SUPREME COURT OF QUEENSLAND

CITATION:	*Insite Construction Services Pty Ltd v Daniels Civil Pty Ltd & Anor* [2023] QSC 33
PARTIES:	**INSITE CONSTRUCTION SERVICES PTY LTD ACN 612 898 414** (Applicant) **v** **DANIELS CIVIL PTY LTD ACN 618 903 147** (First Respondent) **DAMIAN LONG** (Second Respondent)
FILE NO:	BS 13031 of 2022
DIVISION:	Trial division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	3 March 2023
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2022
JUDGE:	Crowley J
ORDER:	1. **The application is dismissed.** 2. **The Applicant is to pay the costs of the First and Second Respondents.**
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 entered into a construction contract to which the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) applied – where the first respondent purported to serve a payment claim on the applicant – where the applicant purported to serve a payment schedule asserting a nil amount was payable – where the first respondent applied for adjudication of the payment claim – where the adjudicator determined the first respondent was entitled to the full amount of the payment claim – where applicant seeks a declaration that the adjudicator's decision is void on account of jurisdictional error – where the applicant seeks orders restraining first respondent from relying upon or attempting to enforce the

adjudicator's decision – whether the Court should grant the application

Acts Interpretation Act 1954 (Qld), s 27B
Building Industry Fairness (Security of Payment) Act 2017 (Qld), ch 3, s 3, s 64, s 67, s 69, s 69(c), s 79, s 70, s 71, s 72, s 75, s 75(3), s 75(4), s 76, s 77, s 78, s 79, s 82, s 82(2), s 82(4), s 84(1), s 84(2)(a)(i), s 88, s 88(1)(a), s 88(2), s 88(2)(a), s 88(3), s 88(3)(b), s 88(4), s 88(5)(b), s 91, s 150, s 154, s 93(1), s 101
Building and Construction Industry Payments Act 2004 (Qld)
Building and Construction Industry Security of Payment Act 1999 (NSW), s 22, s 22(1)(a)
Judicial Review Act 1991 (Qld), sch 1 pt 2, s 18(2)

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd (2020) 4 QR 410; [2020] QSC 133, applied
Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2007] QSC 286, cited
Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] 2 Qd R 495; [2008] QCA 213, followed
Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd (2021) 7 Qd R 34; [2021] QCA 10, cited
Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228, considered
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, cited
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, cited
Kioa v West (1985) 159 CLR 550; [1985] HCA 81, cited
Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, cited
Nathanson v Minister for Home Affairs (2022) 403 ALR 398; [2022] HCA 26, cited
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 022, cited
Queensland v Epoca Constructions Pty Ltd [2006] QSC 324, explained
Total Lifestyle Windows Pty Ltd v Aniko Constructions (No. 2) [2021] QSC 231, cited

COUNSEL: T W Ambrose for the Applicant
M C Long for the First Respondent
No appearance for the Second Respondent

SOLICITORS: Construction Lawyers Brisbane for the Applicant
Spire Law for the First Respondent
No appearance for the Second Respondent

Introduction

[1] On 15 December 2021, the Applicant, Insite Construction Services Pty Ltd ('**Insite**') entered into a subcontract (the '**Subcontract**') with the First Respondent, Daniels Civil Pty Ltd (**'Daniels'**), whereby Daniels was to undertake construction works on a project for a new build of school buildings at the Good Samaritan Catholic College at Bli Bli (the '**Project**'). Shortly thereafter, Daniels commenced work on the Project under the Subcontract.

[2] The Subcontract was a 'construction contract' to which the progress payment provisions of ch 3 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the '***Payment Act***') applied.

[3] On 6 June 2022, Daniels publicly issued a 'Company Release', which advised that it had decided to cease trading and wind-down its business, and which included the following statement:

> While there are many current examples of builders who continued to trade while insolvent, this is not the strategy that Daniels Civil Pty ltd wish to pursue. Instead, Daniels Civil's strategy is to communicate openly with our stakeholders and seek an outcome that is in the best interests of all stakeholders. This includes: (i) negotiating with stakeholders to have work in progress transitioned across to another Civil Contractor (subject to any agreement regarding cost increases)...

[4] On 9 June 2022, David Daniels, the managing director of Daniels, sent an email to David Schloss, Insite's project manager for the Project, with the subject heading 'Notification of Contract Termination – Good Samaritan College, Bli Bli'. In that email, Mr Daniels advised:

> As you may have recently been made aware, and as per the circumstances laid out in the attached letter, Daniels civil has made the difficult decision to terminate our current contracts, including Good Samaritan College, Bli Bli - prior to completing our allotted works, as per our entitlement to do so set out within the clauses of our contractual agreement.
>
> …
>
> On this particular project, Daniels Civil will complete our earthworks under block P, and all other works will need to be completed by a third party contractor…

[5] In the course of an ensuing dispute between the parties, Daniels claimed that the Subcontract was not terminated at this time, but that the parties had agreed to a variation, whereby Daniels would complete the remaining Block P works. Daniels further claimed that the Subcontract was later terminated by it on 26 August 2022, as a result of Daniels' acceptance of Insite's apparent repudiation of the Subcontract by its act of engaging another subcontractor to complete the remaining Block P works.

[6] Insite rejected this claim, insisting that the Subcontract was terminated on 9 June 2022, when it accepted Daniels' unlawful termination of the Subcontract, and no variation had been agreed.

[7] On 2 August 2022, Daniels purported to serve a payment claim on Insite (the '**Payment Claim**') seeking a progress payment of $138,387.16, including GST, in

respect of works apparently completed by it in respect of the Project, according to a reference date of 28 July 2022.

[8] On 11 August 2022, Insite purported to serve Daniels with a payment schedule in response to Daniels' Payment Claim (the '**Payment Schedule**'). Insite's Payment Schedule asserted a nil amount was payable to Daniels.

[9] On 21 September 2022, Daniels applied for adjudication of the Payment Claim, pursuant to s 79 of the *Payment Act* (the '**Adjudication Application**'). On or about 27 September 2022, the Second Respondent (the '**Adjudicator'**) was appointed to decide the Adjudication Application.[1]

[10] On 19 October 2022, the Adjudicator gave his decision in the matter (the '**Decision**'). The Adjudicator determined that Daniels was entitled to the full amount of the Payment Claim and decided the adjudicated amount as $138,387.16, including GST.

[11] By Originating Application filed 25 October 2022, Insite seeks a declaration that the Decision is void on account of jurisdictional error and orders restraining Daniels from relying upon or attempting to enforce the Decision.

[12] Daniels says the Decision was not affected by jurisdictional error and the application should be dismissed.

[13] The parties prepared a joint list of issues for determination, which sets out the following grounds and issues which are to be considered and resolved:

Ground 1

1. Did the Adjudicator deny Insite procedural fairness in the way in which he determined the Reference Date Argument (as defined in Insite's Outline of Argument) at [38]-[52] of the Decision?
2. If the answer to Issue 1 is yes, was it a material denial of procedural fairness?

Ground 2

3. Did the Adjudicator misapprehend the nature of his function under the *Payment Act* at [95]-[100] of the Decision in finding that Daniels was entitled to the total amount claimed in the Payment Claim by reference to the reasons in *Queensland v Epoca Constructions Pty Ltd* ('***Epoca***')?[2]
4. Is this case distinguishable from *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* ('***Bezzina***')?[3]
5. If this case is distinguishable from *Bezzina*, do the statements of Hodgson JA in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* ('***Coordinated Construction***') apply to the *Payment Act*?[4]

Ground 3

6. Did the Adjudicator adequately discharge the obligation to 'include the reasons for the decision' under s 88(5)(b) of the *Payment Act* at [95]-[100] of the Decision?

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1 The Second Respondent did not appear at the hearing. He had indicated to the Applicant that he did not intend to appear and will abide by the order of the court (save with respect to costs, if relevant).

2 [2006] QSC 324.

3 [2008] 2 Qd R 495.

4 (2005) 63 NSWLR 385, 399 [52]–[53]

7. Did the Adjudicator deny Insite procedural fairness at [95]-[100] of the Decision in finding that Daniels was entitled to the total amount claimed in the Payment Claim by reference to the reasons in *Epoca*?

Ground 4

8. If the answer to Issue 7 is yes, was it a material denial of procedural fairness?

Remittal

9. If the Decision or part thereof is void on account of jurisdictional error, can the Court remit the Adjudication Application to the Adjudicator to make a new determination?

10. Should the Court follow the decision of Freeburn J in *Total Lifestyle Windows Pty Ltd v Aniko Constructions (No. 2)* in finding that the court has 'an inherent and discretionary power to remit'[5] notwithstanding the decision of the Court of Appeal in *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd* (?[6]

11. If the answer to Issue 9 is yes, should the Court exercise the power to remit?

Legislative framework

[14] The *Payment Act* was introduced to improve security of payment for subcontractors in the building and construction industry by providing for effective, efficient and fair processes for securing payment.[7] It replaced the previous *Building and Construction Industry Payments Act 2004* (Qld) (the '***BCIPA***').

[15] The main purpose of the *Payment Act* is stated in s 3, which provides:

> **3 The main purpose of Act**
>
> (1) The main purpose of this Act is to help people working in the building and construction industry in being paid for the work they do.
>
> (2) The main purpose of this Act is to be achieved primarily by—
>
> (a) requiring the use of statutory trusts for particular contracts related to the building and construction industry; and
>
> (b) granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and
>
> (c) establishing a procedure for—
>
> (i) making payment claims; and
>
> (ii) responding to payment claims; and
>
> (iii) the adjudication of disputed payment claims; and
>
> (iv) the recovery of amounts claimed; and

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5 [2021] QSC 231.
6 (2021) 7 QR 34.
7 Explanatory Note, Building Industry Fairness (Security of Payment) Bill 2017 (Qld) 1.

(d) enabling the use of a statutory charge in favour of subcontractors for payment of the work they do.

[16] Chapter 3 of *Payment Act* sets out the legislative scheme for 'progress payments'.

[17] Section 64 defines a 'progress payment' to mean a payment to which a person is entitled under s 70. Section 70 provides:

> **70 Right to progress payments**
>
> From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.

[18] The phrase 'reference date' is defined in s 67:

> **67 Meaning of reference date**
>
> (1) A ***reference date***, for a construction contract, means—
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract; or
>
> (b) if the contract does not provide for the matter—
>
> (i) the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later month.
>
> (2) However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.

[19] Pursuant to s 75, a claimant who wishes to claim a progress payment must give a payment claim to the respondent. The payment claim must be in the form required by s 68, which provides:

> **68 Meaning of payment claim**
>
> (1) A ***payment claim***, for a progress payment, is a written document that—
>
> (a) identifies the construction work or related goods and services to which the progress payment relates; and
>
> (b) states the amount (the ***claimed amount***) of the progress payment that the claimant claims is payable by the respondent; and
>
> (c) requests payment of the claimed amount; and

(d) includes the other information prescribed by regulation.

(2) The amount claimed in the payment claim may include an amount that—

(a) the respondent is liable to pay the claimant under section 98(3); or

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

(3) A written document bearing the word 'invoice' is taken to satisfy subsection (1)(c).

[20] Pursuant to s 75, a respondent who receives a payment claim, but who disputes the claimant's entitlement to the amount claimed, may respond by giving the claimant a payment schedule. The payment schedule must be in the form required by s 69, which provides:

69 Meaning of payment schedule

A ***payment schedule***, responding to a payment claim, is a written document that—

(a) identifies the payment claim to which it responds; and

(b) states the amount of the payment, if any, that the respondent proposes to make; and

(c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent's reasons for withholding any payment; and

(d) includes the other information prescribed by regulation.

[21] Pursuant to s 75(3), a respondent who gives a claimant a payment schedule must pay the claimant the amount proposed in the payment schedule no later than the date due for the progress payment to which the payment schedule relates.

[22] Pursuant to s 77, a respondent who receives a payment claim but who does not give a payment schedule as required under s 76, is liable to pay the amount claimed under the payment claim on the due date for the progress payment to which the payment relates.

[23] The actions that a claimant may take when a respondent fails to pay the amount owed to the claimant are set out in s 78, which provides:

78 Consequences of failing to pay claimant

(1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.

(2) The claimant may either—

(a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or

(b) apply for adjudication of the payment claim under part 4.

(3) In addition to the action mentioned in subsection (2), the claimant may give the respondent written notice of the claimant's intention to suspend carrying out construction work, or supplying related goods and services, under the relevant construction contract under section 98.

(4) The notice to suspend work must state that it is made under this Act.

(5) In this section—

amount owed, to a claimant for a payment claim, means—

(a) if the respondent did not respond to the payment claim with a payment schedule as required under section 76—the amount claimed under the payment claim; or

(b) if the respondent did respond to the payment claim with a payment schedule as required to do so under section 76—the amount proposed to be paid under the payment schedule.

[24] A claimant may apply under s 79 for adjudication of a disputed payment claim. Where a claimant does apply for adjudication, a copy of the application must be served on the respondent. A respondent may then give an adjudication response, in accordance with s 82, which provides:

82 Adjudication response

(1) After being given notice of an adjudicator's acceptance of an adjudication application under section 81, the respondent may give the adjudicator a response to the adjudication application (the ***adjudication response***).

(2) However, the respondent must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under section 76.

(3) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may include the submissions relevant to the response the respondent chooses to include.

(4) However, the adjudication response must not include any reasons (***new reasons***) for withholding payment that were

not included in the payment schedule when given to the claimant.

(5) The adjudicator may require the respondent to resubmit the adjudication response without the new reasons.

[25] In keeping with the objectives of the *Payment Act*, pursuant to s 84(1), an adjudicator must decide an adjudication application as quickly as possible. As McMurdo P observed in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* in respect of the previous legislative scheme under the *BCIPA*:[8]

> …it provides for the speedy, interim only determination by adjudicators of disputed claims under construction contracts. These adjudications are not intended to be scrutinised in the same way as considered final determinations.

[26] Pursuant to s 84(2)(a)(i), for a proceeding conducted to decide an adjudication application, an adjudicator must first decide whether he or she has jurisdiction to adjudicate the application.

[27] Where an adjudicator has jurisdiction, the adjudicator must then decide an adjudication application in accordance with s 88, which relevantly provides:

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;

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8 [2012] 1 Qd R 525 [3], citing *Bezzina* 515 [71]-[72] and *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83, [51].

(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 the registrar—

(a) a copy of the decision; and

(b) notice of all fees and expenses paid, and to be paid, to the adjudicator for the decision.

Maximum penalty—40 penalty units.

(7) The adjudicator must give the registrar the information mentioned in subsection (6) at the same time the adjudicator gives a copy of the decision to the claimant and the respondent.

[28] Section 91 provides that following the determination of an adjudication application, the registrar[9] must give the claimant an adjudication certificate, stating various matters including the adjudicated amount, if any, payable by a respondent.

[29] Pursuant to s 93(1), an adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.

[30] Section 101 of the *Payment Act* makes plain that nothing in ch 3 affects any right that a party to a construction contract may have under the contract.

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[9] The registrar is the 'Adjudication Registrar' appointed under s 150 of the *Payment Act*. Section 154 of the *Payment Act* sets out the functions and powers of the registrar.

Relevant legal principles

[31] There is no right of appeal from an adjudicator's decision. Additionally, adjudication decisions under the *Payment Act* are expressly excluded from the operation of the *Judicial Review Act 1991* (Qld) ('***JRA***').[10]

[32] However, it is well established that adjudication decisions under the *Payment Act* may be impugned and set aside for jurisdictional error. Relevant principles concerning the nature of jurisdictional error in the *Payment Act* context were set out by Bond J in *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* ('***Acciona***').[11] Those principles apply to the determination of this application.

[33] In *Acciona,* Bond J observed that the two leading cases concerning the nature of jurisdictional error in Australian jurisprudence are *Craig v South Australia* ('***Craig***')[12] and *Kirk v Industrial Court ((NSW)* ('***Kirk***').[13] His Honour further noted that in *Craig*, the High Court had explained that the scope of jurisdictional error differs depending on whether the decision maker in question was an administrative tribunal or an inferior court (or possibly an anomalous tribunal given the right to authoritatively decide questions of law, but not properly characterised as a court).

[34] His Honour then cited what had been said by the High Court in *Craig,* and reiterated in *Kirk,* about the differences in the ambit of jurisdictional error as between administrative tribunals and inferior courts, stating:[14]

> [28] The ambit of jurisdictional error in the case of an administrative tribunal is quite broad. In a passage which was also referred to with approval in *Kirk*, the High Court in *Craig* (1995) CLR 163, 179 said:
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> > "If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."
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> [29] On the other hand, the ambit of jurisdictional error in the case of an inferior court (or other tribunal which is to be regarded in the same way) is much narrower. In *Kirk*, the Court summarised the *Craig* explanation in the following terms ((2010) 239 CLR 531, 573 [72]) (bold print emphasis added; italic emphasis in original; internal citations omitted):
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> > "**First,** the Court stated, as a general description of what is jurisdictional error by an inferior court, that **an inferior court falls into jurisdictional error**

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10 By virtue of s 18(2) and sch 1, pt 2 of the *JRA.*
11 (2020) 4 QR 410, 417-419 [32]–[42].
12 (1995) 184 CLR 163.
13 (2010) 239 CLR 531.
14 *Acciona* 420–1[28]–[29].

> **'if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist'** (emphasis added). **Secondly**, the Court pointed out that jurisdictional error 'is at its most obvious **where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*'** (emphasis added). (The reference to '*theoretical limits*' should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) **Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case**. The Court said of this last example that 'the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern' …"

[35] By reference to relevant authority, Bond J concluded that adjudicators under the *Payment Act* were not to be regarded as 'administrative tribunals', but rather as one of the 'anomalous tribunals' referred to in *Craig.* That is the approach that I also adopt in this case.

[36] Accordingly, when considering whether the Decision is affected by jurisdictional error, it is the observations of the High Court in *Craig* with respect to jurisdictional error committed by inferior courts (and like tribunals) that are apposite.

[37] On the issue of the requirement for procedural fairness to be observed by an adjudicator making a decision under the *Payment Act*, Bond J relevantly stated:[15]

> [41] …the valid exercise of an adjudicator's jurisdiction is conditioned on the adjudicator having accorded to the parties what White JA described in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 as "the

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15 *Acciona* 427–8 [41] (footnotes omitted).

> necessary level of procedural fairness". The juridical basis for this proposition is the same as the preceding propositions. The legislature must be taken to have contemplated that an adjudicator would have accorded the parties the necessary level of procedural fairness, such that failure to do so would be regarded as breach of a condition of the valid exercise of the jurisdiction...

[38] In terms of the concept of procedural fairness more generally, in *Kioa v West,* Mason J observed:[16]

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute…What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting…
>
> In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e., in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations…

[39] With respect to the nature of an adjudicator's function, Bond J relevantly stated in *Acciona:*[17]

> [35] …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 Payment Act. But as to this, the following important matters must be noted:
>
> (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, the question is whether the adjudicator arrived at his or her

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16 (1985) 159 CLR 550, 584–5.

17 *Acciona* 422–4 [35] (some citations omitted).

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, 469–470 [20], 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 ([2015] 1 Qd R 463, 470 [30]):

> 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 Payment 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 *Payment Act* requires, then they will have fallen into jurisdictional error because they will not have done the very thing s 88(2) of the *Payment Act* required them to do.

[40] Finally, as to jurisdictional error revealed by the inadequacy of, or failure to give, reasons, Bond J noted:[18]

> [37] …the valid exercise of an adjudicator's jurisdiction is conditioned on the inclusion in the decision of written reasons for the decision in compliance with s 88(5)(b). Failure to meet

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18 Ibid 426 [37]–[38] (citations omitted).

this condition would amount to jurisdictional error by the adjudicator and would result in invalidity…

[38] Difficulty in the application of this proposition usually arises where written reasons have been provided, but they are said to be so deficient as not to comply with the legislative requirement. Circumstances in which courts have suggested that an identified deficiency of reasons may justify a conclusion of jurisdictional error include:

(a) where the reasons do not reflect a genuine consideration of the matters identified in s 88(2);

(b) where the adjudicator has not made the critical findings in the way contemplated by the Payment Act;

(c) where findings or conclusions have no basis, are bare conclusions and do not reveal due consideration such that '… being insufficiently supported by reason, they appear to be an improper exercise of the power conferred or arbitrary or there was no evidence or other material sufficient to justify the making of the decision or the decision was so unreasonable that no reasonable person would have so exercised the power';

(d) where one party's evidence is rejected for no reason or on no other ground than a bare conclusion that one party's evidence is preferred over another;

(e) where the reasons reveal no intellectual justification for the decision that was made;

(f) where the reasons do not reveal any foundation or logical basis for the decision, so it is appropriate to conclude there has been a failure to exercise jurisdiction.

The Decision

[41] On 6 October 2022, Insite provided the Adjudicator with its adjudication response. On 7 October 2022, the Adjudicator requested further submissions from the parties on several issues, including the termination of the Subcontract. The Adjudicator received the further submissions from both parties on 10 October 2022. The parties were then provided with the opportunity to comment on each other's submissions. The Adjudicator received those further comments on 11 October 2022.

[42] The issues of when and how the Subcontract was terminated were fundamental to the preliminary question of the Adjudicator's jurisdiction to decide the Adjudication Application. In its adjudication response, Insite contended that the Subcontract had been terminated by Daniels on 9 June 2022It further contended that as Daniels had already issued a payment claim on 27 June 2022 before issuing the Payment Claim on 2 August 2022. the Payment Claim was invalid as it was the second payment claim

issued for a single reference date.[19] Insite therefore submitted that in the absence of a valid Subcontract, a valid reference date and a valid payment claim, the Adjudicator had no jurisdiction to decide the Adjudication Application.

[43] The Adjudicator rejected Insite's jurisdiction arguments and decided Insite was to pay the full amount of the Payment Claim.

[44] For present purposes, the Adjudicator dealt with three key issues in his reaching Decision.

[45] *First,* the Adjudicator determined whether there was a valid contract in place at the time the Payment Claim was given, and hence whether the Payment Claim was valid (which Insite refers to as the '**Reference Date Argument**').

[46] As noted earlier, each of the parties had contended that the contract had been terminated, albeit at different times and on different bases.

[47] In his reasons for the Decision, the Adjudicator identified the relevant dispute with respect to the termination date of the contract as follows:

> 26. The existence of a valid contact at the time of making the payment claim is disputed. It is important to establish whether a contract existed at the time the works subject to the payment claim were carried out and the appropriate reference dates.
>
> 27. The claimant claims that the contract was terminated on 27 August 2022 [*sic*. 26 August 2022] whilst the respondent believes the contract was terminated on 9 June 2022.
>
> …
>
> 29. If the contract was terminated on 9 June 2022, then the reference date would be 9 June 2022. The claimant could only serve one payment claim from this date. No other reference dates would arise making the payment claim subject of this adjudication application the second payment claim for this reference date.
>
> 30. Conversely, if the contract has not been terminated a reference date of 28 July 2022 would arise and the payment claim subject of this adjudication application would be relevant to this date.

[48] The Adjudicator noted the 9 June 2022 email sent by Daniels to Insite. The Adjudicator found Daniels had clearly intended to terminate all current contracts, including the Subcontract with Insite that was the subject of the Adjudication Application, prior to completing the contracted works. However, the Adjudicator further noted that the Subcontract did not actually provide any right for Daniels to terminate the Subcontract and the only right to terminate lay solely with Insite.

[49] The Adjudicator then outlined the process for termination as provided by cl 25 of the Subcontract, which commenced with the issue of a show cause notice.

[50] In support of its argument, Insite submitted to the Adjudicator that when Daniels sent the 9 June 2022 email notifying Insite of its intention to terminate all current contracts, it breached its contractual obligations. Insite contended that it had accepted the termination of the Subcontract on that same day.

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[19] *Payment Act* s 75(4) provides that a claimant cannot make more than one payment claim for each reference date under the construction contract.

[51] The Adjudicator agreed that Daniels had breached the Subcontract and that its actions were a repudiation of the Subcontract. However, the Adjudicator found that Insite did not follow the contractual requirements for termination of the Subcontract, as stipulated by cl 25, until it issued a show cause notice on 29 August 2022.

[52] Accordingly, the Adjudicator found that irrespective of whether Insite had accepted Daniels' purported termination of the Subcontract on 9 June 2022, the Subcontract remained on foot after that time. In his reasons for the Decision, the Adjudicator relevantly stated:

> 45. The respondent had two options to respond:
>
> 1. Affirm the contract and insist the claimant performs its statutory obligations under the contract
>
> 2. Terminate the contract in accordance with the contract.
>
> 46. The respondent stated that they had no option but to accept the claimant's intention to terminate the contract on 9 June 2022. In the Statutory Declaration by Mark Taylor, director of the respondent, he stated that he accepted the termination of the contract on 9 June 2022.
>
> 47. Regardless of the claim that the termination was accepted by the respondent, the respondent did not follow the requirements of the contract to terminate until it issued a show cause notice on 29 August 2022. The show case notice required the claimant to remedy breaches of Clauses 2, 3, 19 and 20 within 7 days of the notice.
>
> …
>
> 51. I am not aware if the contract was terminated by the respondent after the 7 days from the issuing of the Show Cause Notice as required by the contract. If this is the case this is after the date the payment claim was served on the respondent.
>
> 52. For the reasons above I am satisfied that the contract was not terminated at the time the payment claim relates and is a construction contract in accordance with the Act.

[53] Given this conclusion, the Adjudicator was satisfied that there was a valid Subcontract at the relevant time, that 28 July 2022 was a valid reference date, and that the Payment Claim was therefore valid.

[54] *Second*, the Adjudicator determined whether the Payment Schedule was valid.

[55] The Adjudicator noted that the Payment Schedule had been served on 11 August 2022 and stipulated the amount payable as '$NIL'.

[56] In terms of compliance with the statutory requirements for a payment schedule as mandated by the *Payment Act*, the Adjudicator noted the following in his reasons:

> 64. The payment Schedule:
>
> - Was in writing
> - Identified the payment claim to which it responds
> - Stated the amount the respondent proposed to pay, ($NIL)

65. However, if the amount proposed to be paid in the payment claim is less than the payment schedule reasons must be given for why this is so.

66. The payment schedule comprised and (*sic*) email and attachment. The attachment was the respondent's valuation of the amount it proposed to pay. There are no reasons included with the attachment.

67. The email states:

Please find attached Payment Schedule for Civil PCS08 at Good Samaritan College. Total value approved S0.00. (*sic*)

We are still to confirm a sub-contractor to take over the balance of the scope of works that you are contracted to finish. I'll inform you next week the status.

[57] Insite submitted to the Adjudicator that the reasons for scheduling an amount of '$NIL' payable for the Payment Claim were well known to Daniels because they had been stated in an earlier payment schedule and in an email sent to Daniels on 8 August 2022.

[58] Insite's argument was noted by the Adjudicator as follows:

69. The respondent argues that the payment claim reagitates payment claim 7 and that the reasons for scheduling an amount of $NIL are not new as they were well known to the claimant as they were stated in payment schedule 7.

70. The reason given in the previous payment schedule 7 was:

As you can imagine, in the current market, we are struggling to confirm a subcontractor to take over the balance of the scope of works that you are contracted to finish. We are Close. Hopefully over the next week. Until such time, we are not in a position to confirm with certainty what is owed, if any(thing)*, to Daniels Civil.*

71. The respondent states that this reason is loosely referring to a right under Clause 25(e) of the contract in that the respondent is entitled to calculate the difference between the cost to perform works taken out of the claimant's hands and the cost for the claimant to perform the same works. This requirement is in reference to the default and termination of the contract and remedies can only be enacted after 7 days of issuing of a show cause notice.

[59] The Adjudicator rejected this argument, relevantly stating:

80. I can not [*sic*] accept the reasons provided in the payment schedule relating to payment claim 7 can be reasons relating to the payment schedule subject of this adjudication application.

81. I have considered the statement on the email as detailed in paragraph 69 (*sic*. 67) as to whether it is sufficient as a reason for non-payment of the payment claim.

…

> 83. For the reasons above I have decided that the statement in the payment schedule, *We are still to confirm a sub-contractor to take over the balance of the scope of works that you are contracted to finish. I'll inform you next week the status,* is not a sufficient reason(s) contemplated by s.69(c) of the Act.
>
> 84. I have decided that the payment schedule is not a payment schedule in accordance with s.69 of the Act, is not valid and as such the respondent failed to provide a payment schedule under s.76 of the Act.

[60] *Third,* the Adjudicator decided the adjudicated amount as $138,387.16 including GST, being the 'uncontested valuation' put forward by the claimant.

[61] In reaching that conclusion, the Adjudicator had earlier observed in his reasons that the adjudication response received from Insite raised jurisdictional issues which he was obliged to consider. He further noted though that the adjudication response included reasons why the amount proposed to be paid was less than the amount of the Payment Claim and 'also detailed a number of set offs in relation to the repudiation of the contract'. The Adjudicator concluded that these were new reasons which had not been included in the Payment Schedule, contrary to s 82(4) of the *Payment Act*. For that reason, the Adjudicator decided that he would not consider the new reasons set out in the adjudication response.[20]

[62] It was on that basis that the Adjudicator concluded, under the heading 'Amount Decided':

> 95. The payment claim is for $138,387.16 including GST.
>
> 96. The make up of the payment claim is for Level 1 testing and reporting, $3,487.11 GST included and seven variations totaling (*sic.*) $134,900.05 GST included.
>
> 97. I have decided that the respondent has not provided a valid reason to not pay the full amount of the payment claim. In *State of Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324 the court held that the adjudicator was entitled to accept the uncontested valuation put forward by the claimant.
>
> 98. The claimant has provided in the payment claim supporting documentation for both the claim for level 1 supervision and reporting and for the seven variations.
>
> 99. The respondent has failed to provide reasons as to why the claimed amounts should not be paid. I have found in favour of the claimant for the full amount of the payment claim.
>
> 100. I have decided that the adjudicated amount is $138,387.16 including GST.

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[20] It should also be noted that pursuant to s 82(2), a respondent must not give an adjudication response if the respondent failed to give the claimant a payment schedule as required under s 76.

Did the Adjudicator deny Insite procedural fairness?

[63] Insite submits that it was denied procedural fairness by the Adjudicator because he determined the 'Reference Date Argument' on a basis that was not addressed by the parties and which the parties were not given an opportunity to address.

[64] In particular, Insite argues that the Adjudicator's reference to cl 25 of the Subcontract, and Insite's right under that clause to elect between the affirming or terminating the Subcontract, was not a matter that arose from the parties' submissions, nor was it an interpretation of Insite's common law right to terminate the Subcontract for Daniels' repudiation, about which submissions were sought from the parties and which the parties were given an opportunity to address. Insite further argues that, in any event, the Adjudicator's approach was incorrect as a matter of law.

[65] Insite says that this denial of procedural fairness was material and therefore a jurisdictional error.

[66] I reject each of Insite's submissions.

[67] There are three key reasons why it simply cannot be said that Insite has been denied procedural fairness in any of the ways it asserts.

[68] *First*, contrary to the submissions now made by Insite that it had terminated the Subcontract because of Daniels' repudiation, Insite's repeated and consistent submission to the Adjudicator was that it was Daniels, not Insite, who had terminated the Subcontract.

[69] For example, in its adjudication response, Insite submitted:[21]

> 2. In its most succinct form, the Respondent says that the Claimant terminated the subcontract on 9 June 2022 and the [*sic*] 9 June 2022 became the last Reference Date available to the Claimant under the *BIF Act* to issue a payment claim. The Claimant had the right to issue one single payment claim after the termination date and issued Payment Claim No7 three weeks later on 26 June 2022: The purported Payment Claim No 8 dated 2 August 2022 is based on the invalid Reference Date of 28 July 2022 and is not a valid payment claim under the *BIF Act* that can be referred to this Adjudication.
>
> …
>
> 16. Therefore, on 9 June 2022, and due to the previously stated re-evaluation of its business model, **the Claimant terminated the Contract with the Respondent**. The email from Daniels Civil reads at the relevant paragraph:
>
> > *Daniels civil has made the difficult decision to **terminate our current contracts, including Good Samaritan College, Bli Bli** prior to completing our allotted works, as per our entitlement to do so set out within the clauses of our contractual agreement."*
>
> 17. The Adjudicator should note that contrary to the Claimant's email of 9 June, the Subcontract between the parties for the Good Samaritan College **does not contain any clauses that entitle the**

[21] Emphasis in original. Citations omitted.

> **Claimant to terminate the contract early** more so without any financial consequences.
>
> …
>
> 19. Therefore, in breach of all undertakings and warranties given by Daniels Civil under Clause 3, the Claimant wrongfully terminated the Subcontract on 9 June 2022.
>
> 20. The Respondent had no alternative but to accept the termination…

[70] Similarly, in its additional submissions to the Adjudicator, Insite stated:

> 6. However, the evidence is that there was no amicable agreement on the commercial aspects after Daniels Civils' termination of the Subcontract. In that regard:
>
> …
>
> b. on the other hand, it is also obvious that Insite was overwhelmed by the additional expense that Daniels Civil had imposed on them due to the untimely termination of the Subcontract…
>
> i. The evidence is that Insite accepted Daniel's Civil 9 June termination of the Subcontract and arranged for them to stay on the site completing Block P until Sunshine Coast Civil took over the works so as to reduce the delays in progress.

[71] Insite's other evidence was to the same effect. In a Statutory Declaration provided as an exhibit to the adjudication response, Mark Taylor, a director of Insite, stated:

> 5. On 6 June 2022, I received a Company Release issued by David Anderson of Daniels Civil stating in no uncertain terms that Danial Civil [*sic*] was going to cease operations and wind down the business (Exhibit A to the Respondent's submissions).
>
> 6. On 9 June 2022, after making telephone enquiries, Insite received a 'Notification of Contract Termination' indicating that Daniels Civil had made a decision to not progress with the works at the a [*sic*] Good Samaritan College at Bli Bli (Exhibit B to the Respondent's submissions).
>
> 7. Insite had no alternative but to accept the termination of the Subcontract.

[72] Similarly, in a further Statutory Declaration included with Insite's further submissions, David Schloss, Insite's project manager for the Project, stated:

> 9. On the morning of 9 June 2022, I met with Dave Daniels who introduced me to Liam Gallagher, the owner of Sunshine Coast Civil. During our discussions, I accepted the termination of the Subcontract, but we agreed that Daniels Civil would stay onsite another week or so to complete the Block P before they demobilised from the site.
>
> …

> 13. I confirm that on the morning of 9 June 2022, I unequivocally accepted the termination of the Subcontract.

[73] In its further submissions in reply, Insite again reiterated that it was Daniels Civil that had terminated the Subcontract.

[74] Contrary to the submissions now made, Insite did not make any submission to the Adjudicator that Daniels had repudiated the contract on 9 June 2022 and Insite had accepted that repudiation and itself terminated the contract.

[75] Whilst it is now argued by Insite that this was the effect of what had occurred, I cannot accept that argument. In my view, Insite artificially seeks to restyle the submissions it made to the Adjudicator in a way that would support its assertion of jurisdictional error. The plain fact is that Insite's position was consistently put that Daniels had unlawfully terminated the contract.

[76] Insite had ample opportunity to raise and argue the issue of repudiation in its submissions to the Adjudicator. It did not do so. It instead insisted that Daniels had terminated the contract on a basis that was not provided by the terms of the contract. It was therefore not necessary for the Adjudicator to consider whether Insite had accepted Daniels' repudiation and itself terminated the contract.

[77] *Second,* and in any event, in its additional submissions, Insite referred the Adjudicator to letters from Insite to Daniels, dated 29 and 30 August 2022, which specifically referred to cl 25 of the Subcontract and suggested that the Subcontract had not yet been terminated.

[78] The 29 August 2022 letter was styled as a 'Notice to Show Cause'. It relevantly contained the following notice:

> Pursuant to Clause 25 of the Subcontract Conditions the Contractor issues the Subcontractor this Notice to Show Cause for the following breach of the Subcontract:
>
> **The Breach**
>
> - The Subcontractor has committed a breach of the Subcontract by:
>   - Failing to fulfill its obligations under Clause 2
>   - Failing to maintain the Subcontractor warranties per Clause 3
>   - Failing to progress the work in accordance with Clause 19 & Clause 20
>
> **Remedy**
>
> - The Subcontractor is required to remedy the above breach within 7 days.

[79] The 30 August 2022 letter refuted Daniels' suggestion that there had been a variation of the Subcontract to remove any part of the Subcontract works required to be carried by the Subcontractor. The letter again drew attention to cl 25 stating:

> C. Clause 25 defines Default and Termination under the Subcontract
>
> Correspondence issued by the Subcontractor 06/06/2022 to notify the Contractor of its intention to:
>
> - withdraw resources
> - cease the progress of work
> - not complete the defined lump sum Subcontract Works
>
> notified the Contractor of the Subcontractor's intention to commit a breach of the Subcontract. Activities and action by the Subcontractor to enact the aforementioned intentions ratified the breach of the Subcontract.
>
> Clause 25(c) defines the Contractors [*sic*] right in relation to Subcontract Works taken out of the Subcontractor's hands.
>
> We refute your claim that the Contractor engaging another Subcontractor or consultant represents a termination of the Subcontract.
>
> The Subcontract between the Contractor and the Subcontract [*sic*] remains valid and the breach of Subcontract by the Subcontractor is continuing, and the Contractor will continue to employ all reasonable measures required to facilitate completion of the Subcontract Works.

[80] The Adjudicator had a copy of the Subcontract and was referred to it by each of the parties. He was obliged to consider the provisions of the Subcontract in performing his function to decide the Adjudication Application.

[81] Given the content of Insite's letters and the procedure for termination of the Subcontract provided by cl 25, which Insite purported to follow, and given Insite's argument to the Adjudicator that its reason for valuing the Payment Claim as nil was based on the exercise of its rights under cl 25(e) of the Subcontract, it is hardly surprising that the Adjudicator referred to these matters in deciding the Reference Date Argument. This was not a situation where the Adjudicator decided the issue on a basis that no-one had suggested and without giving the parties an opportunity to make submissions.

[82] *Third,* Insite made no argument or submission to the Adjudicator about its common law right to terminate the Subcontract for Daniels' repudiation. Accordingly, I do not consider it was a matter the Adjudicator was required to determine. Contrary to the submission Insite now makes, the Adjudicator's reference to Insite's right to 'terminate in accordance with the contract' under cl 25 did not purport to be an interpretation of Insite's common law rights. The Adjudicator's function was to determine the matter according to the facts and arguments put before him by the parties in support of, or in opposition to, the Adjudication Application.

[83] In those circumstances, I reject Insite's argument that it was denied procedural fairness in relation to the Reference Date Argument.

Did the Adjudicator commit jurisdictional errors in determining the Adjudication Amount?

[84] Each of the issues raised by Grounds 2, 3 and 4 may be dealt with together as they each stem from a common complaint. The essence of Insite's argument is that the Adjudicator did not actually 'adjudicate' and decide the amount of the progress payment that was to be paid by reference to the merits of the Payment Claim. Rather, having concluded that Insite failed to give a Payment Schedule under s 76 of the *Payment Act*, and by erroneously relying upon *Epoca*, the Adjudicator simply awarded Daniels the amount stated in the Payment Claim, without undertaking his own intellectual consideration of the basis for that sum.

[85] Insite argues that by doing so, the Adjudicator:

(a) misconceived the nature of the functions he was performing or misapprehended the limits of his functions under s 88 of the *Payment Act*;

(b) failed to give sufficient reasons to discharge his obligation under s 88(5)(b) of the *Payment Act*;

(c) misdirected himself with respect to the reasoning in *Epoca;* and

(d) denied Insite procedural fairness by not referring the parties to *Epoca* and asking for submissions on his intended approach to determining the Adjudication Application.

[86] I do not accept any of these arguments. In my view, the Adjudicator's Decision is not vitiated by any such jurisdictional errors.

[87] It is pertinent to first consider the decision and reasoning in *Epoca.* That case concerned an application for judicial review of a decision made by an adjudicator under the *BCIPA*. The applicant, the State of Queensland, acting through the Department of Main Roads, (**'DMR'**) had entered into a contract with the respondent, Epoca Constructions Pty Ltd ('**Epoca'**), for the construction of a bikeway. After the DMR terminated the contract, Epoca submitted a payment claim for $1,698,379.21. In response, the DMR gave a payment schedule in which it asserted it was not obliged to make any payment.

[88] Epoca brought an application for adjudication under the *BCIPA*. The adjudicator ultimately determined that DMR was required to make a progress payment of $738,293.39. The DMR challenged the adjudicator's decision by applying to the Court for relief under the *JRA*.[22]

[89] Philippides J allowed the application in part. Her Honour set aside the adjudicator's decision with respect to certain elements of the adjudicated amount and referred other parts back to the adjudicator for further consideration.

[90] One of the arguments put by the DMR in support of its application for judicial review was that the adjudicator had accepted a particular itemised amount stated in the payment claim, without any apparent independent assessment or valuation of that work, simply because no valid reason had been given for reducing that amount in the payment schedule.

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22 Unlike the *Payment Act*, adjudication decisions made under the *BCIPA* were not excluded from judicial review under the *JRA* at the time.

[91] Philippides J dealt with that argument in the following passage of her Honour's judgment:[23]

> *(ii) Noise Barriers (Item 6213.01) - $59,615.97*
>
> [42] The payment claim identified this claim as a claim for partial completion of works included within the agreed schedule of rates (as part of the portion 1 claim). The DMR's payment schedule identified the reason for withholding payment simply as "no work done". The adjudicator stated at p14:
>
> > "In the adjudication application … the claimant says that this is incorrect. In the adjudication response, the respondent acknowledges that this is so and provides a different explanation for withholding payment. The respondent is not entitled to rely upon these additional reasons for withholding payment [s 24(4) of the Act]. Since the respondent's reason (in the payment schedule) for withholding payment is not valid, I am satisfied that the respondent has no valid reason for withholding payment for the claimed amount."
>
> [43] The adjudicator correctly identified that DMR was precluded by s 24(4) of the *BCIPA* from relying on additional matters in its adjudication response that were not raised in the payment schedule. DMR's complaint is essentially that, having rejected its contentions, the adjudicator was required to assess the construction work carried out independently and value it but failed to do so. Epoca argues that the adjudicator was entitled to accept the uncontested valuation material which Epoca had put before him and, in the circumstances, detailed reasons were not required in the circumstances. I accept Epoca's submissions that the adjudicator interpreted the DMR's adjudication response as conceding that it was incorrect to say that no work had been done and correctly refused to allow the additional and different rationale for withholding payment. The adjudicator was entitled to accept the valuation put forward by Epoca and adequately revealed his reasons for the decision reached in this regard. I do not consider that in the circumstances there was any reviewable error in the adjudicator's approach.

[92] In determining this issue, Philippides J was not attempting to espouse a particular legal principle concerning the way in which an adjudicator may permissibly decide the amount of a progress payment to be paid. Rather, her Honour's conclusion followed from the particular facts of the case at hand. It was in those particular factual circumstances that her Honour rejected the DMR's argument that the adjudicator had failed to perform his function in accordance with the *BCIPA*.

[93] I therefore accept Insite's submission that *Epoca* is not an authority for the proposition that an adjudicator can simply award the total amount claimed to a claimant because a payment schedule has not been given. It is, however, an example of an instance where an adjudicator properly decided the amount payable in respect

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23 *Epoca* 13–14, [42]-[43].

of a progress payment was the claimant's uncontested valuation of the work, in circumstances where there was no issue that the work had been done and the respondent had failed to give a valid reason for withholding the amount claimed.

[94] Whether such an approach will be permissible in other instances will depend on the particular circumstances of the given case. *Epoca* is an illustration of that approach. The critical issue will always be whether the adjudicator has performed his or her function as required by, and in accordance with, the *Payment Act*.

[95] It is to be recalled that with respect to the 'adjudicated amount', s 88(1)(a) requires an adjudicator to decide the 'amount of the progress payment, if any, to be paid by the respondent to the claimant'. In doing so, the adjudicator is to consider only the matters set out in s 88(2) and is precluded from considering the matters set out in ss 88(3) or (4). Under s 88(2)(a), the adjudicator must consider the provisions of ch 3 of the *Payment Act*.

[96] For the purposes of determining the adjudicated amount,

the relevant starting point for provisions within ch 3 is s 64, which defines a 'progress payment' as a payment to which a person is entitled under s 70. Section 70 then provides that, from each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work under the contract.

[97] As to the amount of a progress payment to which a person is entitled, s 71 provides:

> **71 Amount of progress payment**
>
> 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.

[98] As to the valuation of construction work carried out under a construction contract, s 72 relevantly provides:

> **72 Valuation of construction work and related goods and services**
>
> (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—

contracted party, for a construction contract, means the party to the contract who is required to carry out the construction work under the contract.

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.

[99] In *Bezzina*, the Court of Appeal considered whether an adjudicator had erred by adopting the amount stated by the claimant in a payment claim as the value of the construction work in question. In that case, there had been two separate adjudication applications and decisions in respect of successive payment claims given by the claimant. The second payment claim included a claim in respect of some of the same work that had been included in the earlier payment claim. On each occasion, the respondent had given a payment schedule in which it stated a nil amount was payable for the subject work. Neither payment schedule expressly challenged the amount claimed for the value of the work. Rather, each listed a series of deductions which the respondent claimed reduced the payment claims to nil.

[100] Although the first adjudication application had been decided by the time the second adjudicator's decision was pending, the second adjudicator was not informed of the fact of the first adjudicator's decision. The second adjudicator's valuation of the subject work was higher than that of the first adjudicator. The respondent subsequently brought an application for judicial review in respect of each adjudication decision.

[101] At first instance, the trial judge upheld the respondent's contention that the second adjudicator had contravened the *BCIPA* by failing to adopt the valuation in the first adjudication decision for that part of the claim covered by the first payment claim. However, the trial judge rejected the respondent's further argument that the second adjudicator had also erred by failing to make a bona fide attempt to value the work in the manner required by the *BCIPA.*

[102] On appeal, the respondent sought to support the judgment in its favour on the ground that the trial judge had erred in rejecting its application for judicial review on this further basis.

[103] Before setting out the Court of Appeal's conclusion on this issue, it is pertinent to first note the relevant conclusions of the trial judge: [24]

> [27] Had the only argument available to Bezzina been that the second adjudicator did not approach his task properly by valuing the work before considering the defects alleged by Bezzina, I would not have been disposed to interfere with his decision. Bezzina, apart from drawing my attention to the obligation to value construction work in s. 14 of the Payments Act, also relied upon the reasons of Brereton J in *Pacific General Securities Ltd v Soliman & Sons Pty Ltd* [2006] NSWSC 13 where his Honour, at [82]-[86], found that the adjudicator's duty was to come to a view as to what was properly payable on what the adjudicator considered to be the true construction of the contract and the Act and the true merits of the claim. He treated the obligation to determine whether the construction work identified in the payment claim had been carried out and its value as part of the basic and essential requirements of validity. In reaching that conclusion he said that if an adjudicator allowed a claim in full just because a respondent's submissions were rejected, without determining whether the construction work had been performed and without valuing it, that would bespeak a misconception of what was required by an adjudicator, leading to jurisdictional error resulting in invalidity.
>
> [28] In these circumstances, however, there was no issue raised by Bezzina about whether the work had been performed or about the value claimed by Deemah. Bezzina's submissions focussed more upon the alleged defects. Had that been the only problem associated with the second adjudication decision I would not have been inclined to exercise my discretion to review it. Nor would I have been inclined to grant the extension of time necessary to review the decision under s. 26 of the JR Act in respect of the relief claimed for a statutory order of review under that Act.
>
> [29] It seems to me, however, to be a significant issue that the exercise apparently required by s. 27(2) of the Payments Act has not occurred, namely the second adjudicator did not give the same value to the work, goods or services as that previously assessed by the first adjudicator. The first adjudicator approached her task as one requiring her to value the work in arriving at her views as to the appropriate progress payments to order; see, e.g., paras 37, 46, 64, 87 and 119 of the first adjudication decision.
>
> [30] It was argued that the second adjudication did not decide the value of the construction work but examined whether there should be a deduction from the price claimed for alleged defects and some other matters dealt with in detail by the adjudicator. The consequence argued was that his adjudication did not involve 'the working out of the value of that work' to use the language

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[24] *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd* [2007] QSC 286, 7–9 [27]–[31] (Douglas J).

> of s. 27(2). Reference was also made to the decision of Mullins J in *ACN 060 559 971 Pty Ltd v O'Brien* [2007] QSC 91 at [32]-[34] where her Honour considered two decisions of the New South Wales Supreme Court dealing with the interpretation of their statute's equivalent section; *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 and *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* [2006] NSWSC 798 ('*Goss Projects*'). McDougall J in *Goss Projects* drew a distinction at [40] 'between the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work.' Her Honour applied that approach, correctly in my respectful view, to conclude that a deduction for liquidated damages, was 'distinct from the value of work carried out by the contractor in the performance of the contract'; see at [34].
>
> [31] It seems to me, however, that the exercise engaged in by the second adjudicator here of examining the possible deduction of claimed defects from the price claimed for work done does involve the 'working out of the value of that work' to use the words of s. 27(2). Here the only evidence of value was the price claimed which was not itself put in issue and alleged defects in that work, if established, must be matters that are involved in working out its value.

[104] The Court of Appeal endorsed the trial judge's conclusion and rejected the respondent's further argument. In doing so, Fraser JA (with whom McMurdo P and Keane JA agreed) relevantly stated:[25]

> [26] Bezzina's argument is that the second adjudicator contravened the obligation in s 26(1)(a) 'to decide … the amount of the progress payment …' by simply accepting the sum claimed by Deemah rather than embarking upon a valuation of the work. The primary judge rejected the same argument, correctly in my respectful opinion, for the reason that the valuation of the relevant work was not in issue.
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> …
>
> [32] It is apparent that the adjudicator construed Bezzina's payment schedule as implicitly admitting Deemah's valuation of the work, subject only to the particular 'reasons why the revised schedule amount = nil' which are then set out in the schedule.
>
> …
>
> [34] Whilst a particular adjudication might involve a valuation, the express obligation imposed by s. 26 is 'to decide', not 'to inquire'. Paragraphs (c) and (d) of subsection 26(2) required the second adjudicator, in deciding the adjudication application, to consider the payment claim and submissions as well as any payment schedule and any submissions in support of it. The valuation ascribed by Deemah in its payment claim being

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25 *Bezzina* 506–08 [26], [32], [34]–[36] (footnotes omitted).

> implicitly admitted by Bezzina in its payment schedule, the adjudicator was entitled to adopt Deemah's valuation.
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> [35] Bezzina's counsel referred to *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*. In that case, Hodgson JA expressed the 'tentative view' that an adjudicator was not entitled automatically to determine a progress claim at the amount claimed by the claimant if a respondent to a payment claim did not raise any relevant ground for denying or reducing it. His Honour was not there concerned with a case such as this, where a respondent does raise relevant grounds for denying a claim and confines the dispute to those particular grounds. Other decisions relied upon by Bezzina are similarly distinguishable.
>
> [36] I would reject Bezzina's contention that the adjudicator erred in law in failing to value the work in the manner required by the Act.

[105] In my view, the reasoning and rationale for the Court of Appeal's decision in *Bezzina* on this issue is apposite in the present case. Accordingly, if it was open to the Adjudicator to conclude that there was no dispute that the work had been performed by Daniels and that the valuation ascribed to that work by Daniels was not challenged, then there can be no substance to Insite's various complaints under Grounds 2, 3 and 4. In such circumstances, the Adjudicator could permissibly 'decide' the adjudicated amount by adopting the unchallenged (and implicitly accepted) valuation. There would be no obligation upon the Adjudicator to 'inquire' and undertake his own valuation exercise.

[106] In my view, it was open to the Adjudicator to take such an approach in this case. Insite's Payment Schedule did not challenge Daniels' valuation of the claimed work it had performed. Rather, Insite sought (in reasons that it was precluded from advancing and which were ultimately not considered) to argue that the Payment Claim should be reduced to nil because the costs it had incurred, or would incur, under the contract and other set-off amounts Daniels was liable to pay because of its apparent breach of contract, would exceed the amount of the Payment Claim. In the absence of any reasons advanced to challenge the valuation contained in the Payment Claim, the Adjudicator was permitted to accept Daniels' valuation.

[107] It is, of course, a point of factual distinction that the respondent in *Bezzina* had given a payment schedule which set out reasons for its nil valuation of the subject work, whereas Insite gave an invalid payment schedule. Nevertheless, given the statutory obligation imposed on the respondent by s 69(c) of the *Payment Act*, I consider it is open to an adjudicator in the performance of his or her function under s 88 of the *Payment Act* to conclude from the failure by a respondent to give a payment schedule setting out reasons that challenge either the fact that the work was done, or a claimant's valuation of the work, that those matters are not disputed and are impliedly admitted.

[108] That, of course, was the situation in the present case. The Adjudicator concluded that the purported Payment Schedule given by Insite was invalid because it failed to provide any reasons at all for assessing the payment due to Daniels as nil. Indeed, the Adjudicator found that no payment schedule at all had been given in accordance with s 69. In the absence of a payment schedule containing reasons for not paying the amount claimed, the Adjudicator was not permitted to consider any new reasons for

withholding payment of the Payment Claim contained in Insite's adjudication response.[26]

[109] It was for that reason the Adjudicator concluded no valid reasons had been given by Insite to not pay the full amount of the Payment Claim. That being so, it was open to the Adjudicator to accept the uncontested valuation put forward by Daniels. I see no error in the Adjudicator approaching his task and performing his function in that way, nor in citing *Epoca* in support of that approach. The Adjudicator did not misdirect himself.

[110] Before leaving this issue, it is pertinent to note that during the course of oral submissions in this matter, counsel for Insite cross-referenced various entries in the 'Schedule of Additional Works' attachment to Daniels' Payment Claim with entries in the 'Continuation Sheet' attached to Insite's Payment Schedule, to submit that the differences between these entries demonstrated that this was not a case where the claimant's valuation was unchallenged. I do not accept that argument or the validity of that exercise. Quite apart from the fact that the figures in Insite's Continuation Sheet do not contain any accompanying reasons or explanations for its supposed 'valuations', the simple fact is that the Adjudicator found that no Payment Schedule had been given. Pursuant to s 88(2), the purported Payment Schedule and its attachments was therefore not a matter that the Adjudicator was permitted to consider in deciding the adjudicated amount. Similarly, it is not a matter that I may now have regard to in deciding whether jurisdictional error is established.

[111] Having regard to the issues in dispute and nature of Insite's arguments opposing the Adjudication Application, it was not necessary in the circumstances for the Adjudicator to provide extensive reasons on the issue of the adjudicated amount. Insite did not challenge the valuation of the work contained in Daniels' Payment Claim. Rather, it challenged the Adjudicator's jurisdiction to decide the Adjudication Application. Once those issues had been decided adversely to Insite, it was not necessary for the Adjudicator to give extensive reasons for deciding the adjudicated amount. The reasons given, which referred to the Payment Claim and supporting documentation, were adequate and sufficient. They do not evidence a failure by the Adjudicator to perform his statutory function to decide the Adjudication Application under the *Payment Act*, nor any misconception or misapprehension of jurisdiction.

[112] I should add that I do not accept Insite's argument on this point that the Adjudicator's reasons were inadequate as they failed to comply with the requirements of s 27B of the *Acts Interpretation Act 1954* (Qld). Section 27B provides:

> **27B Content of statement of reasons for decision**
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> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
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> (a) set out the findings on material questions of fact; and
>
> (b) refer to the evidence or other material on which those findings were based.

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26 *Payment Act* ss 82(2), 88(3)(b).

[113] In my opinion, the Adjudicator complied with s 27B. The material questions of fact in issue before the Adjudicator concerned the first two key issues decided by the Adjudicator. On the first issue, Insite chose to challenge the validity of the Payment Claim by advancing the Reference Date Argument and thereby put in issue the Adjudicator's jurisdiction to decide the Adjudication Application. The Adjudicator rejected Insite's argument. In doing so, the Adjudicator sufficiently set out, in some detail, his finding on this issue and the evidence and other material on which his finding was made. The same may be said about the Adjudicator's finding and reasons with respect to the second issue concerning the validity of the purported Payment Schedule.

[114] Although it was raised by the parties in the joint list of issues for determination, I do not consider it necessary nor desirable in determining this application to decide whether the statements of Hodgson JA in *Coordinated Construction* apply to the *Payment Act.* In that case, his Honour relevantly stated:[27]

> [52] The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.
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> [53] Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.

[115] These remarks were made in respect of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('***NSW Act***'). His Honour's statements were purely *obiter dicta* and were 'tentative views' that were not endorsed by the other members of the Court.[28] For those reasons alone, I would be reluctant to apply them as an analogous authoritative interpretation of s 88 of the *Payment Act*.

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27 Ibid 399–400 [52]–[53] (citations omitted).

28 Ibid 400 [55]-[57] (Ipp JA), 400 [58], 403 [67] (Basten JA).

[116] Further, whilst it may be accepted that s 22 of the *NSW Act*, which deals with an adjudicator's determination, is materially similar in certain respects to s 88 of the *Payment Act*, there is an obvious, and perhaps significant, difference in the respective statements of the adjudicator's statutory task. Section 22(1)(a) of the *NSW Act* requires an adjudicator to 'determine' the amount of the progress payment, if any, to be paid, whereas s 88(1)(a) of the *Payment Act* requires an adjudicator to 'decide' the amount of the progress payment, if any, to be paid. To my mind, the difference is perhaps similar to the distinction drawn by the Court of Appeal in *Bezzina* between 'to decide' and 'to inquire'. Irrespective, it seems to me to be a potentially important distinction, and that is a further reason why I would be reluctant to apply Hodgson JA's statements to the proper interpretation of s 88 of the *Payment Act*.

[117] In any event, I consider I am bound to apply the law in accordance with the Court of Appeal's decision in *Bezzina.*

[118] Finally, I do not consider the Adjudicator was obliged to refer to parties to *Epoca* and foreshadow his intended approach to deciding the adjudicated amounts, so as to give the parties the opportunity to make any contrary submissions. Insite failed to provide reasons why the Payment Claim should not be paid. The Adjudicator was entitled to conclude that Insite did not dispute Daniels' valuation. The approach taken by the Adjudicator was in accordance with *Bezzina* and consistent with the approach taken in *Epoca.*

[119] It follows, in my view, that Insite was not denied procedural fairness on this issue.

[120] Even if I am wrong, I do not consider that any denial of procedural fairness would have been material, as there was no realistic possibility of a different outcome.[29] If Insite had been given an opportunity to make submissions about the proposed approach, it is most unlikely the Adjudicator would have decided a different adjudicated amount. Insite would not have been permitted to advance any reasons for not paying the Payment Claim because of any valuation dispute, as no Payment Schedule had been given.

Conclusion

[121] I am not satisfied of any of the various complaints Insite raises concerning the Adjudicator's Decision. No basis has been established to impugn the legality of the Decision by reason of jurisdictional error. The Decision is not void.

[122] Accordingly, the application must be refused.

Orders

[123] The Orders of the Court are:

1. The application is dismissed.
2. The Applicant is to pay the costs of the First and Second Respondents.

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[29] cf. *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398, 401 [1], 410 [33] (Kiefel CJ, Keane and Gleeson JJ).