Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor
[2014] NTSC 20

PARTIES:	HALL CONTRACTING PTY LTD (ABN 55 009 786 065) v MACMAHON CONTRACTORS PTY LTD (ABN 37 007 611 485) And: COLIN BOND
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	116 of 2013 (21349879)
DELIVERED:	5 June 2014
HEARING DATE:	16 December 2013
JUDGMENT OF:	BARR J

CATCHWORDS:

ADMINISTRATIVE LAW – Construction – contract for dredging and disposal of seabed materials – payment dispute – standby costs – claim rejected – adjudicator's determination – validity of

ADMINISTRATIVE LAW – Substantial denial of natural justice – determination based on matter not in dispute – failure to provide an

opportunity to make submissions on a matter highly significant to adjudicator's determination – determination quashed

Craig v State of South Australia (1995) 184 CLR 163*; Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531*; K and J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1*; O'Donnell Griffin Pty Limited v John Holland Pty Limited* [2009] WASC 19; *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80*; Perrinepod v Georgiou Building Pty Limited* (2011) 43 WAR 319*; Re Graham Anstee-Brook; Ex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35*; Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219*; Police and State of South Australia v Lymberopoulos and Others* (2007) 98 SASR 433; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576*; Musico v Davenport* [2003] NSWSC 977; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302; *Avopilang (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466; *McKay v Commissioner of Main Roads* [2013] WASCA 135*; Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, referred to.

Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd; Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd (2008) 24 NTLR 15*; A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 1*; Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd* [2014] WASC 40; *Brodyn Pty Ltd v Davenport and Another* (2004) 61 NSWLR 421, followed.

Construction Contracts (Security of Payments) Act 2004 (NT) s 8, s 27, s 28(1)(a), s 28(2)(b) and (c), s 29(1), s 29(2)(b) and (c), s 33(1)(a) and (b), s 34(2)(a).

REPRESENTATION:

Counsel:

Plaintiff:	W Roper
Defendant:	A Monichino QC, N Christrup

Solicitors:

Plaintiff:	Minter Ellison Lawyers
Defendant:	Squire Sanders

Judgment category classification:	B
Judgment ID Number:	Bar1407
Number of pages:	26

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor
[2014] NTSC 20
No. 116 of 2013 (21349879)

BETWEEN:

HALL CONTRACTING PTY LTD
(ABN 55 009 786 065)
Plaintiff

AND:

MACMAHON CONTRACTORS PTY LTD
(ABN 37 007 611 485)
First Defendant

AND:

COLIN BOND
Second Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 5 June 2014)

[1] The plaintiff seeks relief in the nature of certiorari to quash an adjudication determination delivered 16 September 2013, made by the second defendant under the *Construction Contracts (Security of Payments) Act* (NT). Alternatively, the plaintiff seeks a declaration that the determination is void and of no force and effect.

Background

[2] The plaintiff and the first defendant were at all relevant times parties to a contract for dredging and disposal of seabed materials for the Darwin Marine Supply Base project at the East Arm Port, Darwin Harbour.

[3] The impugned adjudication determination was made against the background of an ongoing contractual dispute between the plaintiff and the first defendant as to whether the plaintiff was entitled to the costs of maintaining a dredge, the Eastern Aurora, on standby during the Darwin wet season of 2012/2013. The first defendant issued a letter dated 29 October 2012 which (the adjudicator determined) required the plaintiff to maintain the dredge on site for the coming wet season. In a contract progress claim, which for convenience I will identify as "the first dredge claim",[1] the plaintiff charged for the standby costs of maintaining the dredge on site for the period 1 December 2012 to 25 February 2013. The first defendant rejected the first dredge claim. The plaintiff applied for adjudication. The adjudicator determined that the letter of 29 October 2012 constituted a direction under the contract, and that the plaintiff was entitled to recover its costs for complying with the direction. The plaintiff thus recovered the standby costs for the dredge, for the period claimed.

[4] In a subsequent progress claim, the plaintiff sought the standby costs of the dredge for a period which included the period from 25 February 2013 to

[1] Although it would be more accurately identified as 'Progress Claim 9'.

1 May 2013 ("the second dredge claim").[2] The first defendant rejected the second dredge claim, on essentially the same grounds previously relied on in rejecting the first dredge claim.

[5] The first defendant's contention had been and remained that the letter of 29 October 2012 did not vary the contract such as to require the plaintiff to maintain the dredge on site for the 2012/2013 wet season and entitle it to standby costs.[3] That contention was the essential dispute between the parties.

[6] After the first defendant rejected the second dredge claim, the plaintiff applied for another adjudication.[4] The application document made clear that the plaintiff's underlying claim relied on the same facts and evidence as in the earlier adjudication.[5] The plaintiff submitted that the adjudicator was "bound by the determination in the First Adjudication on entitlement" and that "the only matter open for consideration is the valuation of the further amount claimed in relation to the same entitlement."[6] The plaintiff then stated its claim for a total of 1,554 hours in the 65-day period from 25 February 2013 to 1 May 2013, and made the following submission:

---

2 The second dredge claim was submitted before the adjudicator had determined the dispute in relation to the first dredge claim, and it included the whole of the period from 1 December 2012 to 1 May 2013. It was thus, in part, a repeat claim. However, the plaintiff made it clear, once it had succeeded in the adjudication of the first claim, that it was only seeking standby costs for the period from 25 February 2013 to 1 May 2013, and the adjudication of the dispute arising from the second dredge claim proceeded on that basis.

3 Statutory Declaration Malcolm Hingston 29 August 2013 paragraphs 4.56 to 4.68, part of the material relied on by the first defendant in response to the plaintiff's application for adjudication.

4 Adjudication Application dated 16 August 2013.

5 Adjudication Application, paragraph 1.4 (g) and (h).

6 Adjudication Application, paragraph 1.4(s).

> … the total compensable hours should be multiplied by the Standby Rate of $4,200 per hour set out in the Schedule of Rates. Accordingly, the total costs claimed is $6,190,800 (plus GST). The Adjudicator should note that the claimed amount is equal to the amount claimed in Payment Claim 12 less the amount paid pursuant to the first adjudication.[7]

[7] The reference to the "Schedule of Rates" was to the schedule annexed to the contract between the first defendant and the plaintiff, item 4.0 of which provided for an agreed standby rate of $4,200 per hour for the Eastern Aurora.[8] The contract (including the schedule) was contained in the plaintiff's application documents and was thus part of the evidence provided to the adjudicator.

[8] In relation to whether the dredge was on standby for the period of the second dredge claim, the plaintiff provided evidence to the adjudicator in the form of a statutory declaration made by Cameron Leslie Hall, from which I have extracted the following passages:

> … I took the Superintendent's letter of 29 October 2012 to be a direction from the Superintendent … [*which*] required Hall to retain the Eastern Aurora in Darwin over the Wet Season for its use on the Project after the Wet Season.[9]

> … the Eastern Aurora remained at the Project consistent with the Superintendent's direction from 26 January until 1 May 2013. On 1 May 2013, the Eastern Aurora commenced dredging in accordance with the DDSPMP.[10]

---

7 Adjudication Application, paragraph 4.2(d) and (e).
8 Major Works Contract, Instrument of Agreement, page 25, Schedule of Rates.
9 Statutory Declaration Cameron Leslie Hall, 9 August 2013, paragraph 4.20(b)
10 Statutory Declaration Cameron Leslie Hall, 9 August 2013, paragraph 4.27. The reference to the 'DDSPMP' is to the Dredging and Dredge Spoil Placement Management Plan.

[9] The first defendant's (respondent's) submissions in response to the application identified the dispute between the parties in the following terms:[11]

> 1 EXECUTIVE SUMMARY
>
> 1.1 Hall Contracting's application for adjudication must be dismissed.
>
> 1.2 Fundamentally, Hall Contracting's application is based on two propositions:
>
> (a) There was an agreement reached between the parties on or about 3 October 2012; and
>
> (b) On 29 October 2012, the Superintendent issued a direction to vary the works from that agreed on 3 October 2012.
>
> 1.3 Neither of these propositions is supported by the facts or at law. Put simply, Hall Contracting has failed entirely to prove its claim to the adjudicator in this adjudication and the law does not support Hall Contracting's arguments.
>
> 1.4 The Adjudicator is obliged to consider each separate application as it is presented by the applicant. This requires considering the merits of each and every application afresh. It would be contrary to the CCA and a miscarriage of justice if the Adjudicator were to ignore the requirements of the *Construction Contracts (Security of Payments) Act* 2004 (CCA) and base a decision on material presented in a prior adjudication application or to accept a prior adjudication determination as binding.
>
> 1.5 In any case, even if there is a factual and legal basis for a standby claim, the claim now made by Hall Contracting is a 'rolled up' claim for several months of standby but only standby for the period 26 April 2013 to 1 May 2013 is validly

[11] Respondent's submissions dated 2 September 2013: Introduction, paragraphs 1.1 to 2.3; paragraphs 5.1 to 6.4.

the subject of Payment Claim No 12 and can be properly claimed in the present adjudication.[12]

2. BACKGROUND

2.1 On 20 February 2012, Macmahon Contractors Pty Ltd (Macmahon) was appointed by Shore ASCO Pty Ltd, on behalf of the Northern Territory Government, to design and construct an international standard marine supply base in the Port of Darwin, comprising three berths and a rock loadout facility Project (Project).

2.2 On 8 May 2012, Macmahon Contractors engaged Hall Contracting Pty Ltd (Hall Contracting) to undertake dredging works as part of the Darwin Marine Supply Base Project (Subcontract).

2.3 The parties are in dispute regarding:

(a) the delay in obtaining approvals to commence dredging; and

(b) whether Hall Contracting was obliged to retain the dredge Eastern Aurora in Darwin over the wet season, rather than demobilising and if so, whether this constituted a variation to the Subcontract. ….

…….

5 NO BASIS FOR CLAIM

5.1 In order to succeed in respect of 'Claim 2', Hall Contracting must prove the following two underlying propositions:

(a) There was an agreement reached between the parties on about 3 October 2012 to vary the Subcontract, and

(b) On 29 October 2012, the Superintendent issued a direction to vary the works from that agreed on 3 October 2012.

[12] This was conceded by the plaintiff – see footnote 2 above.

5.2 However, the submissions put by Hall Contracting are based on a complete misunderstanding of the facts and of the law which applies.

5.3 In fact:

(a) there was no agreement on 3 October 2012; and

(b) no variation was directed on 29 October 2012.

5.4 As no agreement was made on 3 October 2012, the 29 October 2012 direction cannot be a variation.

6. NO EVIDENCE HAS BEEN LEAD BY HALL TO SUPPORT ITS CLAIM

6.1 The sum total of the evidence lead by Hall Contracting comprises:

(a) only one statutory declaration – by Cameron Hall;

(b) the Subcontract;

(c) the payment claims; and

(d) correspondence regarding the claims.

The prior adjudication material including the prior determination is not evidence in this adjudication and must be ignored.

6.2 The crux of Hall Contracting's case is set out at paragraphs 4.13 – 4.20 of Cameron Hall's statutory declaration.

6.3 However, none of these paragraphs gives any actual evidence of what happened. Instead, Mr Hall's statutory declaration is a summary outline of what Mr Hall says is the legal outcome of the discussions (a matter for the adjudication) and what he supposes other people were thinking. There is nothing in the statutory declaration that sets out the material facts to support Mr Hall's summary or Mr Hall's legal conclusions. Put simply, Mr Hall does not say what was said or done, that is, what actually happened. More disturbingly, even where Mr Hall

refers to a document (which would provide actual evidence) he does not provide it for the adjudicator to consider.

6.4 This is Hall Contracting's application and it is responsible to ensure that it provides everything that it wants the adjudicator to consider. In this case, Hall Contracting has not provided anything factual for the adjudicator to rely on in making a decision. Hall Contracting should have set out what happened. – provided the documents where they exist, and whether they allege an oral agreement, set out who said what. It chose not to do that and accordingly, the adjudicator has no facts from Hall Contracting to consider that might support its case.

[10] The dispute identified by the first defendant in sub-paragraph 2.3 (b) of its submissions in response thus did not include any dispute as to whether or not the dredge was on standby from 25 February 2013 to 1 May 2013,[13] or as to the standby costs charged and claimed by the plaintiff.

[11] It can also be seen from the first defendant's submissions in response that the submission in paragraph 1.3: "Hall Contracting has failed entirely to prove its claim to the adjudicator" and, in paragraph 6.4: "Hall Contracting has not provided anything factual for the adjudicator to rely on in making a decision" were both in relation to the substance, meaning and effect of the letter dated 29 October 2012 and of the discussions alleged to have taken place on 3 October 2012. They were submissions specific to those issues, not submissions directed to asserted general evidentiary deficiencies in the plaintiff's application. I therefore do not accept the submission of the first

[13] Save for the contention in paragraph 1.5 in relation to the rolled up claim for the period preceding 25 February 2013, which is not relevant to this proceeding.

defendant in this proceeding that it had "advanced a general objection that Hall had not produced any proper evidence to support its claim".[14]

[12] The second defendant (adjudicator) determined, consistently with the first adjudication, that the letter of 29 October constituted a direction under the contract, having the same effect referred to in [3] above. However, the second defendant dismissed the plaintiff's application because he found the plaintiff had not established or proven the standby costs for the dredge for the period the subject of the second dredge claim. I set out below relevant parts of the adjudication determination:

> **Issues in dispute**
>
> 34. In its adjudication response the respondent states that the application for adjudication must be dismissed as the applicant has failed entirely to prove its claim.[15]
>
> 35. The applicant does state in its application that the claim is a rolled up claim for several months of standby from 1st August 2012 to 1st May 2013 less an amount paid for standby costs in the first adjudication.
>
> 36. I am satisfied that the 29th October 2012 letter from the Superintendent constituted a direction under the terms of the subcontract. This decision was reached by me in the first adjudication 34-13-01 based on the evidence provided by both parties.
>
> 37. The delay period claimed by the applicant in the first adjudication was from 1st December 2012 to 25th February 2013 for standby costs however the standby costs claimed in this adjudication are from 25th February 2013 to 1 May 2013.

[14] First defendant's submissions dated 9 December 2013, paragraph 31.

[15] The respondent's (first defendant's) statement referred to by the adjudicator was set out in paragraph 1.3 of the respondent's submissions extracted above. As mentioned in [11], it was not a general submission that the plaintiff had failed to prove its claim, but was directed at the two propositions contained in sub-paragraphs (a) and (b) of paragraph 1.2 of the respondent's submissions.

38. I therefore agree with the statements made by the respondent in its adjudication response that the applicant is incorrect in stating that the "same facts and evidence" apply as the first adjudication.

39. I therefore do not consider that the applicant has provided any relevant evidence in this adjudication to demonstrate an entitlement to claim any standby costs for the Eastern Aurora for the period between 25th February and 1 May 2013. These standby costs relate to a separate time period and I do not consider it appropriate to simply multiply the standby rate of $4,200 per hour by this further standby period.

40. The applicant in its adjudication application states that it is not seeking to adjudicate the same dispute however I am not satisfied that the applicant has provided any relevant evidence for me to evaluate these additional standby claims.

41. The information provided by both parties in the first adjudication satisfied me that the 29th October 2012 letter from the Superintendent constituted a direction under the terms of the subcontract and the 1st December 2012 to 25th February 2013 [*sic*] and the Eastern Aurora had indeed been on the project "standing idle" during the period between 1st December 2012 to 25th February 2013.

42. However I have not been provided with any evidence to demonstrate that the Eastern Aurora continued to be at the project for the period between 25th February and 1 May 2013.

…

48. … I have previously stated in paragraph 36 above that the decision reached in the first adjudication regarding the Superintendent's letter dated 29th October 2012 constituted a direction under the terms of the subcontract.

49. My decision on this key issue is consistent with the first adjudication; however it is common ground that the time period being claimed for the standby time in this current adjudication is different from that being claimed in the first adjudication.

50. I am not convinced that any specific evidence has been provided to demonstrate that the Eastern Aurora was idle on the project for the period between 25th February and 1 May 2013.

51. My determination in relation to this adjudication is as follows:

Summary of adjudicated amount is *Nil* for the reasons set out above.

[end extract]

[13] The adjudicator thus determined the contentious issue between the parties in favour of the plaintiff: see extracted paragraphs 48 and 49; also paragraphs 36 and 41 for additional context. The reasons given by the adjudicator for the 'nil payable' determination were contained in paragraphs 39, 40, 42, and 50. In particular, in paragraph 42, the adjudicator stated that he had not been provided with *any evidence* to demonstrate that the dredge continued to be at the project for the period 25 February 2013 to 1 May 2013. Then, in paragraph 50, the adjudicator stated that he was not convinced that *any specific evidence* had been provided to demonstrate that the Eastern Aurora was idle on the project for the relevant period.

[14] It is difficult to reconcile the reasons given by the adjudicator for the 'nil payable' determination with the evidence identified by me, set out in [7] and [8] above. In particular, the adjudicator's statement in paragraph 42 of his reasons was wrong, as Mr Monichino QC properly conceded in this proceeding. I have reached the conclusion that the second defendant (adjudicator) did not realize or appreciate that the documents in support of the plaintiff's application contained evidence that the dredge continued to be at the project for the period 25 February 2013 to 1 May 2013, and that it was on standby for most if not all of that period (re-commencing dredging on

1 May 2013). I refer to the fact that there was *some* evidence; it is not my intention to make an assessment as to the weight which should have been given to the evidence, or to decide whether the evidence was sufficient to establish the plaintiff's claim on the balance of probabilities.

The contentions of the parties in this proceeding

[15] The parties filed and relied on lengthy written submissions, in addition to oral submissions made at the hearing.

[16] The plaintiff contended that there was no dispute between the parties that the dredge was on standby for the whole of the period of the second dredge claim, and that there was no dispute as to the quantum of the standby costs for the dredge: "Nowhere in the Response is it alleged that the dredge did not remain on site and idle, throughout the period of 25 February 2013 to 1 May 2013."[16] The plaintiff then contended that, because the first defendant's stated grounds of rejection of the second dredge claim did not include a ground that the dredge had not been on site and idle in the relevant period, the second defendant determined the adjudication unfavourably to the plaintiff on the basis of a "wholly illusory dispute".[17] On the plaintiff's argument, this led to jurisdictional error because the adjudicator failed to take into account a relevant consideration (that there was no dispute that the dredge remained on site and idle) and then ignored relevant evidence which

[16] Plaintiff's Submissions dated 2 December 2013, paragraph 39.
[17] Plaintiff's Submissions dated 2 December 2013, paragraph 42.

proved that the dredge was on site and idle for period of the second dredge claim.[18]

[17] The plaintiff further contended that the second defendant's unfavourable adjudication, on the basis of a matter not in dispute, was in breach of the principles of procedural fairness in that the second defendant ought to have informed the parties of the basis on which he was intending to determine 'nil' as the adjudicated amount payable, to give the plaintiff an opportunity to make good the evidentiary deficiencies which he had identified (or, I would add, to draw to his attention evidence which he had overlooked). The second defendant was able to request further written submissions, information or documents,[19] and in the circumstances he ought to have done so. His failure to do so meant that the plaintiff was denied procedural fairness.

[18] In addition to the arguments in relation to relevant and irrelevant considerations referred to in [16], and procedural fairness in [17], the plaintiff relied on other administrative law grounds: misconception of function, *Wednesbury* unreasonableness and serious irrationality. It is not necessary to refer to them in detail.

---

[18] Plaintiff's Submissions dated 2 December 2013, paragraphs 66, 72. The relevant evidence was set out in Schedule I to the Submissions, and included paragraph 4.27 from the statement of Cameron Hall extracted in [8] above. The evidence also included an apparent concession by the respondent in paragraph 13.14 of the Respondent's submissions dated 2 September 2013, as follows: " … in the present context, there was no work done as such because the dredge was on standby, but…".

[19] See s 34(2)(a) *Construction Contracts (Security of Payments) Act* (NT).

[19] The first defendant argued that whatever errors the second defendant may have made were errors within jurisdiction and hence beyond the scope of any prerogative or declaratory relief this Court might grant. It referred to the decisions of the High Court in *Craig*[20] and *Kirk*[21] in support of its contention and submitted that "it remains that errors of law or fact made within jurisdiction are not jurisdictional errors and that the making of such errors does not render the decision of an inferior court void or of no effect."[22] In this respect, the first defendant contended that an adjudicator determining an application under s 33(1)(b) of the Act is more akin to an inferior court than an administrative tribunal,[23] and hence the scope for judicial review of an adjudication, for jurisdictional error, is more limited.[24]

[20] In reply to the plaintiff's arguments in relation to relevant and irrelevant considerations referred to in [16], the first defendant submitted that the role of relevant and irrelevant considerations for the purposes of jurisdictional error is properly confined to the matters set out in *Craig* and *Kirk*, namely, the disregard of a matter which the relevant statute requires to be taken into account as a condition of jurisdiction or, conversely, taking into account a

---

20 *Craig v State of South Australia* (1995) 184 CLR 163.

21 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [69] – [71].

22 First defendant's submissions dated 9 December 2013, paragraph 48.

23 The first defendant refers to and relies on the decision of Southwood J (in dissent, but not on this issue) in *K and J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 at [35]; also decisions of the Western Australian Supreme Court in *O'Donnell Griffin Pty Limited v John Holland Pty Limited* [2009] WASC 19 at [102] and *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80 at [59]; further, to *obiter* comments of the Western Australian Court of Appeal in *Perrinepod v Georgiou Building Pty Limited* (2011) 43 WAR 319 at [118] and [1]. However, I note that in *Re Graham Anstee-Brook;Eex parte Mount Gibson Mining Ltd* (2011) 42 WAR 35 at [18]-[22], Kenneth Martin J. held that jurisdictional error in the case of an adjudicator acting under the equivalent Western Australian legislation was to be assessed by reference to the standard applicable to tribunals rather than to an inferior court.

24 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [67] – [73]. See also *Re Carey; Ex parte Exclude Holdings Pty Ltd* [2006] WASCA 219 [106]-[115]; [181]

matter required to be ignored as a condition of jurisdiction. Otherwise any error (if there is error) is non-jurisdictional.

[21] Mr Monichino raised in oral submissions the distinction between a vessel which is located at a site simply being idle and the same vessel being available and actually ready to start work. By way of example, he argued that if the vessel were undergoing repairs, it was not available for work. In such a case it would not have been on standby, and standby charges would not apply.[25] Although the argument has some validity, the adjudicator's reasons did not refer to the distinction sought to be made or identify it as an issue,[26] and the first defendant had not raised it (or any similar argument) in the adjudication, as Mr Monichino conceded in oral submissions:[27]

> "We don't resile from the fact that whether the vessel was on standby was not at the forefront of the dispute in the second adjudication, but nevertheless it was not admitted and it was a matter that needed to be determined for the claim to be determined in favour of Hall pursuant to the statute."

[22] The first defendant submitted that the plaintiff's procedural fairness arguments summarised in [17] are misconceived, and that the second defendant had no obligation to alert the plaintiff to matters which the plaintiff had to prove. The legislation required that the plaintiff's application "state or have attached to it all the information, documents and

---

[25] Transcript 16/12/2013 from 2.06 pm, p.16.1.
[26] There is a possibility that the references to "any relevant evidence" in paragraphs 39 and 40 and to "any specific evidence" in paragraph 50 of the adjudication determination were oblique references to the distinction.
[27] Transcript 16/12/2013 from 2.06 pm, p.21.5.

submissions on which the party making it relies in the adjudication".[28] The second defendant (adjudicator) was entitled to expect that the plaintiff would prove all the facts necessary to succeed in the adjudication. For the same reason, the plaintiff's argument that the second defendant had a positive duty to inquire further and request further submissions, information or documents under s 34(2) of the Act is also misconceived.

The "payment dispute" between the plaintiff and first defendant

[23] At the end of proceedings in court on 16 December last, I sought assistance from counsel as to whether the adjudicator was limited by statute or otherwise to determining the specific issue over which the parties were in dispute, and requested written submissions addressing the following questions relevant to the present case:

(a) What was the "payment dispute" (s 27 *Construction Contracts (Security of Payments) Act*) the subject of the adjudication?

(b) Was the adjudication limited to the identified payment dispute or did it deal with the plaintiff's progress claim generally?

[24] Counsel for both parties provided supplementary submissions in response to that request. Counsel for the plaintiff referred to the first defendant's "concession as to the boundaries of the dispute" and contended that the payment dispute was that identified by the parties in the Application and Response.[29] Counsel for the first defendant submitted that the relevant 'payment dispute' was a dispute as to the entitlement of the plaintiff to be paid the amount claimed for standby costs for the period claimed, for which

[28] See s 28(2)(c) *Construction Contracts (Security of Payments) Act* (NT).
[29] Plaintiff's submissions as to what constitutes a 'payment dispute' dated 23 December 2013, paragraph 40.

it had to establish several elements, including that the dredge was on standby (available to undertake dredging) for the full period claimed; and that it was entitled under the contract to be paid for standby during that period, at the rates claimed.[30]

Consideration of the adjudicator's task

[25] The expression "payment dispute" is not actually defined in s 4 of the Act, but s 4 contains a reference to s 8 of the Act, which sets out the three circumstances in which a "payment dispute" arises:

> 8. Payment dispute
>
> A payment dispute arises if:
>
> (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or
>
> (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or
>
> (c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

[26] A "payment dispute" does not require there to be a dispute as such. Simple non-payment of a payment claim, in whole or in part, will result in a "payment dispute". Non-payment of retention monies due to be paid under a contract will result in a "payment dispute". The failure to return a security due to be returned will result in a "payment dispute".

[30] Amended first defendant's supplementary submissions dated 26 December 2013, paragraphs 15(b) and 16.

[27] If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under Part 3 of the Act.[31] The party applying for adjudication must prepare a written application for adjudication.[32] The application must state the details of (or have attached) the construction contract or relevant extracts of the contract, and of any payment claim that has given rise to the payment dispute.[33] The application must also "state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication."[34] The respondent party to an application must prepare a written response to the application.[35] The response must state the details (or have attached) any rejection or dispute of the payment claim that has given rise to the dispute, and (as required for the application) must "state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication."[36]

[28] Unless the adjudicator dismisses the application,[37] the adjudicator's function is to "determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment … and, if so, determine … the

---

31 S 27 *Construction Contracts (Security of Payments) Act*.
32 S 28(1)(a) *Construction Contracts (Security of Payments) Act*.
33 S 28(2)(b) *Construction Contracts (Security of Payments) Act*.
34 S 28(2)(c) *Construction Contracts (Security of Payments) Act*.
35 S 29(1) *Construction Contracts (Security of Payments) Act*. The response must be prepared and served within 10 working days of being served with the application.
36 S 29(2)(b) and (c) *Construction Contracts (Security of Payments) Act*.
37 In relation to which see s 33(1)(a) *Construction Contracts (Security of Payments) Act*.

amount to be paid … and any interest payable on it … and the date before which the amount must be paid …".[38]

[29] Relevant to the present case, therefore, the function of the adjudicator under s 33(1)(b) of the Act was to determine on the balance of probabilities whether the first defendant was liable to make a payment to the plaintiff, and if so, the amount of such payment. Because the "payment dispute" involved not only the non-payment in full of the payment claim but also a specific dispute as to the legal effect of the first defendant's letter dated 29 October 2012 in the context of discussions which had taken place on 3 October, the adjudicator obviously needed to consider the specific dispute. However, that was only part of his task because, even if he resolved the specific dispute in favour of the plaintiff, he still had to be satisfied on the balance of probabilities as to (1) the first defendant's liability to the plaintiff and (2) the quantum of that liability.

[30] In light of my findings in [29], I reject the plaintiff's submission that the first defendant's concession or apparent concession resulted in the "payment dispute" being "necessarily limited" to whether the events of 1 to 3 October 2012 and the direction (in the letter dated 29 October) resulted in the plaintiff having an entitlement to claim standby costs in respect of the dredge for the relevant period.

---

[38] S 33(1)(b) *Construction Contracts (Security of Payments) Act*.

[31] The plaintiff has not established that the asserted errors made by the second defendant, summarized or referred to in [16] and [18] above, were anything other than errors within jurisdiction. Given the preponderance of authority[39] to the effect that an adjudicator is to be treated as akin to an inferior court for the purposes of determining the consequences of error within jurisdiction, I would hold that the asserted errors do not render the adjudication determination void or of no effect.

Procedural fairness

[32] In my judgment, the central question in this proceeding is whether, after the adjudicator decided the specific dispute in favour of the plaintiff,[40] the obligation to accord procedural fairness *required* him to then (1) inform the parties that he was unable to determine the amount payable without further information, and (2) ask for further information under s 34(2)(a) of the Act; alternatively, whether the obligation to accord procedural fairness required him to at least hear from the plaintiff, against whom he ultimately made the erroneous finding that there was no evidence that the dredge continued to be at the project from 25 February to 1 May 2013.

[33] Notwithstanding its submission summarised in [22], the first defendant acknowledged that there have been obiter observations in some of the decided cases to the effect that an adjudicator's determination is reviewable

[39] See footnotes 23 and 24.
[40] See [12] and [13] above, with references to relevant paragraphs in the adjudication determination.

by the court where there has been a substantial denial of natural justice.[41] This is a distinct ground of review to review on the basis of jurisdictional error.[42]

[34] In my opinion, a purported determination would be void (or 'not a determination under the Act'), if there were a substantial denial of natural justice. I adopt, with respect, the view expressed by Southwood J in *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd*; by Mildren J in *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*; and by Kelly J in *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*.[43] The commonly held view (albeit obiter in each of the judgments referred to) was explained by Southwood J in *Nilsen* as follows:

> While the legislature intended that the determinations of adjudicators should have strong legal effect within their intended area of operation, it is equally important that the courts ensure that where an adjudicator strays outside the intended area of operation of the Act appropriate declaratory relief is available. Determinations of adjudicators might otherwise have potentially catastrophic effects. A purported determination will be void if the basic requirements of the Act are not complied with, or if a purported adjudication is not made bona fide, or if there is a substantial denial of natural justice.

[35] Once it is accepted that the rules of procedural fairness apply to an adjudication under the Act, such that a purported determination would be void if there were a substantial denial of natural justice, the difficulty in

---

41 Specifically the first defendant referred to *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd and Another* (2008) 23 NTLR 123 at 138 [43] (Southwood J); *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at 24 [49] (Mildren J); and *A J Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd and Another* (2009) 25 NTLR 1 at 11 [29] (Kelly J). See also *Brodyn Pty Ltd v Davenport and Another* (2004) 61 NSWLR 421 at 441-442 [55] (Hodgson JA).

42 See, for example, *Police and State of South Australia v Lymberopoulos and others* (2007) 98 SASR 433 at 441 [40]-[42] per Doyle CJ; Bleby and Sulan JJ agreeing at [74] and [82] respectively.

43 All cited at footnote 41.

each case is assessing what constitutes a *substantial* denial of natural justice to an affected party.

[36] In *Zurich Bay Holdings Pty Ltd v Brookfield Multiplex Engineering and Infrastructure Pty Ltd*,[44] Le Miere J ordered that the determination of an adjudicator under the *Construction Contracts Act 2004* (WA) should be quashed on the ground of denial of procedural fairness. The adjudicator had denied the defendant natural justice by failing to inform the parties of his intention to determine the dispute on a basis not contended for by either of them, and by not giving them a proper opportunity to be heard further.

[37] Le Miere J acknowledged in *Zurich Bay Holdings* that procedural fairness does not normally require decision makers to disclose their proposed conclusions, but held[45] that a decision maker should notify the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated:

> Generally speaking, the parties must anticipate possible findings and make submissions at the trial of the potential findings on the issues litigated. Nevertheless, procedural fairness may require the judge to hear the parties further if certain matters emerge in the judge's consideration of the case after trial which the judge regards as potentially dispositive but in relation to which, in all the circumstances, it is to be inferred that the parties did not have a proper opportunity to address at trial.[46]

---

44 [2014] WASC 40.

45 Referring to *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590E; *Musico v Davenport* [2003] NSWSC 977; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205; [2010] 1 Qd R 302; and *Avopilang (NSW) Pty Ltd v Menard Bachy Pty Ltd* [2012] NSWSC 1466.

46 Referring to *McKay v Commissioner of Main Roads* [2013] WASCA 135 [156] (Murphy JA).

[38] Within the bounds of rationality, a decision maker is generally not obliged to invite comment on his evaluation of an applicant's case.[47] Nonetheless, that proposition may be subject to the qualification that a party to a potentially unfavourable decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them.[48]

[39] After reasons for judgment in *Zurich Bay Holdings* were delivered in February 2014, I granted leave to the parties in this proceeding to provide further submissions.

[40] Predictably, the plaintiff submitted that the essential facts in *Zurich Bay Holdings* were not readily distinguishable from those in this proceeding. There, the adjudicator had interpreted a clause of the relevant contract as being void in circumstances where neither party had contended that the clause was or might be void; in the present case the adjudicator based his decision on a matter that was not in dispute between the parties, and which had not been raised in the adjudication application or in the response to the adjudication application (or in the documents provided respectively in support). Counsel for the plaintiff contended that the plaintiff could not

---

47 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590C, per the Court (Northrop, Miles and French JJ).

48 *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 108-9 per Jenkinson J, cited with approval in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590E.

have reasonably anticipated that the adjudicator would make a decision based on an issue that was not in dispute between the parties.[49]

[41] The first defendant contended in response that the interpretation point in *Zurich Bay Holdings* was not a point which could reasonably have been anticipated by the parties whereas, in this proceeding, proof of the vessel being on standby was a matter which the plaintiff always had to prove in the adjudication application, along with the other elements of its claimed entitlement to payment referred to in [4]. The fact in issue in respect of which the adjudicator ultimately based his determination was something that the plaintiff could and should have reasonably anticipated.[50]

Conclusion and orders

[42] In my judgment there was a substantial denial of natural justice. In circumstances where the dredge being on standby was not an issue raised by the first defendant, the plaintiff was not given an opportunity to make submissions on a matter which was highly significant in the adjudicator's evaluation of the plaintiff's application and which was ultimately dispositive. Not only did the adjudicator determine the matter on a basis not contended for by the first defendant, but in doing so he laboured under a misapprehension as to the absence of evidence which, if its existence had been brought to his attention (which surely it would have been), might have led to a determination in favour of the plaintiff, or at least led the

[49] Plaintiff's further supplementary submissions, dated 27 February 2014.
[50] First defendant's further supplementary submissions, dated 26 February 2014.

adjudicator to request further information and submissions as to matters which were probably readily provable.

[43] An adjudication under the *Construction Contracts (Security of Payments) Act* does not finally determine the contractual rights of the parties to the adjudication. If an applicant claiming payment is successful, that applicant receives money on account of its contractual entitlements and, in any further contract litigation, has to account for monies received. Notwithstanding that aspect of an adjudication, the object of the Act (and adjudications under the Act) is to facilitate timely payment between parties to construction contracts and thereby overcome cash flow problems faced by many contractors and sub-contractors during the course of fulfilling their contractual obligations.[51]

[44] The legislature has recognised that cash flow is the key to completion of construction contracts. The second reading speech for the Act referred to the importance of the building and construction industry to the economy of the Northern Territory and went on to say: "The failure to pay at any stage in the contracting chain can have disastrous effects for those further down the chain awaiting payment." The second reading speech described the process established by the Act as a "rapid adjudication process" and a "process for speedy adjudication outside the court system".[52]

---

[51] As explained by Southwood J in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd and Another* (2011) 29 NTLR 1 at 6 [1].

[52] Hansard 5 October 2004, Presentation and Second Reading Speech for the Construction Contracts (Security of Payments) Bill (Serial 259) by Dr Toyne, Minister for Justice and Attorney-General.

[45] In this context, there is no proper basis to distinguish an adjudication for the purpose of maintaining cash flow from an adjudication to determine a party's ultimate rights and entitlements, at least not in relation to whether or not the court should intervene to set aside a purported determination as void where there has been a substantial denial of natural justice.

[46] I have not found it necessary to determine the issue whether an adjudicator is more akin to an inferior court than to a tribunal, or vice versa, because a breach of the principles of procedural fairness would permit a grant of prerogative or declaratory relief in either case.

[47] I would make an order in the nature of certiorari to quash the determination of the second defendant adjudicator on the ground of denial of procedural fairness.

[48] I will hear the parties in relation to final orders and costs.
