

SUPREME COURT OF QUEENSLAND

CITATION: *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65

PARTIES: **Watkins Contracting Pty Ltd**
ACN 164 122 721
(applicant)
v
Hyatt Ground Engineering Pty Ltd
ACN 063 988 158
(first respondent)
Noel Jensen (Adjudicator J1057076)
(second respondent)
Ruth Hatten (Adjudication Registrar)
(third respondent)

FILE NO/S: Brisbane No 4668 of 2017

DIVISION: Trial

PROCEEDING: Civil Hearing

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 March 2018

DELIVERED AT: Brisbane

HEARING DATE: 20 July 2017

JUDGE: Brown J

ORDER: **The order of the Court is:**

- 1. that the application is dismissed;**
- 2. that the applicant pay the costs of the first respondent;**
- 3. that the parties should make submissions within 7 days as to any orders required in relation to the security for 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 (Watkins) and the first respondent (Hyatt) entered into a construction contract – where Watkins alleges it terminated the contract for Hyatt’s breach arising out of an onsite incident –

where the terms of the contract are in dispute – where the alleged termination of the contract is in dispute – where Hyatt denies that the alleged termination was effected – where the Hyatt served a payment claim under the *Building and Construction Industry Payments Act 2004* – where the adjudicator found in Hyatt's favour and determined the adjudicated amount – whether the adjudicator refused to consider Watkins' submission that the construction contract had been terminated – whether jurisdictional error or denial of natural justice – whether the adjudicator denied natural justice in making his decision on a basis not raised by either party – whether the Court could determine jurisdictional fact – whether alternative reference date available.

Building and Construction Industry Payments Act 2004 (Qld)
Queensland Building and Construction Commission Act 1991 (Qld)

Annie Street JV Pty Ltd v MCC Pty Ltd [2016] QSC 268
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977)
 52 ALJR 20
BRB Modular Pty Ltd v AWX Constructions Pty Ltd [2015] QSC 222
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78
 NSWLR 393
Chowdhary v Bayne (1999) 29 AAR 100
Craig v State of South Australia (1995) 184 CLR 163
David Hurst Constructions Pty Ltd v Durham [2008] NSWSC 318
FK Gardner & Sons Pty Ltd v Dimin Pty Ltd [2007] 1 Qd R 10
*Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors
 (Aust) Pty Ltd* [2013] QCA 386
John Holland Pty Ltd v TAC Pacific Pty Ltd [2010] 1 Qd R 302
Kirk v The Industrial Court of New South Wales (2010) 239 CLR 531
*McNab Developments (Qld) Pty Ltd v MAK Construction Services
 Pty Ltd* [2013] QSC 293
McNab NQ Pty Ltd v Walkrete Pty Ltd [2013] QSC 128
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd
 [2012] 1 Qd R 525
Northbuild Construction Sunshine Coast Pty Ltd v Beyfield Pty Ltd
 [2015] 1 Qd R 463
Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd [2011]
 NSWSC 16
*Southern Han Breakfast Point Pty Ltd (in liq) v Lewence
 Construction Pty Ltd and Ors* (2016) 340 ALR 193
*Thiess Pty Ltd & John Holland Pty Ltd v Civil Works Australia Pty
 Ltd* [2011] 2 Qd R 276
Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd [2013] 2 Qd
 R 75
*Walton Construction (Qld) Pty Ltd v Corrosion Control Technology
 Pty Ltd* [2012] 2 Qd R 90

Watpac Construction (Qld) Pty Ltd v KLM Group [2013] QSC 236

COUNSEL: S Kelly for the applicant
S Armitage for the respondent

SOLICITORS: Cohen Legal for the applicant
BCCS Law for the respondent

- [1] Hyatt Ground Engineering Pty Ltd was engaged by Watkins Contracting Pty Ltd to carry out grouting works on a large concrete plinth in August 2016. While the parties agree that they entered into a construction contract, the terms of that contract are in dispute. On 29 October 2016 an incident occurred on site which involved Hyatt's drill rig slipping while on the concrete plinth and rolling on to its side. As a result of the incident Watkins says that its contract was terminated by the principal, MMG Dugald River Pty Ltd (**MMG**). Watkins contends that it also terminated its contract with Hyatt on 14 November 2016, as a result of Hyatt's breach of contract due to the 29 October 2016 incident. Alternatively, Watkins contended that the contract was frustrated upon termination of the head contract.
- [2] The present dispute relates to a payment claim made by Hyatt after the contract was said to be terminated under the *Building and Construction Industry Payments Act 2004* (the Act) and which was the subject of an adjudication decision in Hyatt's favour. Watkins contended that that the adjudicator had no jurisdiction to determine the matter because there was no available reference date for the payment claim claimed by Hyatt as the contract had been terminated. Hyatt denied that it had breached the contract and that it had been terminated. Watkins contends that the adjudicator failed to consider its submissions as to termination of the contract which was a jurisdictional error, if further contends that the adjudicator proceeded to consider the matter by denying documents and implied terms were part of the contract which neither party had contended.
- [3] Watkins claims that the adjudicator's decision is void on the basis of jurisdictional error because:
- (a) The adjudicator refused to consider Watkins' submission that the construction contract had been terminated which, if accepted, had the consequence that no valid "reference date" arose and the adjudicator could not adjudicate the payment claim under the Act;
 - (b) Alternatively, the adjudicator ignored Watkins' submissions, substantially denying it natural justice;
 - (c) Further and in the alternative, the adjudicator proceeded to decide the adjudication on the basis that certain documents and implied terms did not form part of the construction contract, when the exclusion of those documents and terms was not a position contended for by either party. In doing so, it is said that the adjudicator denied Watkins natural justice.
- [4] The first two matters turn on whether the adjudicator considered Watkins' submissions or not.
- [5] Watkins contends that if this Court finds in its favour on any of the grounds the decision is void and should be set aside.

- [6] Hyatt submits that the adjudicator did consider Watkins' submissions as to jurisdiction and particularly the submissions as to whether the contract had been terminated but found Watkins had not established the threshold issue that the terms breached were part of the contract. Hyatt further contends that the terms of the contract were in issue between the parties and the adjudicator resolved that issue such that there was no denial of natural justice in not seeking further submissions from the parties as to Watkins' asserted terms.
- [7] Hyatt contends that even if this Court found that the adjudicator had committed a jurisdictional error, the reference date under the Act is a jurisdictional fact and the Court should find that even if the contract was terminated, a reference date had accrued prior to the termination of the contract.
- [8] Neither the second or third respondent appeared.
- [9] The issues that require determination are:
- (a) Whether the adjudicator failed to consider the submissions of Watkins as to termination and whether there was a "reference date" to support the payment claim under the Act;
 - (b) If he did fail to consider the submissions, was it a jurisdictional error or a substantial denial of natural justice;
 - (c) If he did consider Watkins' submissions, were his reasons sufficient or do they demonstrate jurisdictional error;
 - (d) If it was a jurisdictional error, should the decision be set aside or should the Court make a determination as to whether there was a jurisdictional fact or not;
 - (e) Whether the adjudicator proceeded to decide the adjudication on a basis not contended for by either party in relation to the terms of the contract such that there was a denial of natural justice; and
 - (f) If there was a denial of natural justice, was it a substantial denial of natural justice.

Statutory Framework

- [10] The Act establishes a statutory-based scheme of rapid adjudication for the interim resolution of "payment on account" disputes involving building and construction work contracts.¹ The rapid adjudication does not extinguish a party's ordinary contractual rights to obtain a final resolution of a payment dispute by a court or tribunal.² The adjudicator is also limited as to the matters to which he or she can have regard in making a decision and must turn around his or her decision in a short time-frame.³ The avenue for review of the adjudicator's decision by a

¹ *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525 at [53].

² *Building and Construction Industry Payments Act 2004* (Qld) s 100.

³ *Ibid* s 26 and s 25A.

court is also limited to judicial review under the Court's inherent power to review a decision for jurisdictional error.⁴

- [11] Pivotal to the statutory right to progress payments is the existence of a "reference date". In the present case, there is no dispute that by operation of the Act, the reference date is the last day of the month in which the work was "first carried out" and the last day of each month thereafter.⁵
- [12] Section 12 of the Act provides that for each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out, *inter alia*, construction work under the contract.
- [13] Section 17 of the Act provides that a person mentioned in section 12 who is or who claims to be entitled to a progress payment may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment. It outlines various requirements for the payment claim. Section 18 provides for the provision of a payment schedule by a respondent which, *inter alia*, must state the amount of the payment, if any, that the respondent proposes to make and if the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less. If it is less because the respondent is withholding payment for any reason, the respondent must state its reasons for withholding payment.
- [14] If the payment claim is not paid, a claimant may apply for adjudication of the payment claim which may, *inter alia*, contain the submissions relevant to the application the claimant chooses to include.⁶ If the adjudication application is accepted under section 23, there is a right for the respondent to provide an adjudication response under section 24. Pursuant to section 24(3), the adjudication response may contain the submissions relevant to the response that the respondent chooses to include. Pursuant to section 24(4), if the adjudication application is about a standard payment claim, the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule when served on the claimant. Where the case concerns a standard payment claim there is no right of reply to the adjudication response.⁷ There is no suggestion that the payment claim in this case is anything other than a standard payment claim.
- [15] Pursuant to section 25(1)(a) of the Act, an adjudicator must decide an adjudication application as quickly as possible. Section 25(3) of the Act provides that an adjudicator:
- “(a) must decide whether he or she has jurisdiction to adjudicate the application; and
 - (b) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions...”

⁴ *Northbuild Constructions* at [75].

⁵ See definition of "reference date" (b) in Schedule 2 of the Act.

⁶ *Building and Construction Industry Payments Act 2004* (Qld) s 21.

⁷ *Ibid* s 24B(1).

[16] Section 26 provides for the matters which the adjudicator must decide.⁸ Section 26(2) of the Act provides as follows:

- “(2) In deciding an adjudication application, the adjudicator is to consider the following matters only –
- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the *Queensland Building and Construction Commission Act 1991*, part 4A;
 - (b) the provisions of the construction contract from which the application arose;
 - (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
 - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.”

Steps taken under the Act

[17] Hyatt served a payment claim dated 1 February 2017 on Watkins, claiming \$479,488.10.

[18] Watkins’ payment schedule was served on Hyatt on 24 February 2017. It stated that the scheduled amount was “nil” because Watkins contended that the payment claim was invalid. This was on the basis that:

- (a) At the time the payment claim was served, the contract had been terminated following the drill rig incident and there was no valid reference date for the purposes of sections 12 and 17 of the Act;⁹
- (b) Alternatively, upon termination of the head contract, the contract was frustrated and there was no valid reference date for the purposes of sections 12 and 17 of the Act; and
- (c) Hyatt was not appropriately licensed under the *Queensland Building and Construction Commission Act 1991* (the **QBCCA**) to carry out the works under the contract.

[19] The third contention was subsequently abandoned.

⁸ Ibid s 26(1).

⁹ The schedule did not identify the particular terms of the contract said to have been breached or how the contract was terminated.

- [20] Hyatt subsequently made an adjudication application. It contended that Watkins had no right at common law to terminate the contract because there was no breach of an essential condition of the contract or an intermediate term of the contract of sufficient seriousness to warrant termination. In any event, it said that the responsibility for the drill rig incident lay with Watkins. It further contended that Watkins had not terminated the contract as it had failed to communicate any such termination to Hyatt.
- [21] Hyatt claimed that even if the contract had been terminated, a reference date of 31 October 2016 had accrued and applied to the payment claim of 1 February 2017. If the contract had not been terminated, Hyatt contended that the reference date was 31 January 2017.
- [22] Hyatt accepted in its adjudication application that a valid reference date is required in order for a payment claim to be valid. It further accepted that if the contract was terminated, then no further reference dates accrue from the date of termination.
- [23] Watkins in its adjudication response submitted that in the absence of a valid reference date the adjudicator should decide under section 25(3)(a) of the Act, that he does not have jurisdiction. It submitted that various express and implied terms of the contract were breached by reason of the drill rig incident. It rejected Hyatt's assertion that the incident was Watkins' fault. It addressed Hyatt's arguments as to termination, including whether the breach justified termination and whether the contract had been effectively terminated. It provided an affidavit of Cameron Clarke which set out, *inter alia*, what Watkins asserted were the terms of the contract and that Hyatt had been told orally on 14 November 2016 that the contract was terminated. It asserted that there was no valid reference date either on 31 October 2016 or 31 January 2017 available to support the payment claim. Watkins asserted that a payment claim had already been made in respect of the reference date of 31 October 2016 and that the termination of the contract resulted in no further reference date accruing to support a payment claim.
- [24] The adjudicator found he did have jurisdiction. The determined that the adjudicated amount was \$479,448.10 which was to be paid to Hyatt by Watkins.

Competing Contentions

Watkins' Contentions

- [25] The adjudicator recognised that in both Watkins' payment schedule and in its adjudication response, Watkins challenged the jurisdiction of the adjudicator to consider the adjudication application, stating that:
- “The respondent has raised jurisdictional grounds of challenge, initially in its payment schedule and again in the adjudication response.”¹⁰
- [26] Watkins contends, however, that despite that recognition, the adjudicator failed to address the jurisdictional issue because the adjudicator said incorrectly that Watkins' identification and

¹⁰ Exhibit SAC-5 to the affidavit of Ms Cohen, CFI 2-5, pp 683 – 723 at [31], hereafter referred to at the 'adjudication decision'.

reliance upon specific clauses of the contract said to have been breached were “new reasons” for withholding payment that were not contained in its payment schedule. It asserts that the adjudicator then determined incorrectly that the new reasons should not be taken into account under section 24(4) of the Act and did not consider the question of whether the contract had been terminated nor the jurisdictional issue any further.

- [27] Watkins contends that its submissions regarding the jurisdictional issue were “properly made” within section 26(2)(d) of the Act and were not impermissible under section 24(4) of the Act because the adjudication response only further particularised the matters raised by it in the payment schedule.
- [28] Watkins contends that even if there were new matters raised by it in the adjudication response they were matters which had to be considered by the adjudicator in deciding whether he had jurisdiction. It is uncontroversial that the existence of a valid reference date is a jurisdictional issue. Watkins contends that jurisdictional issues can be raised by either party at any time and once raised and it is the duty of the adjudicator to address them. Watkins also contends that jurisdictional issues going to the operation of the Act are not “reasons for withholding payment” and section 24(4) of the Act did not apply to prevent consideration of them.
- [29] Watkins states that its position is supported by section 25(3)(a), which provides that an adjudicator must decide “whether he or she has jurisdiction to adjudicate the application”. The adjudicator is not, according to Watkins, limited by the matters set out in section 26(2), which apply to “deciding an adjudication application” (emphasis added). The question of jurisdiction is a threshold issue and is not limited by section 24(4) or section 26(2) of the Act.
- [30] Watkins also relies on section 35(5)(b) of the Act as further support for the distinction between the adjudicator’s decision as to jurisdiction as opposed to determining any amount of a progress payment that is required to be paid. Section 35(5)(b) provides for the adjudicator to be paid even if the adjudicator decided that he or she did not have jurisdiction to adjudicate the application.¹¹ Similarly, the definition of adjudicating in section 35(8) also states:
- “**adjudicating**, an adjudication application, includes accepting, considering and deciding the application.”
- [31] Watkins submits that the adjudicator’s failure to consider the submissions as to termination of the contract resulted in him committing a jurisdictional error by refusing to consider the jurisdictional issue,¹² not only in the context of the specific contractual clauses said to have been breached, but at all.

¹¹ The Wallace Report identified the need for such a provision as there was considerable debate as to whether the Act permitted an adjudicator to charge for his or her time if they reached the conclusion that they did not have jurisdiction to decide the application.

¹² As discussed by the High Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 574 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; see *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors* [2012] 1 Qd R 525 at [78].

- [32] Alternatively, Watkins contends that, even if it was found that the adjudicator's task under section 25(3)(a) of the Act was limited by the matters specified in section 26(2) of the Act and the matters raised were outside section 26(2)(d), the adjudicator was still obliged to consider the jurisdictional issue under section 26(2)(a) and/or (b). This it contended was because the adjudicator was aware of the matters raised and that they were relevant to the provisions of the Act and/or the provisions of the contract.¹³
- [33] Watkins contends that the adjudicator disregarded a matter that the Act required be taken into account as a condition of jurisdiction and the failure to have regard to the submissions which went to the heart of a jurisdictional fact was a jurisdictional error as recognised in *Kirk v Industrial Court of New South Wales*.¹⁴
- [34] Alternatively, Watkins contends that the adjudicator's decision to ignore Watkins' submissions was a jurisdictional error as it was a substantial denial of natural justice. The adjudicator was required to consider Watkins' submissions in the adjudication response, which Watkins claims responded to Hyatt's submissions that there was no contractual right to termination and/or that termination did not occur. According to Watkins, the adjudicator was required to consider those matters pursuant to section 26(2)(d) or section 26(2)(a) and/or (b) of the Act. The denial of natural justice was substantial because if there was no valid reference date for the payment claim, the adjudicator had no jurisdiction under the Act.
- [35] Finally, Watkins contends that the adjudicator's decision is invalid because the adjudicator effectively treated certain documents and implied terms as not forming part of the contract by refusing to consider them, when that was not a position contended for by either party. While Watkins had asserted that the documents were part of the contract and terms were implied as a matter of fact, it argues that Hyatt had not responded to those particular matters such that it was not apparent whether their inclusion in the contract was contentious or not.
- [36] While Hyatt did not have a right of reply to the adjudication response,¹⁵ Watkins contends that the adjudicator did have the power to call for further submissions, which he failed to do.¹⁶

Hyatt's Contentions

- [37] Hyatt submits that in its adjudication application, it attempted to deal with what it describes as the vague and unparticularised manner in which Watkins' asserted in its payment schedule that the contract had been terminated as a result of Hyatt's breach, and that it did so in a

¹³ Watkins relies upon Hodgson JA in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales & Ors* (2007) 23 BCL 205. It is to be noted Hodgson JA, with whom Beazley JA agreed, did not necessarily accept that jurisdiction submissions were not reasons for withholding payment under s. 20(2B) of the NSW Act (the equivalent s 24(4) of Qld Act): [35]-[42].

¹⁴ (2010) 239 CLR 531.

¹⁵ Pursuant to ss 24(5) and s 24B(2) of the Act, such a response is provided for under the Act only when a payment claim is a complex payment claim. The payment claim in this case was not so characterised.

¹⁶ Section 25(3) of the Act. Watkins contends that this should have been done by the adjudicator in relation to the "new reasons".

number of ways. It submits that for the first time in its adjudication response, Watkins sought to identify and provide particulars as to:

- (a) The terms of the contract said to have been breached;
- (b) How Hyatt's drill rig being involved in an incident on site where it rolled over was a breach of the contract by Hyatt;
- (c) How the asserted breach entitled Watkins to terminate the contract; and
- (d) How the contract was in fact terminated or discharged by frustration.

[38] In its adjudication response, while Watkins accepted the proposition of Hyatt that the contract was partly oral and partly written, it asserted that there were four additional documents to those identified by Hyatt in its adjudication application which formed part of the contract, and that Watkins had asserted for the first time that there were oral terms of the contract. Hyatt submits that Watkins also, for the first time, asserted in its adjudication response that the contract contained implied terms, as a matter of fact, that:

- (a) Hyatt would carry out the works contracted for in a proper and tradespersonlike manner; and
- (b) Hyatt would carry out the works safely and without negligence.

[39] According to Hyatt, Watkins, for the first time in its adjudication response, identified three written express terms in the contract which were contained in documents referred to as the Hyatt Ground Engineering SHE Work Method Statement (**SWMS**)¹⁷ and Schedule 9 of the MMG Head Contract with Watkins¹⁸ which it alleged had been breached by Hyatt. In terms of the drill rig incident, Watkins submitted, at [26] of the adjudication response:

“[26] Watkins says firstly that by reason of the incident, Hyatt has breached the following essential terms of the contract by:

- (a) failing to carry out the works contracted for in a proper and tradespersonlike manner (a breach of the first of the implied terms);
- (b) failing to carry out the work safely and without negligence (a breach of the second of the implied terms);
- (c) failing to use conveyor rubber (or similar) to provide additional traction for the tracks of the drilling rig (a breach of the SWMS expressed term);
- (d) failing to comply with its own safety procedures, namely, a requirement to use conveyor rubber (or similar) as set out in the SWMS (a breach of clause 4 of the schedule 9 expressed terms); and

¹⁷ Referred to in the adjudication decision as SHEWMS.

¹⁸ Referred to in the adjudication decision as MMGSR.

- (e) failing to ensure that safe working practices were adopted at the site (a breach of clause 16.12 of the schedule 9 expressed terms)."

- [40] According to Hyatt, while Watkins contended that the contract was partly oral, it did not assert a breach of any of the oral terms in relation to the termination. That was undisputed. Hyatt claims that it was only in its adjudication response that Watkins claimed that it terminated the contract either by conduct or by words.¹⁹ Hyatt disputes that and relies on a statutory declaration sworn by a Hyatt director which states that Hyatt was not notified that the contract between it and Watkins had been terminated.
- [41] Hyatt states that the adjudicator expressly acknowledged Watkins' contention that he did not have jurisdiction to adjudicate the application and that he properly identified the points of contention between the parties.
- [42] According to Hyatt, the adjudicator at [27] to [30] of the adjudication decision correctly identified the approach to the adjudication and the task that he was required to perform, namely:
- (a) "My task is to resolve the issues raised by the payment claim and the payment schedule by evaluating the relevant material before me. This task is to be performed under the constraints of ss 12, 13, 14, 25 and 26(2) of the Act. When all the competing material is evaluated, the onus is on the claimant to persuade me 'on balance' that the amount claimed is, in fact, payable (footnote omitted)"; and
- (b) That he was restricted by section 26(2) of the Act as to the matters he may consider in deciding the application. He stated, *inter alia*, that he could only consider the provisions of the construction contract from which the application arose and the payment schedule to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule.
- [43] According to Hyatt, it is evident from the reasons given in the decision that the adjudicator approached the jurisdiction argument advanced by Watkins in two distinct ways:
- (a) First, he determined that Watkins had not satisfied him that Hyatt breached the contract or that Watkins had validly terminated the contract on the basis that the substantial arguments advanced by Watkins in the adjudication response had not been disclosed in the payment schedule;²⁰ and
- (b) Secondly, and more importantly in the context of the present application, that the adjudicator proceeded to make actual findings in resolution of the contractual controversies as between Hyatt and Watkins and was not satisfied that the terms relied upon as having been breached constituted part of the contract.²¹

¹⁹ Said to have been between a Watkins employee and a Hyatt director on 14 November 2016.

²⁰ Hyatt relies on [33] and [34] and [47] of the adjudication decision.

²¹ In particular, Hyatt referred to [48] to [50], [51] and [82] of the adjudication decision.

[44] In particular, the adjudicator stated at [82]:

“The respondent’s only submission regarding a reference date is that none are available to the claimant due to the contract termination. As I have found against the respondent on the termination points, I accept the claimant’s submissions and find the 31st January 2017 to be an available reference date.”

[45] Hyatt contends that prior to adjudicating the application, the adjudicator did first decide that he had jurisdiction and did not simply ignore Watkins’ submission that the contract had been terminated because of section 24(4) of the Act. Hyatt contends that the submissions made by Watkins overlook the two separate ways in which the adjudicator approached the determination of the competing contractual terms and termination arguments.

[46] Hyatt relies upon [48] to [51] of the adjudication decision, where the adjudicator made findings as to the controversy between the parties in relation to the documents containing the express terms said to form part of the contract between Watkins and Hyatt and in relation to the implied terms. These were, according to Hyatt, the critical terms relied upon by Watkins as having been breached. In rejecting that those documents and the implied terms were part of the contract, the adjudicator did not need to go further in his considerations. The fact that others may have reached different conclusions to those reached by the adjudicator does not, in Hyatt’s submission, amount to a jurisdictional error.

[47] Hyatt further contends that the adjudicator did not fail to accord procedural fairness to Watkins in circumstances where, on a proper analysis of the adjudication decision and considered by the adjudicator, the adjudicator correctly identified and applied the principles of McDougall J in *David Hurst Constructions Pty Ltd v Durham*.²²

[48] Hyatt contends that even if the adjudicator failed to afford Watkins procedural fairness, the adjudicator’s error did not constitute a material denial of procedural fairness. This is on the basis that the opportunity Watkins claims to have been denied could not have made any difference to the outcome, as:

- (a) Watkins did not contend that any of the oral terms asserted in the adjudication response had been breached by reason of the drill rig incident;
- (b) Once the adjudicator had determined (quite correctly) that neither schedule 9 nor the SWMS/SHEWMS formed part of the contract or “construction contract” as written express terms, there were no further submissions that Watkins could have made to change the outcome; and
- (c) The substance of the adjudicator’s decision reached is correct.

Relevant Principles

²² [2008] NSWSC 318.

- [49] An adjudicator's decision is not reviewable under the *Judicial Review Act 1991* (Qld). An adjudicator's decision may however be declared void if it is affected by jurisdictional error.²³

Nature of jurisdictional error

- [50] In *Craig v State of South Australia*, the High Court stated:²⁴

"... jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case."

- [51] The ambit of jurisdictional error in the case of an inferior court (or other tribunal which is to be regarded in the same way) was discussed by the High Court in *Kirk* in the following terms:

"[72] First, the court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist" (emphasis added). Secondly, the court pointed out that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision or order of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers* " (emphasis added). (The reference to "*theoretical limits*" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:

- (a) the absence of a jurisdictional fact;
- (b) disregard of a matter that the relevant statute requires be taken 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.

²³ *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525.

²⁴ (1995) 184 CLR 163 at 177.

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" ..."

- [52] Hyatt accepts that the adjudicator is obliged to consider submissions made as to jurisdiction, even if not raised in the payment schedule and that section 24(4) of the Act does not apply to such submissions. However in light of section 25(3)(a) if in the course of determining facts that are relevant to the ultimate issue such as the "reference date" the adjudicator makes an error such as whether a term is part of the contract or not, it contends that may be an error within jurisdiction.²⁵

Jurisdictional fact

- [53] There is no dispute between the parties that the reference date is a jurisdictional fact and as such an error in its determination is a jurisdictional error.
- [54] In *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd and Ors*,²⁶ the plurality of the High Court, in analysing the New South Wales Building and Construction Industry Security of Payment Act 1999, held that the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1).²⁷ In reaching such a finding, the court identified that the existence of a reference date to support a payment claim is a jurisdictional fact.²⁸ In that case, the Court noted that there was no reference date in existence under the construction contract, as the contract had been terminated and nothing in the contract was indicative of a contractual interpretation that clause 17, which fixed the date for the claiming of progress payments under the contract, survived termination.²⁹
- [55] Hyatt contends that even if the Court determined that the adjudicator had made an error in determining that there was a reference date, this is one of the rare occasions when it could make a factual finding as to whether or not there was such a date. That is a point of controversy between the parties.
- [56] In *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd*,³⁰ Philippides JA, with whom Holmes JA and White JA agreed, set out the relevant principles as to the distinction between jurisdictional and non-jurisdictional error as identified by the High Court in *Craig v State of*

²⁵ Consistent with the decisions that errors as to the terms of a contract or its interpretation in the process of adjudication under s 26 have been treated as errors within jurisdiction: *The Minister for Commerce v Contrax Plumbing NSW Pty Ltd* [2005] NSWCA 142; *CF Saville v Hallmark Construction Pty Ltd* [2015] 47 VR 177 at 93.

²⁶ (2016) 340 ALR 193.

²⁷ See also *Low v MCC Pty Ltd & Ors; MCC Pty Ltd v Low* [2018] QSC 6 at [11].

²⁸ See [47].

²⁹ At [79]-[80].

³⁰ [2013] 2 Qd R 75.

*South Australia*³¹ and *Kirk v The Industrial Court of New South Wales*.³² In the context of jurisdictional facts, the Court relevantly stated:

[96] The following pertinent observations were also made by McDougall J in *Chase Oyster* at 427-429:

“As Gleeson CJ and McHugh J observed in *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at [24], ‘[j]urisdiction is the authority to decide’.

A ‘jurisdictional fact’ is, in general terms, ‘a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question’ (*Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [43]).

Spigelman CJ pointed out in *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37] that ‘[t]he parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality)’. As his Honour said (at [38]), those two features ‘are two inter-related elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense’. The interrelationship arose because essentiality may often suggest objectivity.

...

[97] Likewise, in *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 McLure P said at [11]-[12]:

“Whether a criterion is a jurisdictional fact is a question of statutory construction. A consequence of characterising a fact as ‘jurisdictional’ is that it significantly enlarges the scope of judicial review. The court’s judicial review power is confined to intervening when a decision-maker has made a jurisdictional error (or there is an error of law on the face of the record). Ordinarily, an error of fact does not give rise to a jurisdictional error and thus is outside the scope of the court’s review power. Not so when a fact is jurisdictional. The court must be satisfied that a jurisdictional fact actually (objectively) exists. ...

Another consequence (at least for inferior courts, tribunals and administrative decision-makers) is that the non-existence of a jurisdictional fact invalidates any order, determination or other outcome flowing from the exercise of the relevant statutory power. Any purported exercise of the power is invalid (that is, it is void not voidable). This consequence underpinned the historical reluctance of the courts to

³¹ (1995) 184 CLR 163.

³² (2010) 239 CLR 531.

characterise a statutory criterion as a jurisdictional fact: *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369.””

- [57] Hyatt accepts that if the contract was validly terminated, which it denies, no further reference date accrues from the date of termination. However, it asserts that reference dates which have accrued prior to termination are not extinguished by termination. In that regard, it relies on *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd*.³³ A number of cases have held that reference dates which have accrued prior to termination are not extinguished by termination of the contract with the authorities. That was the subject of reasoning by the High Court in *Southern Han* and also discussed by Justice Peter Lyons in *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*.³⁴ The proposition quite correctly is not a point of dispute between the parties.
- [58] A point of contention between the parties is the effect of any failure by the adjudicator to consider material relevant to the question of whether the contract was terminated. Watkins submits that, consistent with the decisions of *Kirk* and *Craig*, the effect of such a failure is that the adjudicator has failed to consider material required to be taken into account by the Act. That it contends, is a jurisdictional error, and the decision is void and should be set aside. Hyatt submits however, that if the failure of the adjudicator was to consider material relevant to the existence of a jurisdictional fact, the Court could determine whether or not the jurisdictional fact existed. Hyatt submits that the Court could determine whether the contract had been terminated or alternatively could determine that even if the contract had been terminated, a reference date, namely 31 October 2016, had accrued prior to termination and was available to support a payment claim.
- [59] McDougall J in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*³⁵ stated that the proper approach to construction where some fact is specified as a precondition to the exercise of jurisdiction by a Court, is to regard it as a matter for the Court to decide whether or not the fact exists, unless the statute clearly precludes that approach.³⁶ Thus, if a decision is challenged on the basis that the jurisdictional fact does not exist, the Court must itself enquire into the existence of that fact.³⁷
- [60] Consistent with the fact that this is an area in which the Court will as part of judicial review examine whether an adjudicator was correct in his or her finding of a jurisdictional fact, the Chief Justice in *McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors*,³⁸ having heard oral evidence, found that the contract in question had been terminated, contrary to the finding of the adjudicator. He therefore found that no reference date could relevantly arise. The decision of the adjudicator was consequently declared void.

³³ [2013] QSC 293.

³⁴ [2012] 2 Qd R 90 at [36] to [38] and [45].

³⁵ (2010) 78 NSWLR 393.

³⁶ At [172].

³⁷ At [167].

³⁸ At [10]-[25] and [34].

- [61] A Court can declare the absence of a necessary jurisdictional fact on the basis of fresh evidence.³⁹ Generally the burden of proving the absence of such a fact lies on the party challenging jurisdiction.⁴⁰ No further evidence was called in the present case.
- [62] The Court will not always make a determination as to the existence of a jurisdictional fact. If the donee of the power is authorised to decide authoritatively the existence of the jurisdictional fact, the Court enquires into the process adopted by the primary decision-maker's decision in determining that a jurisdictional fact exists, but does not enquire itself into the existence of that jurisdictional fact.⁴¹
- [63] Hyatt appeared to suggest such a change may have been brought about in Queensland in light of the 2014 amendment which provides in s 25(3)(a) of the Act for the adjudicator to decide whether he or she has jurisdiction to adjudicate the application. Watkins rejects that such a radical change could be effected by the inclusion of the provision. The explanatory notes to the *Building and Construction Industry Payments Amendment Bill 2014* do not shed light as to the purpose of inserting the provision.⁴² The New South Wales legislation, considered in cases such as *Chase Oyster Bar*, does not include such a provision.

Natural Justice

- [64] A substantial denial of the natural justice that the Act requires to be given would invalidate an adjudicator's decision such that it would be declared void. The authorities were helpfully analysed and applied by Applegarth J in *John Holland Pty Ltd v TAC Pacific Pty Ltd*.⁴³ His Honour concluded that there is a substantial denial of natural justice where an adjudicator has decided a dispute on a basis for which neither party contended, unless it can be said that no submission could have been made to the adjudicator which might have produced a different result.

The Adjudication Decision

- [65] The adjudication decision⁴⁴ demonstrates that the adjudicator:
- (a) Correctly acknowledged that Watkins denied that there is jurisdiction to adjudicate the application;⁴⁵

³⁹ Aronson & Groves, *Judicial Review of Administrative Action*, 5th Ed. Law Book Co, Thompson Reuters at 4.480; *Chowdhary v Bayne* (1999) 29 AAR 100 at [19].

⁴⁰ *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 382.

⁴¹ *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 at [169] per McDougall J.

⁴² Nor does the Wallace Report suggest the purpose of the provision was to provide for the adjudicator to authoritatively decide the existence of jurisdictional facts.

⁴³ [2010] 1 Qd R 302.

⁴⁴ Exhibit SAC-5 to the affidavit of S Cohen, CFI 2-5.

⁴⁵ At [5].

- (b) Recorded the fact that the payment schedule raised three bases upon which it was said that there was not a valid payment claim and did not enliven the Act. These included, *inter alia*, that Watkins claimed at the time that Hyatt served the payment claim (1 February 2017) that Watkins had terminated the contract, and that there was therefore no reference date for the purposes of sections 12 and 17 of the Act to make a valid payment claim; and further that the contract was terminated by frustration following an incident onsite on 29 October 2016 (this second reason was an alternative to the first reason);⁴⁶
- (c) Set out the response of Hyatt to the submission of Watkins that there was no jurisdiction;⁴⁷
- (d) Acknowledged that he had to decide whether he had jurisdiction pursuant to s 25(3) of the Act;⁴⁸
- (e) Addressed jurisdictional issues, noting that before embarking on an assessment of the payment claim, Hyatt had to satisfy him with its material that he had jurisdiction to proceed;⁴⁹
- (f) At [33], referred to the payment schedule and stated that Watkins referred to the incident on 29 October 2016 when Hyatt's drill rig rolled over onsite as the event that gave rise to termination of the contract. Watkins did not advance the specifics of any clauses of the contract that it claims Hyatt breached by the incident;
- (g) In [34] to [38], referred to Hyatt's submissions in the adjudication application responding to the payment schedule reasons and stated "when making the adjudication application, Hyatt did not have before it specific clauses of the contract that were allegedly breached or the Watkins' construction of the contract.";⁵⁰
- (h) Noted that Hyatt submitted that the adjudication response cannot include any reasons for withholding payment unless those reasons were included in the payment schedule and referred to s 24(4) of the Act and the case of *Thiess Pty Ltd and John Holland Pty Ltd v Civil Works Australia Pty Ltd & Ors*;⁵¹
- (i) At [41] to [45], addressed the fact that Watkins had raised matters in the adjudication response which were not raised in the payment schedule and stated as follows:

"[41] The respondent, in the adjudication response, introduced specific conditions of the (claimant's version of the) contract and advanced a certain construction of the contract which

⁴⁶ At [16].

⁴⁷ At [20].

⁴⁸ At [29].

⁴⁹ At [31].

⁵⁰ See [38]-[39].

⁵¹ [2011] 2 Qd R 276.

was not contained in the payment schedule. The respondent gave extensive submissions and argued that applying its construction of the contract, the claimant breached essential terms of the contract, namely the implied terms, the SWMS express term ... and the schedule 9 express terms which are clauses 4 and 16.12 of the MMGSR (the “**new reasons**”)

[42] The respondent did not provide submissions in response to the claimant’s submissions in the adjudication application relating to the Thiess case or the s 24(4) point.

[43] In *State Water Corporation v Civil Team Engineering Pty Ltd* [2013] NSWSC 1979 at [63], Sackar J stated:

“... Once a payment claim and payment schedule have been exchanged, the claimant’s decision of whether or not to take the further step of lodging an application will depend on its assessment of the respondent’s reasons for non-payment as disclosed in its payment schedule. There are obvious and powerful policy considerations in ensuring that the respondent discloses all of its reasons for non-payment in its payment schedule. The difficulties a claimant would experience if faced with an adjudication response which raised reasons for non-payment which were not included in the payment schedule, are amplified by the fact that the Act does not grant to the claimant a right to reply to the respondent’s adjudication response.”

[44] Nowhere in the payment schedule does the respondent give the new reasons that were advanced in the adjudication response. These new reasons for rejecting the claim were disclosed for the first time in the adjudication response. The claimant therefore had no opportunity to address them with submissions in the adjudication application. Furthermore, the Act does not give the claimant the right of reply to the adjudication response. In my view, if the respondent wanted to rely on these new reasons in the adjudication response, they should have been included in the payment schedule.

[45] I therefore agree with the claimant’s submissions regarding 24(4) of the Act and find that these new reasons cannot be raised in the adjudication response and I therefore do not take them into account in my decision. (emphasis added).”

[66] Watkins has particularly relied on [45] of the adjudication decision and the fact that at [46] the adjudicator stated that the asserted oral terms of the contract “are also caught by s 24(4) of the Act and I do not take them into account either.” However, Hyatt relies on the fact that the adjudicator went on at [46] to say: “In any event, I would not have placed much weight on Mr

Clarke's evidence on this point...". The oral terms said to be contained in the contract were not said by either party to be material to the matters required to be considered by the Court.

[67] The adjudicator further stated at [47] that:

"As a result of the above, the respondent has not satisfied me that the claimant breached a condition of the contract. It follows I am not satisfied that the respondent validly terminated the contract."

[68] At [48] to [51], still under the heading of 'Jurisdictional Issues', the adjudicator then stated as follows:

48. The parties have provided separate lists of what they submit are the contract documents. These are set out above under the heading of "The Contract." The claimant does not list either the SHEWMS or the MMGSR as contract documents.

49. On its face, the MMGSR is a document under the head contract between MMG and the respondent. The SHEWMS is a document required to be prepared by legislation.

50. When making the adjudication response, the respondent was aware from the adjudication application of the different positions being taken regarding the contract documents. As the respondent takes the position and asserts that the SHEWMS and MMGSR are contract documents, it is incumbent upon the respondent to satisfy me with submissions why I should treat them so. Mr Clarke in his affidavit sets out what he considers to be the contract documents from the respondent's standpoint. The respondent submissions also contain the same list of documents. What is missing however from the material are the respondent's submissions explaining the discrepancy between the claimant's and the respondent's lists and why I should accept the SHEWMS and the MMGSR as contract documents. In the absence of submissions to this effect, in my view, I am not able to consider the issue and accordingly, the respondent has not satisfied me that the MMGSR or the SHEWMS are contract documents.

51. As to the implied terms, the respondent asserts that they are implied as a matter of fact. However, the respondent has not provided submissions or satisfied me as to why these terms are implied into the contract."(footnotes omitted)

[69] At [80], the adjudicator referred to Watkins' denial of the existence of a reference date and with it any entitlement to a progress payment. He stated:

"However, for the reasons stated above, the respondent has not satisfied me that it validly terminated the contract for breach of condition or that the parties were discharged from their obligations under the contract on 14th November 2016 by the principle of frustration."

Did the adjudicator consider the submissions of Watkins as to termination of the contract and the existence of the reference date?

- [70] Hyatt contends that, notwithstanding what the adjudicator stated at [45] and [47] of his reasons, the adjudicator's reasons in [48] to [51] showed that he did consider Watkins' submissions and reach a decision that he was not satisfied that the written documents SHEWMS and MMGSR were part of the contract nor that the implied terms were part of the contract. Having decided that, Hyatt contends that the adjudicator did not have to consider Watkins' submissions as to termination any further. It contends that the Court must be cautious in its analysis of an adjudicator's decision before finding error.
- [71] In this regard it refers to *John Holland Pty Ltd v TAC Pacific Pty Ltd*.⁵² In that case, Applegarth J observed that:⁵³
- “... in circumstances in which adjudicators are required to determine complex legal issues quickly, the detection of flaws in reasoning or poorly expressed reasons in an adjudication decision do not compel the conclusion that the adjudicator did not attempt to understand and apply the contract. Adjudicators provide their determinations in a ‘somewhat pressure cooker environment’. In some instances the adjudicator ‘cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing’. The Court should be slow to conclude that adjudicators who work under the very tight deadlines imposed by the Act, and who, in seeking to do their best, make a mistake, have not acted in good faith.”(citations omitted)
- [72] Watkins however contends that [45] and [47] contain the decision of the adjudicator and that the matters in [48] to [51] are mere afterthoughts by the adjudicator which did not constitute findings by him and were at best bare conclusions with no reasoning. It contends that the adjudicator refused to consider the jurisdictional issue, not only in the context of the specific contractual clauses said to have been breached, but at all. It contends that the statements by the adjudicator at [45], that he was not taking into account what he described as the “new reasons” in determining the question of jurisdiction, were unequivocal, particularly given the further statement in [46] and [47] of the adjudicator's decision.
- [73] While Hyatt did make written submissions that if the adjudicator had failed to consider the matter it was an error within jurisdiction it did not in oral argument contend that the adjudicator was not obliged to consider and make findings on the basis of Watkins' arguments as to jurisdiction. It did however contend that if he made an error in the process of determining whether there was jurisdiction that may no longer necessarily characterised as a jurisdictional error in light of the introduction of s 25(3)(a) into the Act.
- [74] On the basis of the adjudicator's reasons in [45] and [47] alone, I consider that the adjudicator would have made a jurisdictional error in failing to consider the “new reasons” which were relevant to the determination of whether there was a reference date which could support the payment claim made by Hyatt and whether he had jurisdiction to determine the matter.

⁵² [2010] 1 Qd R 302.

⁵³ Referred to by White JA with approval in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors* [2012] 1 Qd R 525 at [92].

- [75] Although the detailed argument as to the terms of the contract and the termination of the contract were not raised until the payment schedule, the payment schedule had stated that the contract had been terminated and that there was no “reference date” to support the payment claim made by Hyatt. The “new reasons” were in fact an elaboration of those matters already raised. In any event the “new reasons” were submissions directed at jurisdiction and even if they had not been raised in the payment schedule, I consider that section 24(4) of the Act did not apply and the adjudicator was required to consider them.⁵⁴
- [76] Nor would s 26(2)(d) of the Act apply. Section 26(2) applies to the consideration of the subject matter of the adjudication itself and not jurisdiction.⁵⁵
- [77] The question of jurisdiction is different from the decision required to be made pursuant to s 26 of the Act, which is predicated on jurisdiction already having been determined. The demarcation between a decision as to jurisdiction and the adjudication decision itself is apparent in s 35 of the Act. A decision as to jurisdiction is not confined to the matters in s 26(2) of the Act.
- [78] Further the case referred to by the adjudicator, *Thiess Pty Ltd & John Holland Pty Ltd v Civil Works Australia Pty Ltd*,⁵⁶ in deciding that the “new reasons” should not be considered by operation of s 24(4) of the Act is different from the present case. In that case, the submissions as to a time bar, which his Honour determined not to consider because they had not been raised in the payment schedule, did not go to the jurisdiction of the adjudicator to adjudicate the matter and s 24(4) of the Act applied. Further, unlike the present case, the question of the time bar had not been raised in any way in the payment schedule. That cannot be said of the present case. The contention that the contract had been terminated and there was no reference date to support a payment claim was a matter raised in the payment schedule, albeit that the terms of the contract were not identified.

Did the adjudicator consider Watkins submissions on a second basis?

- [79] Notwithstanding the definite statements that he would not take into account the “new reasons” contained in Watkins’ adjudication response in determining the application, the adjudicator did go on in his reasons to address them at least in part. The question is whether the adjudication decision demonstrates that the adjudicator considered those “new reasons” and whether those reasons reveal an assessment of the issues raised and set out why the

⁵⁴ *Rail Corporation of New South Wales v Nebax Constructions Australia Pty Ltd (t/as Tracksyde Constructions)* [2012] NSWSC 6 at [36]-[37]; *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165 at 11 referred to with approval in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd & Anor* [2013] 2 Qd R 75; See also *Surfabear Ptd Ltd v GJ Drainage & Concrete Constructions Pty Ltd* [2010] 2 Qd R 366 at [48].

⁵⁵ *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165 at [14], although under the Queensland Act there is power to determine the question of jurisdiction. I do not consider that alters the obligation of the adjudicator to examine all relevant matters in making a determination of whether he or she has jurisdiction.

⁵⁶ [2011] 2 Qd R 276; see [40] and [43] of the adjudicator’s decision.

adjudicator arrived at the determination.⁵⁷ While the reasons should not be subject to the level of scrutiny to which reasons of a judge must be exposed, they must sufficiently set out the reason for the decision made.

- [80] Watkins contends that, even if the Court was satisfied that the reasons in [48] to [51] demonstrate that the adjudicator gave any consideration to its submissions as to the terms breached and its contention that the contract had been terminated, the Court should still find jurisdictional error as they are no more than bare conclusions.⁵⁸
- [81] Where the reasons do not reveal any foundation or logical basis for the decision, then there has been a failure to exercise jurisdiction.⁵⁹
- [82] In [48] of the adjudicator's decision, the adjudicator considers the list of documents which Watkins submitted constituted the contract. Those two documents which he described as MMGSR and SHEWMS are the documents that Watkins submitted contained the express terms which were breached as a result of the 29 October 2016 incident. The adjudicator had identified in his reasons at [25] and [41] that Watkins contended those express terms were part of the contract on the basis that MMGSR and SHEWMS were part of the contract and that they were *inter alia* breached such that Watkins was entitled to terminate the contract.
- [83] The adjudicator identified the fact that MMGSR was a document under the head contract between MMG and Watkins and that SHEWMS was a document required to be prepared under legislation.⁶⁰ He concluded however that he was not able to consider the issue because of the lack of submissions substantiating the point and thus determined that Watkins had not satisfied him that MMGSR or SHEWMS were documents constituting the contract.⁶¹
- [84] In reaching that view, the adjudicator noted that Watkins was aware from the adjudication application that Hyatt had taken a different position as to the documents said to constitute the contract and in particular that Hyatt's construction did not include the documents MMGSR and SHEWMS. He stated in that context it was for Watkins to satisfy him of why he should treat them as forming part of the contract.
- [85] The adjudicator did not simply disregard the submissions made by Watkins. He had identified the fact that Watkins otherwise relevantly agreed with the documents asserted by Hyatt as forming part of the contract.⁶² He had identified that on their face they did not apparently form part of the contract, which the adjudicator had identified and in that context considered, it was for Watkins to set out in its adjudication response the matters relied upon to

⁵⁷ *Bauen Constructions Pty Ltd v Westwood Interiors Pty Ltd* [2010] NSWSC 1359 at [40].

⁵⁸ *Annie Street JV Pty Ltd v MCC Pty Ltd* [2016] QSC 268 at [26].

⁵⁹ *Annie Street JV Pty Ltd v MCC Pty Ltd & Ors* [2016] QSC 268 at [30].

⁶⁰ Adjudicator's decision at [49].

⁶¹ At [50].

⁶² At [49] and [7] and [9] of the adjudicator's decision.

substantiate that fact. The adjudicator recognised that Mr Clarke in his affidavit had set out that they formed part of the contract.

- [86] As to the implied terms, the adjudicator found that he was not satisfied that they were incorporated. In this regard, he stated that Watkins had not provided him submissions or satisfied him as to why those terms were implied in the contract.
- [87] The adjudicator again noted that no submissions had been made to him setting out why those terms would be implied as a matter of fact and referred to the fact that five conditions must be satisfied for a term to be implied as a matter of fact according to *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*.⁶³

Were the reasons sufficient?

- [88] An adjudicator cannot determine a matter by merely rejecting or disregarding a party's submissions.⁶⁴ In the present case, although that appeared to be the case from the adjudication decision in [45] to [47], the adjudicator ultimately was unpersuaded that the additional documents and implied terms formed part of the contract. The inclusion of those terms was critical to Watkins' case.
- [89] The reasons in [48] to [51] were not separate from the adjudicator's consideration of whether the contract had been terminated. The adjudicator's reasons in [25] and [41] identified that the implied terms and express terms in SHEWMS and MMGSR were the essential terms which Watkins relied upon as having been breached and justifying termination. If they were not found to be part of the contract, Watkins' argument that the contract had been terminated necessarily failed and the adjudicator did not have to consider the further arguments as to the termination of the contract. The reasons in [48] to [51] were clearly part of his reasoning in determining that the contract was not terminated given the identification of the relevance of those matters in [25] and [41].
- [90] Given the lack of submissions made in support of the fact that the documents and the implied terms formed part of the contract, the reasons of the adjudicator demonstrate that the adjudicator considered the question of whether those terms did form part of the contract. He clearly had regard to the evidence of Mr Clarke. His reasons, albeit brief, revealed a foundation and logical basis for the decision he reached that they were not part of the contract and are not simply a bare conclusion.⁶⁵
- [91] Mr Clarke swore to the matters discussed and the fact that Hyatt was provided with a copy of MMGSR in the meeting of 16 August with Hyatt, which they were told they would have to

⁶³ (1977) 52 ALJR 20 at 26.

⁶⁴ *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd* [2010] VSC 300 at [21] –[24]; *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279 at [58]; This of course assumes s 24(4) of the Act does not apply to the submissions.

⁶⁵ *Annie Street JV Pty Ltd v MCC Pty Ltd* [2016] QSC 268 at [26]-[30] and [53].

comply with,⁶⁶ and that Hyatt agreed it would provide a safe work method statement (SHWEMS) prior to commencing works.⁶⁷ He further swore that those documents were part of the written contract.⁶⁸ The fact that they were part of the contract was however a matter of assumption rather than demonstrated by the evidence provided.⁶⁹ While parties have to prepare material in this setting in an accelerated time frame and in a short hand way, Watkins did know that these documents were not said by Hyatt to be part of the contract and they were key terms on which they were relying. While it may be that Watkins can ultimately establish those documents were part of the contract with Hyatt, I am unpersuaded that the adjudicator's findings that there was a lack of explanation as to why they should be accepted as contract documents and that he was not satisfied that they did form part of the contract, were incorrect. Similarly the submission that there were implied terms of fact in the contract did not set out the factual basis relied upon to suggest that the terms were implied. In those circumstances, I am again unpersuaded that the adjudicator was incorrect in finding that he was not satisfied that the terms contended for by Watkins were not implied on the basis of the material before him.

- [92] Given his findings that the terms relied upon by Watkins as having been breached which justified termination were not part of the contract, the adjudicator did not have to consider the question of breach and whether termination had occurred. It is therefore unnecessary for me to consider whether, if he made an error in finding those terms were not part of the contract, it was, as submitted by Hyatt, an error within jurisdiction.
- [93] On the basis of the above, I find that the adjudicator did have regard to Watkins' submissions as to termination and provided sufficient reasons in [48] to [51] which determined the question of whether the contract had been terminated and which supported his ultimate determination that a reference date of 31 January 2017 was available. Given it is a question of jurisdiction, I am unpersuaded that his findings in that regard were incorrect.
- [94] Watkins' alternative argument, that the adjudicator's decision to ignore Watkins' submissions was a substantial denial of natural justice, is not made out, given my findings that he did consider them.

Did the Adjudicator determine the matter on a basis not raised?

- [95] A further and alternative argument raised by Watkins is that the decision was invalid because the adjudicator effectively treated certain documents and implied terms as not forming part of the contract by refusing to consider them and that that was not a position contended for by either party. In so doing it is contended the adjudicator denied Watkins natural justice.

⁶⁶ Exhibit SAC4 to the affidavit of Clarke, p 214.

⁶⁷ Exhibit SAC4 to the affidavit of Clarke, p 216.

⁶⁸ Exhibit SAC4 to the affidavit of Clarke, p 216.

⁶⁹ In relation to which see *Surfstone Pty Ltd as Trustee of the IERNA Property Trust v Morgan Consulting Engineers Pty Ltd* [2017] 2 Qd R 66.

[96] Hyatt in its adjudication application had stated the documents which it contended formed part of the written contract and had specifically stated the contract was, insofar as it was written, limited to those documents.⁷⁰ Watkins took a different view of what was constituted by the contract in its adjudication response. It is not correct to say that Hyatt did not dispute that either the MMGSR, SHEWMS or implied terms did not form part of the contract, as Hyatt set out in its adjudication application what it contended constituted the contract.⁷¹ In the circumstances, natural justice did not require the adjudicator to seek further submissions regarding the said documents and the implied terms prior to determining that they did not form part of the contract. It is not correct to say that the adjudicator made his determination on grounds not contended for by either party since clearly it was a matter in issue which had to be resolved by him. Hyatt raised what it said was the relevant part of the contract and Watkins responded with what it contended as the relevant part of the contract. The ground is not made out.

Alternative reference date

[97] Watkins did not seek to have the Court determine whether as matter of fact the contract had been terminated and therefore that no reference date existed. In the case of a jurisdictional fact, that is one of the rare cases where the Court may determine whether the decision maker is correct in finding that a precondition of its jurisdiction was satisfied.⁷² In this regard, although I do not need to determine the matter, I do not consider that the effect of s 25(3)(a) of the Act changes the nature of the Court's power of review⁷³ in relation to a jurisdictional fact.

[98] As set out above on the basis of the material before the adjudicator, I am unpersuaded he was incorrect in finding the contract was not terminated. The adjudication decision does not of course finally determine the parties' contractual rights,⁷⁴ and Watkins may still have that matter finally determined by the Courts or alternate dispute resolution.

[99] It was submitted in oral submissions by Hyatt that I could and should determine whether there was a reference date.⁷⁵ While I do not need to determine that given the findings above, I will consider the matter by briefly giving my findings in that regard.

⁷⁰ Exhibit SAC3 to the affidavit of S Cohen, CFI2-5, p 17 at [8].

⁷¹ While it did not set out the oral terms, they were not relevant in relation to the determination of this part of the dispute.

⁷² *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128; *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2012] 2 Qd R 90; *Saville (T/as China Sourcing Services)v Hallmarc Construction Pty Ltd* (2015) 47 VR 177 at [59] to [61].

⁷³ As discussed by McDougall J and Basten JA at [99] to [100] in *Chase Oyster*.

⁷⁴ *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at [51]; s 100 of the Act.

⁷⁵ This was said to be on the basis that notice was not required to be given as Hyatt had sought to have Watkins' identify the issues it relied upon (Affidavit of D Ho, CFI9) and they did not need to identify the basis upon which it considered such an argument should be met. While I consider it should have been addressed by Hyatt in its written submissions, the argument of Hyatt that there was an alternative

[100] Hyatt, in its adjudication application and before me in oral hearing, submitted that even if the contract had been terminated, the reference date of 31 October 2016 survived and Hyatt was entitled to a progress payment and to serve a payment claim under section 12 and section 17 of the Act. The fact that the reference date of 31 October 2016 was not identified in its payment claim was not fatal. Hyatt referred to the decision of *McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd*,⁷⁶ as supporting the fact that another reference date could be relied upon to support the payment claim. At [18] Mullins J stated:

“The nomination of a patently incorrect reference date in the payment claim that otherwise related to an outstanding reference date in respect of which MAK had not previously made a payment claim, did not deprive the adjudicator of jurisdiction to decide the adjudication application based on that payment claim.”

[101] The ability of Hyatt to rely on the alternative date was disputed by Watkins on the basis that Hyatt had issued payment claims under the contract and the Act on 10 November 2016 and again on 24 November 2016. It therefore submitted that the 31 October 2016 reference date was extinguished.⁷⁷

[102] Hyatt contended those payment claims included work carried out after 31 October 2016 and were therefore not valid payment claims. Hyatt relied on *FK Gardner & Sons Pty Ltd v Dimin Pty Ltd*,⁷⁸ where Lyons J held that the applicant was not entitled to the progress payment claimed nor could it claim such an entitlement as the work had been done after the previous reference date and the progress payment submitted before the next reference date accrued. Accordingly he found in that case that the applicant is not a person to whom s 17 applied and the claim did not come within the section. His Honour’s decision accords with the wording of the section and I consider it is correct.

[103] The fact that Watkins had treated the claims of 10 November 2016 and 24 November 2016 as payment claims, notwithstanding they were incorrectly endorsed, does not make them valid payment claims. It is clear on the face of the payment claims of 10 November 2016 and 24 November 2016 that they included work carried out beyond 31 October 2016.⁷⁹ As they included work carried out after 31 October 2016 they were not valid payment claims and therefore did not extinguish the reference date of 31 October 2016. By contrast the payment claim of 1 February 2017 related to work carried out prior to 31 October 2016. Watkins did

reference date that could be relied upon by Hyatt even if the contract had been terminated was raised in its adjudication application and responded to in the adjudication response. No objection was made to the submissions, albeit that Watkins contended that the decision was void so it didn’t fall for consideration. In any case, Watkins contended that other payment claims had been made in respect of the reference date as was contained in the adjudication response.

⁷⁶ [2013] QSC 293. Her Honour’s decision in this regard was not the subject of an appeal.

⁷⁷ See adjudication response, Exhibit SAC4 to the affidavit of S Cohen CFI 2-5 at p 16, [54] and p 19 at [61].

⁷⁸ [2007] 1 Qd R 10 at [34].

⁷⁹ CC17 pp 637-640; CC20 pp 655-656.

not however dispute that the work logs E1 and E2,⁸⁰ relied upon by Hyatt as showing the work carried out up until 31 October 2016, which was the subject of the payment claim of 1 February 2017 were correct.

[104] In the circumstances I find that the payment claim could be made in respect of the reference date of 31 October 2016, which had accrued prior to any alleged termination of the contract.

Conclusion

[105] Based on the above, I find that the application should be dismissed because:

- (a) The adjudicator did consider Watkins' submissions as to jurisdiction and did not make a jurisdictional error nor deny Watkins natural justice;
- (b) The reasons given by the adjudicator for rejecting the incorporation of express and implied terms contended for by Watkins were sufficient and effectively resolved the question of whether the contract was terminated and thus the question of whether there was an available reference date. There was no jurisdictional error;
- (c) The adjudicator did not proceed to decide the adjudication on a basis not contended for by either party. There was no denial of natural justice;
- (d) Even if the contract had been terminated, I find that the adjudicator had jurisdiction on the basis that a reference date of 31 October 2016 had accrued prior to termination.

[106] I dismiss the application. Costs should follow the event and Watkins should pay Hyatt's costs of the proceedings. The parties should make submissions as to any additional orders that should be made arising out of the order that security for costs should be provided within seven days.

⁸⁰ Exhibit SAC4 to the affidavit of S Cohen, CFI2-5, pp 135-155; T1-4/25-41.