proper construction of the Act permitted of that approach.

[68] The final reference date for this contract was the date the contract was terminated: s 67(2). The Act contemplates a final payment claim under its terms, even if no final payment claim is authorised by the contractual provisions.

[69] From that final reference date, Niclin was entitled to a progress payment: s 70. "Progress payment" is relevantly defined in s 64 as "the final payment for construction work carried out, or for related goods and services supplied, under a construction contract". That means that, from the date the contract was terminated, the Act gave Niclin the entitlement to advance a payment claim for the final payment for construction work carried out under the contract.

[70] Pursuant to s 71:

> The amount of a progress payment to which a person is entitled under a construction contract is—
>
> (a) if the contract provides for the matter—the amount calculated in accordance with the contract; or
>
> (b) if the contract does not provide for the matter—**the amount calculated on the basis of the value of construction work carried out**, or related goods and services supplied, **by the person in accordance with the contract**.

[71] Pursuant to s 72:

> (1) Construction work carried out under a construction contract is to be valued—
>
> (a) if the contract provides for the matter—in accordance with the contract; or
>
> (b) if the contract does not provide for the matter—**having regard to**—
>
> (i) **the contract price for the work; and**
>
> (ii) **any other rates or prices stated in the contract; and**
>
> (iii) **any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and**
>
> (iv) **if any of the work is defective, the estimated cost of rectifying the defect**.
>
> …
>
> (4) In this section—
>
> ***contract price***, for a construction contract, means the amount the contracted party is entitled to be paid under the contract or, if the amount can not be accurately calculated, the reasonable estimate of the amount the contracted party is entitled to be paid under the contract.

[72] In this case, the contract did not provide for the calculation of a final payment claim calculated from the date of termination of the contract or for the valuation of such a claim. Accordingly, the amount of this particular progress payment (which, in the circumstances, was the final payment claim) was to be calculated under s 71(b) and valued under s 72(1)(b).

[73] In the present case, Niclin presented its payment claim in a way which demonstrated that, insofar as its claim sought return of retentions, that was because its payment claim was based on the value of all work done including variations less previous payments, and that

value necessitated payment of retentions which had previously been withheld from the valuation of work done. That is apparent by reference to this table expressed in Niclin's payment claim:

SUMMARY OF TOTAL VALUES	
Total Contract Works:	$ 2,372,337.00
Total Variations:	$ 72,970.21
Total Interest:	$ 17,811.90
Total Value to Date:	$ 2,463,119.11
Previous Payments Received excluding GST (See Schedule 4: Previous Payments):	($ 2,124,932.74)
Total Amount Outstanding excluding GST (including the Final Completion Retention Withheld):	**$ 338,186.37**

SCHEDULE OF VALUES CLAIMED IN THIS PAYMENT CLAIM	
Contract Works (See Schedule 1: Contract Works):	$195,432.95
Variations (See Schedule 2: Variation Works):	$ 65,445.08
Interest (See Schedule 3: Interest Owing on Late Payment):	$ 17,811.90
Final Completion Retention (2.5% of the Contract Sum):	$ 59,496.56
Less Retentions:	$0.00
Amount due this claim:	**$ 338,186.49**
GST	$ 33,818.65
Total Amount (including GST)	**$ 372,005.14**

[74] SHA's first argument before me wrongly seeks to advance the proposition that a payment claim under the Act cannot advance a money claim unless it can demonstrate that the entirety of the amount claimed has actually accrued due under the contract. But that proposition cannot be made good. Most sophisticated construction contracts are structured such that progress payments do not accrue due unless and until a certifier has certified an amount for payment. The existence of such a certificate is a condition precedent to the amount becoming due and payable under the contract. Absent that certificate, the claimant is not entitled to be paid under the contract. But the Act creates an entitlement to a progress payment valued in a particular way, and regardless of whether the contractual certificate has been obtained. The fact that progress payments are to be valued "having regard to … contract price", and that the definition of that term refers to the amount the party is "entitled to be paid under the contract", is not to be construed as a mechanism by which contractual conditions precedent to entitlement stymie the right to a progress payment which the Act provides.

[75] A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract. In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract. The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act.

[76] A variant of the first argument was that conducting the valuation of a final payment claim in a way which permits of the effective recovery of cash retentions would be contrary to the contractual contemplation that security in the form of cash retentions would continue to be available to SHA post-termination. There are two answers to this. First, the answer

given in the previous two paragraphs applies. But second, and even if the first answer is wrong, an adjudicator's erroneous failure to appreciate the correctness of the contended-for construction of the contract would be an error within jurisdiction. I observe, for completeness, that it is not at all clear[23] (and it seems to me to be unnecessary to decide) that, in this contract, SHA's right to have recourse to security would survive termination by it pursuant to cl 39.4. Clause 39.10 was very explicit as to what would happen to contractual rights in the event of such a termination by SHA. It might be thought that that clause is inimical to the conclusion that contractual rights to access or to retain security should continue post-termination.

[77] SHA's second argument seeks to infer the same outcome from what is said to be the paucity of the adjudicator's reasoning. It is impossible to reach that outcome. I discussed the law in this regard in *Acciona* at [37] to [40], particularly by reference to the detailed analysis by Flanagan J in *Annie Street JV Pty Ltd v MCC Pty Ltd* [2016] QSC 268. Although the adjudicator could have developed his reasoning more, I am satisfied that, taken as a whole, his reasoning is both discernible and in fact authorised by the Act.

[78] This ground of challenge also fails.

[79] For completeness, I note that Niclin also sought to justify the adjudicator's reasoning by reference to an argument to which the adjudicator did not refer and where there was no reason to believe that he might have reasoned in that way. If this ground of jurisdictional error were established, it would have been because of the way in which the adjudicator in fact reasoned or because of conclusions on that question which one could draw from the way in which he expressed his reasons. It is not to the point to try to justify retrospectively the conclusion an adjudicator reached by reference to a process of reasoning which there is no reason to believe the adjudicator in fact used.

Ground 2: Failure to undertake statutory task

[80] For the reasons I explained under the previous heading, the amounts of each of the three progress payments which were the subject of this proceeding were to be calculated under s 71(b) and valued under s 72(1)(b) of the Act. I have quoted and highlighted the relevant parts of those sections at [70] and [71] above.

[81] If the adjudicator formed the view that any of the work being valued was defective, then his task required him to value the work, amongst other things, by "having regard to … the estimated cost of rectifying the defect". There is no doubt that the adjudicator in fact recognised that this formed part of his task. He did so explicitly in relation to the Charleville and Tinana decisions,[24] and implicitly in relation to the Nanango decision.[25] However, as SHA correctly identified, the adjudicator's reasoning suggested that he would address the questions required when he embarked upon addressing the separate argument which SHA had raised concerning its ability to advance a set-off for costs incurred in relation to defective work.

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23 Notwithstanding observations by judges in relation to other contracts in cases like *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of NSW* [1982] 1 Aust Const LR 81 at 87; *Kennedy Taylor (Vic) Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2000] VSC 43 at [25]; *Southern Cross Constructions (NSW) Pty Limited (administrators appointed) v Bucasia Pty Limited* [2012] NSWSC 1419 at [28]–[32].

24 As to the Charleville decision, see [242]–[246], [252] and [260]. As to the Tinana decision, see [256]–[260], [266] and [274].

25 In the Nanango decision, the adjudicator quoted the sections of the Act and stated he would have regard to them (see [273]–[277]), but there was no equivalent express statement to those referenced in the previous footnote. However, in light of (1) the fact that the Nanango and Charleville decisions were published on the same day, (2) the broadly consistent reasoning between the three decisions and (3) the commonality between the contracts and the claims, it is implicit that the adjudicator had the same recognition in relation to the Nanango decision.

[82] Unfortunately, and again as SHA correctly identified, for some particular alleged defect items[26] the adjudicator rejected SHA's set-off argument based on SHA having failed to comply with the contractual terms which would have, if complied with, established a debt in SHA's favour. Then, having rejected set-off, he simply proceeded to conclude that there would be no deduction made from what would otherwise be the valuation of the work, without ever returning to the separate questions of whether the work was defective and, if so, what was the appropriate estimate of the rectification cost. This probably would have been satisfactory if the rejection of the set-off argument could be understood as a rejection of the underlying proposition that there had been defective work. However, it could not. The rejection was of the proposition that a debt capable of set-off had been established by SHA having correctly following particular contractual procedures. The reasons could not be understood as rejecting the contention that the work had been defective.

[83] SHA contended, and I agree, that this revealed a failure to undertake the adjudicator's task, in relation to each of the particular items concerned. The valuation task was quite separate to the task of assessing whether SHA had established a contractual right to set-off. What s 72(1)(b)(iv) required the adjudicator to do was to determine if any of the work was defective. If the answer was yes, then he was obliged to estimate the cost of rectifying the defect and then to take it into account in valuing the construction work. He did not do this in relation to the items identified by SHA.

[84] Columns 1 and 2 of Annexure A to these reasons identify the particular alleged defects in respect of which SHA contended that the adjudicator failed to perform his valuation task. Column 3 identifies the amount of rectification costs which SHA contended should have been valued and then taken into account. Columns 4 and 5 identify the decision of the adjudicator, and column 6 identifies the relevant failure to perform the statutory task which I find that SHA has established.

[85] As appears from Annexure A, the amounts concerned were insubstantial except in respect of one item in relation to the Charleville decision.

[86] The question arises as to whether establishing the relevant failures by the adjudicator to perform the statutory task in relation to discrete alleged items of defect is sufficient to establish jurisdictional error. The problem for SHA is that it is evident that the adjudicator considered the relevant terms of the Act and that he did not misconceive his task. His error was that, although he had identified his task correctly in relation to valuation of the work and defects and he said he would come back to perform it, he failed to do so in relation to some defect items, because he either accidentally omitted to do so, or because he wrongly regarded the assessment of whether a contractual set-off argument applied as tantamount to the same thing. The tasks which he did not perform were some only of very many issues which he had to decide. This represented a failure in the proper application to some discrete items before him of the valuation rules which he had correctly identified were applicable. Such an accidental or erroneous omission by an adjudicator cannot be characterised as anything other than an error within jurisdiction: cf *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [54] to [55] per Hodgson JA (with whom Beazley JA agreed); *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [107]; *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd* [2015] 1 Qd R 350 at [89] to [93] per Morrison JA.

[87] The result is that ground 2 also fails.

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[26] The items concerned were identified in a schedule to SHA's submissions. I have treated this ground of complaint as confined to the items so identified.

Conclusion

[88] SHA has failed to establish that any of the adjudication decisions were vitiated by jurisdictional error. Accordingly, the amended originating application filed 28 May 2020 is dismissed. I will hear the parties as to costs.

ANNEXURE A

Number	Defect	Amount claimed	Decision	Reference	Relevant failure to perform the statutory task
Nanango adjudication decision					
2	SHA alleged there was a defect in the freezer room. It claimed the costs of having to engage a contractor to attend the site and undertake an investigation.	$450.00	Non-compliance with cll 29 or 35 meant SHA was not entitled to set-off. Accordingly, no set-off allowed and "the amount of $Nil is carried to collection".	[716]–[724]	The adjudicator failed to value this aspect of the work as required by s 72(1)(b)(iv). He was required (1) to form a view whether the work was defective as SHA alleged and (2) if so, he was obliged to estimate the cost of rectifying the defect and to then take it into account in valuing the construction work. It appeared that the adjudicator did accept that the work had some defects. However, he did not perform the valuation task.
4	SHA alleged there was a defect in the air conditioning system. It claimed the costs of having to engage a contractor to attend the site to undertake an inspection and service of the air conditioning system.	$540.00	As per item 2.	[732]–[737]	See discussion for item 2. However, for item 4, it was not apparent whether the adjudicator accepted there was a defect. He did not perform the valuation task.
5	SHA alleged there was a defect in the freezer room. It claimed the costs of having to engage a contractor to attend the site and undertake an inspection of the freezer room due to failure to sustain adequate temperatures.	$540.00	As per item 2.	[738]–[743]	As per item 4.
6	SHA alleged there was a power short in the freezer room. It claimed the costs of having to engage a contractor to attend the site and undertake an inspection of the freezer room due to the power short.	$560.00	As per item 2.	[744]–[749]	As per item 4.
Subtotal		**$2,090.00**			
Charleville adjudication decision					
1	The ULP fuel tank was said to be defective. As a result of the defect, SHA said it incurred costs associated with pumping out water from the tank.	$4,816.20	Non-compliance with cll 29 or 35 meant SHA was not entitled to set-off. Accordingly, no set-off allowed and "the amount of $Nil is carried to Collection".	[530]–[536]	The adjudicator failed to value this aspect of the work as required by s 72(1)(b)(iv). He was required (1) to form a view whether the work was defective as SHA alleged and (2) if so, he was obliged to estimate the cost of rectifying the defect and to then take it into account in valuing the construction work. It is not clear whether he did (1), but he did not do (2).

Number	Defect	Amount claimed	Decision	Reference	Relevant failure to perform the statutory task
5	Two particular underground fuel tanks were said to be defective. SHA claimed rectification costs.	$102,100.00	As per item 1.	[539]–[561]	See discussion for item 1. However, for item 5, it appeared that the adjudicator may have accepted that the work had some defects. However, he made no specific decision and did not perform the valuation task.
7	SHA alleged that there were electrical works relating to certain fuel tanks which were not completed. It claimed the costs of having to engage a contractor to attend site to reconnect manways, fuel lines and turbines in relation to those tanks.	$7,700.00	As per item 1.	[568]–[573]	As per item 1.
9	SHA alleged there was a plumbing leak in the public toilet that was leaking into the shop and storeroom. It claimed the costs of having to engage a contractor to attend the site and fix the leak.	$350.00	As per item 1.	[578]–[581]	As per item 1.
11	SHA alleged that a light failed in a freezer. It claimed the costs of having a contractor attend site to replace the light.	$450.00	As per item 1.	[588]–[591]	As per item 1.
12	SHA alleged that following the rectification of the defects the subject of item 5, it was required to engage a contractor to attend site to undertake inspection of pipework connections. It claimed the costs of so doing, including the removal and reinstallation of a fill point tube to access E10 tank and supply of confined space permit and safety equipment.	$6,763.40	As per item 1.	[592]–[596]	As per item 1
Subtotal		**$122,179.60**			
Tinana adjudication decision					
3	SHA asserted a defect in the roof and claimed as costs of rectification the costs of having a contractor attend site and undertake an inspection of the roof leak.	$450.00	Non-compliance with cll 29 or 35 meant SHA was not entitled to set-off. Accordingly, no set-off allowed and "the amount of $Nil is carried to Collection".	[714]–[722]	The adjudicator failed to value this aspect of the work as required by s 72(1)(b)(iv). He was required (1) to form a view whether the work was defective as SHA alleged and (2) if so, he was obliged to estimate the cost of rectifying the defect and then to take it into account in valuing the construction work. It is not clear whether he did (1), but he did not do (2).

Number	Defect	Amount claimed	Decision	Reference	Relevant failure to perform the statutory task
Subtotal		**$450.00**			