CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor
[2016] NTSC 42

PARTIES:	CH2M Hill Australia Pty Limited (ABN 42 050 070 892) and UGL Engineering Pty Limited (ABN 96 096 365 972) v ABB Australia Pty Ltd (ABN 68 003 337 611) and BOND, Colin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	64 of 2016 (21634407)
DELIVERED:	15 AUGUST 2016
HEARING DATES:	11 AUGUST 2016
JUDGMENT OF:	KELLY J

CATCHWORDS:

STATUTORY INTERPRETATION – s 27 of the *Construction Contracts (Security of Payments) Act 2004 (NT)* – word 'dispute' in s 27 refers to "payment dispute" as defined by s 8 – s 27 only precludes the making of an application for adjudication where a payment dispute within the meaning of s 8 has arisen in relation to a construction contract as defined in s 5 and an application for adjudication of that dispute has already been made by a party – s 27 does not preclude the making of an application for adjudication where "the substance of the dispute" has been the subject of a previous application for adjudication

ADMINISTRATIVE LAW –*Construction Contracts (Security of Payments) Act 2004 (NT)* ss 33 and 48 – decision of adjudicator not to dismiss an application without a determination on the merits under s 33(1)(a)(iv) not reviewable if the matter in fact too complex to fairly determine within prescribed time limits – Adjudicator must be satisfied it is not possible to fairly make a determination – decision of adjudicator reviewable if adjudicator's satisfaction that the matter is not too complex is unreasonable

ADMINISTRATIVE LAW – *Construction Contracts (Security of Payments) Act 2004 (NT)* ss 38(d), 34(1)(a)(ii) and 33(1)(b) - Judicial review – availability of order in the nature of *certiorari* to quash decision of adjudicator – adjudicator must make a *bona fide* attempt to comply with essential requirements of the Act and comply with essential requirements of natural justice – adjudicator failed to comply with requirement in s 38(d) to provide reasons for determination – reasons failed to meaningfully engaged with the issues raised by the plaintiff - reasons failed to address material submitted by plaintiff - adjudicator failed to consider response to adjudication application as required by s 34(1)(a)(ii) - as a result adjudicator failed to make a *bona fide* attempt under s 33(1)(b) to determine on the balance of probabilities whether defendant liable to make a payment to the plaintiff – adjudicator also failed to comply with essential requirements of natural justice - purported adjudication determination a nullity – order in the nature of *certiorari* granted under O 56 of *Supreme Court Rules* quashing purported determination

Construction Contracts (Security of Payments) Act 2004(NT)
Supreme Court Rules 1987 (NT) O 56

Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466; *Bauen Constructions v Westwood Interiors* [2010] NSWSC 1359; *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15; [2008] NTSC 46; *K & J Burns Electrical Pty Ltd v GRD Group*

(NT) Pty Ltd (2011) 29 NTLR 1; [2011] NTCA 1; *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28; *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* (2014) 242 IR 318; [2014] NSWCA 112; *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited* [2006] NSWSC 94, applied

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190; *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190; [2009] NSWCA 69; *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13; *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors* [2016] QSC 108, referred to

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (2009) 25 NTLR 14; [2009] NTCA 4; *Brierty Limited v Gwelo Developments Pty Ltd*) (2014) 35 NTLR 13; [2014] NTCA 7; *Gwelo Developments Pty Ltd v Brierty Limited* (2014) 36 NTLR 1; [2014] NTSC 44; *Henry v Henry* (1996) 185 CLR 571; [1996] HCA 51, distinguished

REPRESENTATION:

Counsel:

Plaintiffs:	R Fenwick Elliott
Defendant:	A Wyvill SC with W Roper

Solicitors:

Plaintiffs:	Squire Patton Boggs (AU)
Defendant:	De Silva Hebron

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

CH2M Hill Australia Pty Limited & Anor v ABB Australia Pty Ltd & Anor
[2016] NTSC 42
No. 64 of 2016 (21634407)

BETWEEN:

CH2M HILL AUSTRALIA PTY LIMITED (ABN 42 050 070 892)
First Plaintiff

AND:

UGL ENGINEERING PTY LIMITED (ABN 96 096 365 972)
Second Plaintiff

AND:

ABB AUSTRALIA PTY LTD (ABN 68 003 337 611)
First Defendant

AND:

COLIN BOND
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 15 August 2016)

[1] This is an application for judicial review of a purported adjudication determination of an adjudicator appointed under the *Construction Contracts (Security of Payments) Act* ("the Act"). The plaintiffs seek an order in the

nature of *certiorari* under O 56 of the *Supreme Court Rules* quashing the determination or, alternatively, a declaration that the determination is of no effect. In accordance with the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*[1] the second defendant has taken no part in these proceedings. (In this judgment the first defendant is referred to as "the defendant".)

Background

[2] On 17 July 2014, the plaintiffs, as joint venturers, and the defendant entered into a construction contract ("the Contract") under which the defendant was to supply to the joint venture major equipment for the combined cycle power plant at the Ichthys Onshore LNG Facilities at Bladin Point near Darwin[2] for the contract price of $19,112,000.[3] (The plaintiffs as joint venturers [referred to in the Contract as "CH2-UGL JV"] are referred to in this judgment as "the plaintiff".)

[3] On 7 March 2016, the defendant served on the plaintiff a payment claim [PC009 Rev 2] claiming payment of $2,418,603.99 for certain work within the scope of the Contract and for "Change Orders"[4] two to six. On 15 March 2016 the plaintiff issued a payment certificate under the Contract for

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1 (1980) 144 CLR 13, [1980] HCA 13

2 The plaintiff had a sub-contract to build the power plant as part of the larger Ichthys facilities and sub-sub-contracted the supply of certain equipment to the defendant.

3 Determination 2 par 1.3

4 ie agreed variations to the scope of work incorporated in an order from the plaintiff ("Change Order" is a defined term under the Contract.)

$908,047.14 of that amount which it then set off against its claim for liquidated damages.[5] On 10 June 2016 the defendant made application under s 28 of the Act to have the payment dispute adjudicated ("Application 1") and Mr Neil Kirkpatrick was appointed as the adjudicator ("Adjudication 1").[6]

[4] By application dated 15 June 2016, the defendant made a second application for adjudication under s 28 of the Act relating to payment claim PC-10 claiming payment of $6,478,840.50 ("Application 2")[7] and another adjudicator, Mr Colin Bond, was appointed ("Adjudication 2").

[5] On 11 July 2016, Mr Kirkpatrick dismissed Application 1 under s 33(1)(a) of the Act on the ground that the payment dispute had in fact arisen on 2 March 2016 and Application 1 had not been made within 90 days as required by s 28(1) ("Determination 1").

[6] On 27 June 2016, the plaintiff submitted its Response to Application 2 and, after an extension of time under s 34(3)(a), Mr Bond handed down his determination on Adjudication 2 on 18 July 2016 determining that an amount of $3,372,045.80 was owing by the plaintiff to the defendant ("Determination 2").

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5 Determination 1, p 3

6 Determination 1, p 3

7 Application 2 is dated 15 July 2016; Determination 2 refers to it as being dated 17 June 2106 (par 6). (This may have been the date on which it was served.)

[7] On 25 July 2016 the plaintiff filed (and served on 26 July 2016) the originating motion in this proceeding seeking judicial review of Determination 2 and an interim injunction restraining the defendant from enforcing Determination 2.

[8] On 27 July 2016 Grant CJ granted an injunction restraining the defendant from taking steps pursuant to s 45 of the Act or otherwise to enforce Determination 2 except on two days' written notice to the plaintiff and the Construction Registrar; made procedural directions in relation to the filing of submissions; and listed the substantive matter for hearing before me on 11 August 2016.

[9] The matter was heard on Thursday 11 August 2016. I handed down my decision on Monday 15 August 2016 and indicated that I would provide written reasons at a later date. These are those reasons.

[10] Before proceeding to an examination of the grounds upon which the plaintiff contends that Determination 2 is not a valid determination under the Act, it is necessary to provide an overview of the issues in dispute between the parties in Adjudication 2.

Summary of issues in Adjudication 2

[11] In Application 2, the defendant claimed payment for a number of variations, nine of which depended on establishing an entitlement to an extension of time ("EOT") under the Contract for the work in question. It also contained

a claim for delay costs. Entitlement to EOTs (and delay costs) is governed by cl 7 of the Contract which provides, relevantly:

> **7.1 Notice of delay**
>
> (a) Within 10 business days after the date Lower Tier Subcontractor[8] first becomes aware, or ought reasonably to have become aware, that a delay will occur, Lower Tier Subcontractor must notify CH2-UGL JV in writing with details of the delay and the cause.
>
> (b) A notice under clause 7.1(a) must include reasonable detail of the following:
>
> (1) the causes of the delay;
>
> (2) whether, in Lower Tier Subcontractor's reasonable opinion, the cause of delay is an Extension Event;
>
> (3) particulars of its expected effects, including an estimate of any expected delay in the delivery of the Equipment to the Delivery Place;
>
> (4) the activities on the critical path of the Work Time Schedule which are or will be delayed;
>
> (5) the steps which Lower Tier Subcontractor has taken, or will take, to prevent or mitigate the delay to achieving Delivery Acceptance by the Date for Delivery;
>
> (6) the facts relied upon in support of each aspect of the delay; and
>
> (7) any other information reasonably requested by CH2-UGL JV.
>
> (c) Lower Tier Subcontractor must thereafter notify CH2-UGL JV of any material change in the estimated delay, or in any other

[8] The defendant is the Lower Tier Subcontractor.

particulars, and supply such further information as CH2-UGL JV may at any time reasonably require.

(d) Lower Tier Subcontractor is not entitled to an EOT if it fails to strictly comply with this clause.

7.2 Entitlement to an EOT

Subject to clauses 8.3 and 7.4,[9] Lower Tier Subcontractor shall be entitled to an EOT for achieving delivery by the Date for Delivery as CH2-UGL JV assesses if:

(a) Lower Tier Subcontractor is or will be delayed by an Extension Event in delivering the Equipment to the Delivery Place by the Date for Delivery;

(b) Lower Tier Subcontractor gives CH2-UGL JV a notice of delay in accordance with clause 7.1;

(c) the delayed activities are activities on the critical path of Lower Tier Subcontractor's program and Lower Tier Subcontractor provides an updated and sufficiently detailed program showing the impact of the delaying event on the critical path; and

(d) Lower Tier Subcontractor has used and continues to use all reasonable endeavours to prevent or minimise the delay and no reprogramming or alteration of sequences of activities or other method could avoid the delay.

…

7.5 Delay costs

If the Date for Delivery is extended under clause 7.3[10] for delay caused by a Compensation Event,[11] CH2-UGL JV must pay to Lower

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[9] These are not presently relevant.

[10] Clause 7.3 sets out CH2-UGL JV's obligations in relation to assessing EOT claims and providing notice of its decision.

[11] Also a defined term under the Contract.

Tier Subcontractor the reasonable additional costs and expenses incurred by Lower Tier Subcontractor in supplying the Equipment as a direct result of that delay (as reasonably determined by CH2-UGL JV).

7.6 Concurrent delay

Lower Tier Subcontractor is not entitled to an EOT under clause 7.2 for delay caused by an Extension Event to the extent that, disregarding the Extension Event, delivery of the Equipment was delayed during the same period other than by another Extension Event.

[12] The defendant claimed to have complied with the notice provisions in cl 7.1 of the Contract, which are expressed to be a condition precedent to an entitlement to an EOT[12] – both in respect of the timing requirement in cl 7.1(a) and the provision of details in cl 7.1(b).

[13] In the alternative, the defendant claimed, at least in relation to cl 7.1(b), that strict compliance was unnecessary. Further in the alternative, (in relation to two of the nine claims for EOTs) the defendant claimed that if it had not complied, the plaintiff had either waived compliance, or was estopped by its conduct from relying on the need for strict compliance with the notice provisions.

[14] In its Response to Application 2, the plaintiff responded to the technical detail of the defendant's claims and the plaintiff makes no complaint about the way the adjudicator dealt with those aspects of the adjudication.

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[12] See cl 7.1(d) and 7.2(b).

[15] In addition, the plaintiff's overarching response to the nine claimed EOTs was that the defendant was not entitled to the EOTs claimed (for reasons set out in more detail below); that the defendant had failed to complete deliveries by the due dates under the Contract; and the plaintiff was entitled to liquidated damages which it had a right to set off against any money owing to the defendant, such that no amount was owing by the plaintiff to the defendant on payment claim PC-10.

Grounds of attack on Determination 2

[16] First, the plaintiff claims that the issues in Application 1 and Application 2 overlap to a significant degree and that, as a result, the defendant was not entitled to make Application 2 by reason of s 27(a) of the Act. Alternatively, the plaintiff contends that, as a result of this overlap, Application 2 is an abuse of process. (This contention is referred to in the plaintiff's submissions as "the duplicate application ground".)

[17] The plaintiff also claims that the adjudicator made a jurisdictional error in failing to dismiss Application 2 without making a determination of its merits under s 33(1)(a) of the Act: the contention is that the adjudicator could not be reasonably satisfied that it was possible to fairly make a determination within the time limits prescribed in the Act because of the complexity of the matter. (This contention is referred to in the plaintiff's submissions as "the complexity ground".)

[18] The plaintiff claims further that in Determination 2, the adjudicator failed to deal at all with a number of critical issues in the adjudication on the question whether the defendant was entitled to the claimed EOTs, including:

(a) whether there had been delays for which the plaintiff was responsible and (if so) the extent of those delays ("**the delay issue**");

(b) whether the notice provisions of the contract had been complied with ("**the notice issue**"); and

(c) whether the defendant had been itself responsible for concurrent delays which had the capacity to disentitle it to EOTs under cl 7.6 of the Contract. (This was referred to in submissions as "**the James Engineering issue**".)

[19] The plaintiff contends that the adjudicator simply adopted in total a report relied on by the defendant (the Diab report referred to at [1] below), which was attached to Application 2, and that he did not consider the submissions and the evidence on these crucial issues in the plaintiff's Response and the material filed with the Response. The plaintiff characterised these failures as a failure to comply with the basic requirements of the Act, or a failure to act *bona fide*, or a substantial denial of natural justice, in any case leading to constructive failure by the adjudicator to exercise his jurisdiction.[13] (This

[13] The plaintiff also made submissions to the effect that the adjudicator had made errors of law (either jurisdictional or on the face of the record) which it was submitted made the purported determination amenable to review, and also that Determination 2 was unreasonable in the *Wednesbury* sense. However, these submissions in substance simply restated "the rubber stamping ground" and were, consequently, not strongly pressed at the hearing.

contention is referred to in submissions as "the rubber stamping ground".)

The duplicate application ground

(a) Section 27(a)

[20] The plaintiff claims that the defendant was not entitled to make Application 2 by reason of s 27 which provides:

> If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under this Part unless:
>
> (a) an application for adjudication has already been made by a party (whether or not a determination has been made) but subject to sections 31(6A) and 39(2);[14]

[21] The plaintiff relies on *Gwelo Developments Pty Ltd v Brierty Limited*[15] (affirmed by the Court of Appeal in *Brierty Limited v Gwelo Developments Pty Ltd*)[16] ("*Brierty*").

[22] Applications 1 and 2 are not "repeat applications" in the sense of those in *Brierty*. In *Brierty* the first application (in respect of two payment claims under the contract) was withdrawn, and later two separate applications were made in respect of the same two payment claims. In those circumstances the Court held that s 27 precluded the making of the two later applications. In this case, Application 1 related to payment claim PC-009 Rev 2 issued by the defendant to the plaintiff on 24 March 2016 claiming payment for works

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14 It is common ground that neither of the exceptions [in ss 31(6A) and 39(2)] apply.

15 (2014) 36 NTLR 1; [2014] NTSC 44

16 (2014) 35 NTLR 13; [2014] NTCA 7

within the scope of the Contract and a number of variations, none of which are the subject of PC-10. Application 2 relates to payment claim PC-10 for amounts claimed to be owing for variations VAR10 to VAR46.

[23] The plaintiff contends that s 27(a) does not apply only where an application for adjudication has already been made by a party in relation to the very same payment claim – but also where an application for adjudication has already been made by a party in relation to the subject matter of the dispute. This, the plaintiff contends is "the natural reading of section 27".

[24] At the hearing, counsel for the plaintiff supported this contention by submitting that if (for example) a party makes serial payment claims under a construction contract for different items of work, and the other party disputes those claims on the same basis each time (such as, as in this case, a set-off for liquidated damages), then there is effectively the same "dispute" in relation to each of those serial payment claims, and s 27(a) will preclude the making of a second application for adjudication once one application has been made in relation to that "dispute".

[25] The plaintiff places reliance on the following passages in *Brierty* (at first instance):

> [39] Section 26 sets out the object of Part 3 of the Act (which deals with adjudication of disputes). It states that the object of an adjudication of a payment dispute is to determine the dispute fairly and as rapidly, informally and inexpensively as possible. It is difficult to see how this object would be advanced by a construction of s 27 that allowed a party to withdraw an application for adjudication and then make as many further

> applications (within the time frames set out in the Act) as it chose. When pressed, the only particular utility Mr Wyvill could point to for acceptance of the proposed construction was that it might encourage respondents to be more reasonable in responding to requests by applicants for two or more payment disputes to be adjudicated together.

and on appeal:

> [21] As her Honour, the trial Judge, pointed out, the object of Part 3 of the Act is to determine the dispute fairly and as rapidly, informally and inexpensively as possible. Her Honour placed weight upon the fact that, inconsistent with this objective, the construction of s 27 proposed by the appellant would allow a party to withdraw an application for adjudication and then, subject to time constraints, make as many further applications as it desired. It is not surprising that the legislative scheme would not permit a situation where an applicant could withdraw an application and substitute a further application.

[26] The plaintiff contends that *a fortiori*, it is inconsistent with the objects of the Act for a party to put the substance of a dispute to one adjudicator, to have that adjudication rejected on the ground that is out of time, and then to put vast swathes of that same material to another adjudicator.

[27] Whether this contention should be accepted depends upon the meaning to be attributed to the word "dispute" in s 27. Does it mean "substantive dispute" or "dispute in relation to the same issue" as contended by the plaintiff, or is it confined to a "payment dispute" within the meaning of the Act, as defined in s 8?

[28] In my view the plaintiff's contention in relation to s 27(a) cannot succeed. The plaintiff focuses on the word "dispute" in the second line of s 27 and contends that in its natural meaning it refers to "a substantive dispute" or

"the issues under dispute". However, the word does not appear in isolation: it is the sentence that must be construed. The sentence to be construed (excising presently irrelevant parts) is: "If a payment dispute arises under a construction contract any party to the contract may apply to have the dispute adjudicated under this Part unless an application for adjudication has already been made by a party".

[29] Appearing where it does in the sentence, the term "the dispute" can only refer back to the term originally used – ie a payment dispute which has arisen under a construction contract. For the meaning of that term one goes (*inter alia*)[17] to s 8[18] which provides:

> **Payment dispute**
>
> A payment dispute arises if:
>
> (a) a payment claim has been made under a contract and either:
>
> (i) the claim has been rejected or wholly or partly disputed; or
>
> (ii) when the amount claimed is due to be paid, the amount has not been paid in full; 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.

[17] Section 8 is not the only relevant section. "Construction contract" is also a defined term – defined in s 4 by reference to s 5.

[18] The definition of "payment dispute" in s 4 is "See section 8."

[30] It seems to me that the plain and natural meaning of the sentence under consideration is that where a payment dispute within the meaning of s 8 has arisen in relation to a construction contract as defined in s 5, then any party to that construction contract may apply to have that dispute adjudicated unless "an application for adjudication" of that dispute has already been made by a party. Plainly, as counsel for the plaintiff pointed out, the reference to an application for adjudication must refer back to "the dispute" in the stem of the sentence. Otherwise s 27 would prohibit the adjudication of a payment dispute if any application for adjudication had been made by any party to the contract in relation to any subject matter at all – including a completely different payment claim. This would limit the parties to a construction contract to one adjudication under the contract, which would be inconsistent with the objects of the Act and is plainly not what was intended.

[31] Accordingly, the plaintiff's contention that s 27(a) precluded the defendant from making Application 2 fails.

(b) Abuse of process

[32] The plaintiff claims, in the alternative, that the filing (or maintenance) of Application 2 was an abuse of process. No doubt in appropriate circumstances, and subject to the mandatory provisions in the Act, this Court could (and would) restrain any party from proceeding with an

adjudication (or enforcing a determination) which was found to be an abuse of process. In *Brierty*, in the judgment on appeal, Southwood J said:

> [9] It was also suggested that the effect of the trial Judge's interpretation of s 27 of the Act was that a party may be able to stop another party proceeding with an application for adjudication of a payment dispute by filing an application and then withdrawing it. This argument fails in limen. Such conduct would be an abuse of the process of the adjudication procedures provided by the Act and would not preclude a valid further claim being made by the opposing party. *[emphasis added]*

[33] The plaintiff also relied on the decision of *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[19] (**"***Dualcorp***"**). In that case a party received an (essentially) unfavourable determination on an adjudication. It thereafter served a second payment claim based on the same invoices. The respondent (presumably inadvertently) failed to serve a response (referred to in the New South Wales Act as "a Payment Schedule") and as a consequence the applicant commenced proceedings in the District Court for the amount of the second claim pursuant to the provisions of the Act.[20] The judge at first instance (quoted in the appeal judgment at [31]) held:

> In respect to that part of the amount claimed in these proceedings which was the subject of the earlier payment claim and consequent determination by the arbitrator, I am of the view that it would be an abuse of process for the Court to grant the application for summary judgment and therefore in respect of the larger proportion of the claim, the Court will not so grant.

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19 (2009) 74 NSWLR 190; [2009] NSWCA 69

20 Section 15 of the New South Wales Act provides that in those circumstances the claimant is entitled to recover the unpaid portion of the amount claimed as a debt due from the respondent to the claimant in any court of competent jurisdiction.

[34] The New South Wales Court of Appeal upheld that decision. Allsop P based his decision on the application of the provisions of the New South Wales Act which prohibit duplicate payment claims, and held that for that reason the applicant was not entitled to proceed to judgment on the second claim.[21] Macfarlan JA (with whom Handley AJA agreed) concluded that serving another payment claim and seeking a re-determination of the issues in a second adjudication "would be contrary to the intent of the Act" and also "precluded by the principles of issue estoppel".[22] In coming to that conclusion, Macfarlan JA made the following observations:

> [68] Thus the primary judge here was correct in considering that "principles akin to res judicata" or "abuse of process" were applicable. Consistent with that broad description, I conclude that the principles of issue estoppel were applicable. Primarily because temporal considerations are of particular significance in relation to progress claims, the analogy between an adjudicator's determination and a completed cause of action which the principles of *res judicata* would require is an incomplete one. It is best that the applicable principles be recognised to be those of issue estoppel. The more general principle of abuse of process is probably also applicable but it is unnecessary to reach a final view about this. This principle involves a broad concept "insusceptible of a formulation comprising closed categories" (*Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; (2006) 226 CLR 256 at [9]) but certainly including within its ambit an attempt to "litigate anew a case which has formerly been disposed of by earlier proceedings" (*Walton v Gardiner* [1993] HCA 77; (1992-3) 177 CLR 378 at 393). *[emphasis added]*

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21 at [14] and [15]

22 at [18] and [73]

[35] Counsel for the plaintiff contended that it is equally an abuse to bring concurrent proceedings in different tribunals relating to the same subject matter. He relied on *Henry v Henry*:[23]

> [i]t is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue.[24]

[36] However, in this case Applications 1 and 2 do not relate to the same subject matter, nor do they seek to agitate precisely (or even substantially) the same issues. It is the responses of the plaintiff which raised the same issues in both adjudications. I do not say that it could never be an abuse of process to bring serial applications for adjudication in the knowledge and expectation that the responses would raise precisely the same issues in each one.[25] However, this is not such a case.

[37] It may well be, as the plaintiff has contended, that the overlap between the issues in Application 1 and Application 2 is extensive. The plaintiff contends (and this was not disputed by the defendant) that the defendant's submissions in relation to the issue of EOTs in Application 1 are repeated, more or less verbatim, in Application 2 and that approximately 67% of the quantum of Determination 2 is based on that repeated material. However,

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23 (1996) 185 CLR 571; [1996] HCA 51

24 At p 591

25 An example postulated by the plaintiff as conduct which might amount to an abuse of process was a party who made serial applications for adjudication of payment disputes where the validity and quantum of the claims was known not to be in dispute, but the respondent (to the knowledge of the applicant) relied on a right to set off liquidated damages against each such claim, so that the sole issue in each payment dispute was the same.

the claims giving rise to each payment dispute the subject of the applications are different; there is no overlap at all. Moreover, it is not the case that the validity of the payment claims and their quantum are non-contentious. The plaintiff disputes the payment claims in question on other grounds as well. Even on the plaintiff's case the overlap attributable to the same issues being raised in the plaintiff's responses affects less than 67% of the defendant's claim[26] in Adjudication 2.

[38] Moreover, those issues were not in fact determined in Adjudication 1. The adjudicator in Application 1 dismissed that application without proceeding to a determination on the merits on the ground that Application 1 had not been served within time.

[39] In all of the circumstances, I do not think it was an abuse of the process of adjudication for the defendant to have made Application 2, or to have continued with Adjudication 2 after receiving the plaintiff's Response identifying the considerable overlapping issues.[27]

The complexity ground

[40] The plaintiff contends that the adjudicator ought to have dismissed Application 2 under s 33(1)(a) without proceeding to a determination on the

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[26] The percentage of the claim (as distinct from the determination) so affected is less than 67% , as the adjudicator did not allow all of the defendant's claims.

[27] The defendant has appealed to the Local Court against the decision of the adjudicator to dismiss Application 1 without proceeding to a hearing on the merits. If the appeal is successful and if the defendant receives a determination adverse to it on the questions of delay and an entitlement by the plaintiff to set off liquidated damages, this decision should not be taken as holding that it could not be an abuse of process for the defendant to attempt to "re-litigate" those same issues in a further adjudication. I express no opinion on that question either way. [Since the hearing of this case, the appeal to the Local Court has, by consent, been transferred to this Court and set down for hearing before me.]

merits because the dispute between the parties was too complex for the adjudicator to fairly make a determination within the strict time constraints imposed by the Act.

[41] Under s 33(1)(a)(iv) an adjudicator must dismiss the application without making a determination of its merits if the adjudicator is satisfied it is not possible to fairly make a determination because of the complexity of the matter (or because the prescribed time or any extension of it is not sufficient for another reason). This makes it clear that the adjudicator's decision in relation to complexity must be made in the context of the prescribed time limits in the Act.

[42] An appeal lies to the Local Court from a decision of an adjudicator under s 33(1)(a) to dismiss an application without making a determination on the merits.[28] Section 48(3) provides: "Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed."

[43] It is uncontroversial that, in order for there to be a valid determination within the meaning of the Act which is immune from review by reason of s 48(3), the adjudicator must make a *bona fide* attempt to comply with the

[28] Section 48(1)

essential requirements of the Act. In *Brodyn Pty Ltd v Davenport*[29] Hodgson JA (with whom Mason P and Giles JA agreed) said:[30]

> What was intended to be essential was compliance with the basic requirements ....., a *bona fide* attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power, and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a *bona fide* attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. *[citations and references omitted]*

[44] The duty of the adjudicator to dismiss an application under s 33(1)(a)(iv) does not arise where the matter is in fact, objectively speaking, too complex to be dealt with fairly. It arises if the adjudicator "is satisfied it is not possible to fairly make a determination" for that reason. As I held in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*:[31]

> Under s 33(1), the power to make the decision whether to dismiss the application under s 33(1)(a) or proceed to a determination of its merits under s 33(1)(b) is given to the adjudicator. In fact he is obliged by s 33(1) to make that decision. Hence deciding those matters is within, and not outside, the limits of the functions and powers conferred on the adjudicator by the Act.

[45] In other cases, this Court has considered what kinds of error in the application of s 33(1)(a) will render a decision of an adjudicator to proceed

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29 (2004) 61 NSWLR 421; [2004] NSWCA 394

30 at [55]

31 (2011) 29 NTLR 1; [2011] NTCA 1 at [139]

to a determination on the merits reviewable by the court. Those cases concerned decisions by an adjudicator under s 33(1)(a)(ii) that the provisions of s 28 of the Act had been complied with, but making due allowance for the different nature of the decisions to be made under the two paragraphs, essentially the same principles are applicable to a decision under s 33(1)(a)(iv).

[46] In *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd*,[32] Mildren J held that a factual error in an adjudicator's decision that the requirements of s 28 had been met (in that case whether the application for an adjudication had been made within 90 days of a payment dispute arising) would not render a determination a nullity susceptible to review by the Court. *A fortiori* a factual error in an adjudicator's decision under s 33(1)(a)(iv) that a matter was not too complex to fairly make a determination in the circumstances would not render the resulting determination a nullity, since the relevant question under the Act is not whether the matter <u>is</u> too complex but whether the adjudicator <u>is satisfied</u> that it is not too complex.

[47] The Court of Appeal in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*[33] ("*AJ Lucas*") held that a purported determination is reviewable by this Court where it is shown that the adjudicator's satisfaction as to the requirements of s 28(1) is either unreasonable[34] or

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32 (2008) 24 NTLR 15; [2008] NTSC 46

33 (2009) 25 NTLR 14; [2009] NTCA 4

34 *AJ Lucas* per Southwood J at [33]

based on an incorrect understanding of the true construction of the Act which gives the adjudicator his jurisdiction to decide the adjudication on the merits.[35] (In the case of a decision under s 33(1)(a)(ii) that will be s 33 and/or s 28; in the case of a decision under s 33(1)(a)(iv) that will be s 33.)

[48] In this case it has not been suggested that the adjudicator misconstrued the Act in relation to a matter going to his jurisdiction. The plaintiff's contention is that the adjudicator's decision that he was satisfied the matter was not too complex to for him to fairly make a determination was unreasonable.

[49] The plaintiff contends that the issues in dispute between the parties in Adjudication 2 are so obviously too complex for the adjudicator to have fairly dealt with them within the time allocated under the Act that it was unreasonable in the relevant sense for the adjudicator to have proceeded to a determination on the merits. In support of its contention that the matter was plainly too complex and the decision to proceed unreasonable, the plaintiff points to the volume of material before the adjudicator (more than a dozen large lever arch folders); the fact that the adjudicator was obliged to extend the time for handing down his determination (from 10 to 15 working days); and to what the plaintiff submits is the glaring inadequacy of the determination in its failure to deal with key issues.

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35 *AJ Lucas* per Mildren J at [13]

[50] I do not think that the volume of the material is a necessary indicator that the decision to proceed to a determination on the merits was unreasonable. The adjudicator is a quantity surveyor, he dealt with the bulk of that material, and counsel for the plaintiff emphasised that there is no complaint made about the manner in which he dealt with the quantity surveying aspects of the adjudication. There is no complaint about the adjudicator's determination in relation to those variation claims which do not depend upon an entitlement in the defendant to a relevant EOT.

[51] Nor do I think that the legal issues raised were particularly complex. The suggestion was made that the legal issues required the expertise of a lawyer to make a fair determination and that the adjudicator ought to have recognised this once he had received the Response and so dismissed the application under s 33(1)(a). I am not convinced that this is necessarily the case. It seems to me that the issues which the plaintiff complains the adjudicator failed to deal with are at least as much factual as legal. I am of the view that the question of whether the issues surrounding the defendant's entitlement to EOTs were too complex to be fairly dealt with in the given time was one on which reasonable minds may differ and that it was not necessarily unreasonable in the relevant sense for the adjudicator to have decided he would fairly deal with them.

[52] It might be argued that if the adjudicator formed the opinion that the matter was not too complex based on a view that it was only necessary for him to deal with the issues raised by the plaintiff in the perfunctory manner in

which he did, then that was plainly wrong and hence his decision unreasonable. It is not clear to me that this was the basis of the adjudicator's decision. In any case, in light of my decision on "the rubber stamping ground" below, it is not necessary for me to decide this question.

The rubber stamping ground

[53] The plaintiff also contends that the adjudicator's determination is not a valid determination within the meaning of the Act on a number of alternative grounds, all based on the contention that the adjudicator failed to deal at all with what the plaintiff contended were key issues raised in the plaintiff's Response namely "**the notice issue**", "**the James Engineering issue**" and "**the delay issue**".

[54] These terms require some explanation before the plaintiff's contentions in relation to them are dealt with.

Explanation of "the notice issue", "the James Engineering issue" and "the delay issue" by reference to the material before the adjudicator

(a) The Contract

[55] Under the Contract, in order to be entitled to an EOT, the defendant was required to submit notices of delay in accordance with cl 7.[36] Under cl 7.1(a), the defendant (as the "Lower Tier Contractor") was required to submit written notice to the plaintiff within 10 business days of the time when it first became aware (or ought reasonably to have become aware) that

[36] The relevant parts of cl 7 are set out at [11] above.

a delay would occur. Under cl 7.1(b), a notice provided by the defendant under cl 7.1(a) was required to contain reasonable detail, including particulars of the expected effects of the delay; an estimate of any expected delay in the delivery of the Equipment; activities on the critical path of the Work Time Schedule which are or will be delayed; steps taken to mitigate the delay; facts relied upon in support of each aspect of the delay and any other information reasonably requested by the plaintiff.[37] The requirements for the provision of these details in the notice of delay in cl 7.1(b) mirror the preconditions for the grant of an EOT in cl 7.2 (set out at [11] above).

(b) Application 2 and its attachments

[56] Application 2 requested an adjudication of the dispute in relation to payment claim PC-10. Part 9 of Application 2 is headed "Delay and EOT analysis". It sets out details of the defendant's claim to be entitled to EOTs. Part 9 is divided into Sections 9.1 to 9.12, each dealing with a different claim. Each of Sections 9.1 and 9.2, and 9.4 to 9.10 refers to a different "Extension Event" (a defined term under the Contract).

[57] Each of those Sections deals with the adequacy of the notices of delay said to have been given by the defendant under sub-headings entitled "Compliance with clause 7.1(a)" and "Compliance with clause 7.1(b)". Under these sub-headings, the defendant refers to the notices and details provided to the plaintiff in compliance, or purported compliance, with cl 7.1

[37] "Equipment" and "Work Time Schedule" are defined terms under the Contract.

in relation to each Extension Event. In addition, Sections 9.5 and 9.7 contain alternative contentions to the effect that if the adjudicator is not satisfied that the defendant complied strictly with the notice provisions, the plaintiff had nevertheless waived the notice requirements, or was estopped from relying on strict compliance with the notice requirements.[38]

[58] Each of Sections 9.1 and 9.2 and 9.4 to 9.10 of Application 2 places reliance on an "Independent Delay Analysis" contained in an expert report of George Diab[39] obtained by the defendant ("the Diab report"). In this report Mr Diab provides a delay analysis and gives his opinion on the number of days critical delay attributable to each claimed Extension Event, and to the project overall. Each of those sections (except Section 9.1) contains a table showing the days of critical delay found by Mr Diab.[40]

[59] Application 2 was also accompanied by a statutory declaration by Mr Price setting out the factual matters relied on by the defendant ("the Price statutory declaration").

(c) The plaintiff's Response and its attachments

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[38] Application 2 Section 9.5 paras 613 to 616 and Section 9.7 paras 683 to 685. In addition, Application 2 contains general submissions on **the notice issue** in paras 472 to 506 which also include submissions to the effect that if the defendant has not strictly complied with the notice provisions, the plaintiff has either waived compliance or is estopped from relying on strict compliance at paras 487 to 494.

[39] Application 2 Section 9.1 par 515, Section 9.2 par 523, Section 9.4 par 542, Section 9.5 par 621, Section 9.6 par 668, Section 9.7 par 687, Section 9.8 par 713, Section 9.9 par 721 and Section 9.10 par 734

[40] Mr Diab's opinion of the delay in relation to Section 9.1 is contained in the table at the end of Section 9.2. Section 9.3 does not claim an EOT and Sections 9.11 and 9.12 contain general submissions on "Overall Critical Delay" and "Liquidated Damages Milestones" respectively. Section 9.11 also contains a table showing the days of critical delay found by Mr Diab, but it is not relevant to "**the notice issue**" in this proceeding.

[60] The plaintiff's responses to these parts of Application 2 are found in a number of places. Part 12 of the Response (paras 12.1 to 12.7.2) is headed "ALLEGED WAIVER OF NOTICE REQUIREMENTS" and contains a general refutation of the defendant's claim that the plaintiff had waived compliance with the notice requirements. Part 13 is headed "NO ESTOPPEL ARISES" and deals similarly with the defendant's estoppel claim in relation to compliance with the notice requirements.

[61] Section 20 of the plaintiff's Response is headed "ABB'S EXTENSION OF TIME CLAIMS". Paragraph 20.1 states: "ABB'S claims for extensions of time in respect of nine alleged Extension Events should be rejected for the reasons set out below". General submissions follow in paras 20.1 to 20.7.

[62] Paragraph 20.2 refers the adjudicator to, and relies upon, the "Report relating to Matters of Delay" dated 23 June 2016 prepared by the plaintiff's independent expert Mr Gerard King ("the King report"), which was attached to the Response. Paragraphs 20.5 to 20.6 of the Response summarise the problems with the Diab report identified in the King report, and provide paragraph references to the relevant parts of the King report. Paragraph 20.7 concludes: "In light of the foregoing, it is submitted that Mr King's analysis and findings are to be preferred to those of Mr Diab's."

[63] The Response goes on to set out the plaintiff's specific responses to each of the defendants EOT claims in Sections 9.1 and 2 and 9.4 to 9.10 of

Application 2[41]. Those responses rely upon the King report and refer to particular paragraphs of that report. (Unfortunately, some of the references in the Response to paragraphs in the King report were wrongly numbered, but the report itself contains headings which make finding the relevant parts of the report relatively easy.)[42]

[64] The King report describes the various available delay analysis methodologies,[43] concludes that the particular type of time impact analysis utilised by Mr Diab is unsuitable to the exercise at hand,[44] and expresses the opinion that that methodology was in any event misapplied by Mr Diab[45] for the reasons Mr King sets out in the report. Contrary to the defendant's submission,[46] Mr King also provides a delay analysis in relation to each of the claimed Extension Events in Sections 9.1 and 9.2 and 9.4 to 9.10 of Application 2 and gives his own opinion of the number of critical days delay

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41 Paragraphs 20.14 and 20.15 of the Response deal with Section 9.1, paras 20.16 and 20.17 deal with Section 9.2, paras 20.18 to 20.20 deal with Section 9.4, paras 20.21 to 20.24 deal with Section 9.5, paras 20.25 to 20.27 deal with Section 9.6, paras 20.28 to 20.31 deal with Section 9.7, paras 20.32 to 20.35 deal with Sections 9.8, par 20.36 and misnumbered par 20.2 on p 58 deal with Section 9.9 and misnumbered paras 20.3 to 20.5 deal with Section 9.10.

42 For example, reference to the table of contents alone (under the heading "10. ANALYSIS OF ALLEGED DELAYS") reveals that Mr King's analysis of the claim in Sections 9.1 and 9.2 is to be found at p 46, Section 9.4 at p 56, Section 9.5 at p 74, Section 9.6 at p 94, Section 9.7 at p 114, Section 9.8 at p 117, Section 9.9 at p 120 and Section 9.10 at p 126. (The table of contents does not refer to these parts by the numbering in Application 2, as I have done in these reasons, but by reference to the descriptions under those numbered parts of Application 2 – as does Determination 2.)

43 at Part 7

44 at par 93

45 at par 118

46 at par 50(b) of the written submissions

(if any) attributable to each claimed Extension Event[47] except those which Mr Diab assessed as causing no delay.[48]

[65] In addition to the King report, the plaintiff submitted with its Response a statutory declaration by Mr Peter Jewell, the plaintiff's Deputy Project Director ("the Jewell statutory declaration"). The bulk of the Jewell statutory declaration sets out details (often technical) of the plaintiff's responses to the defendant's claims to payment for variations. There is no dispute about the adjudicator's treatment of those aspects of the claim.

[66] On page 39 of the Jewell statutory declaration is the heading: "ABB's Delay Costs Claim",[49] and on page 41 is the heading: "ABB's EXTENSION OF TIME CLAIMS"[50] commenting on Sections 8 and 9 of Application 2. These paragraphs set out the factual matters relied upon by the plaintiff in support of its contentions:

(a) that there was in fact no critical delay caused by the plaintiff;

(b) that the defendant was responsible for critical delays (notably in relation to the fabrication of certain modules for use in the Contract by

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47 For Sections 9.1 and 9.2 his conclusion (preceded by a reasoned analysis) is at par 200; for Section 9.4 at par 248; for Section 9.5 at par 312; for Section 9.6 at par 380; and for Section 9.9 at par 424 of the King report.

48 He identifies these as Sections 9.7 (at par 388 of his report), 9.8 (at par 397) and 9.10 (at par 432).

49 comprising paras 193 to 205

50 comprising paras 206 to 304

its sub-sub-contractor James Engineering) which disentitled it to any EOTs by virtue of clause 7.6;[51]

(c) that the defendant had failed to give notice of claimed delays in accordance with the contract as a result of:

(i) in some cases failure to give notice at all, the documents relied upon by the plaintiff as constituting notice containing no reference to the relevant Extension Event,

(ii) in other cases notice being given outside the 10 day period specified in cl 7.1(a), and

(iii) in all cases, failing to provide the level of detail and/or the particulars specified in cl 7.1(b).

[67] The issue in [66](b)above is referred to in submissions, and in these reasons, as **"the James Engineering issue"** and is described in more detail below. The issues in [66](c) above, (together with the issues raised by the defendant of whether strict compliance with cl 7.1 was necessary and whether the plaintiff had waived compliance or was estopped from relying on strict compliance) are collectively referred to in submissions and in these reasons as **"the notice issue"**.

[68] The section of the Jewell statutory declaration dealing with the "Extension

[51] Clause 7.6 (set out at [11] above) essentially provides that if, in addition to an Extension Event, there was another (or other) concurrent cause/s of delay the defendant is not entitled to an EOT.

of Time Claims" begins[52] with general submissions, references to the Price statutory declaration, references to particular documents relating to the timing of particular notices of delay, and an explanation of the level of detail required in notices of delay and the manner in which Mr Jewell says the defendant's notices were defective. That is followed by specific sections addressing each of Sections 9.1 and 9.2 and Sections 9.4 to 9.10 of Application 2.[53]

[69] Those sections of the Jewell statutory declaration also address factual issues relating to whether or not there were in fact any delays for which the plaintiff was responsible, in separate sections dealing with each claimed Extension Event.

[70] The issues of whether there were in fact delays for which the plaintiff was responsible (addressed in the Jewell statutory declaration), the appropriate way to analyse delays, and the resultant assessment of how many days critical delay (if any) should be attributed to each claimed Extension Event in Sections 9.1 and 9.2, and 9.4 to 9.10 of Application 2 (addressed in the King report) are together referred to in submissions and in these reasons as **"the delay issue".**

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[52] in paras 206 to 224

[53] Section 9.1 of Application 2 is addressed at paras 225 to 229 of the Jewell statutory declaration; Section 9.2 at paras 230 to 235; Section 9.4 at paras 236 to 243; Section 9.5 at paras 244 to 266; Section 9.6 at paras 267 to 271; Section 9.7 at paras 272 to 276; Section 9.8 at paras 277 to 279; Section 9.9 at paras 280 to 281; and Section 9.10 at paras 282 to 304.

[71] That part of the Jewell statutory declaration which addresses Section 9.10 of Application 2 contains a sub-heading "ABB's poor performance and slow progress"[54] under which Mr Jewell deposes to matters of detail relating to **the James Engineering issue**.

(a) He deposes to having visited the James Engineering fabrication facility in Toowoomba and noted that "it consisted of a single workshop with capability for effectively only one module to be fabricated at a time". Based on that observation, the fact that there were 16 modules to be fabricated, and the estimated time it would take to complete each module, Mr Jewell deposes that he "concluded that the fabrication of one or two modules at a time would not meet the Contract nor (sic) [the plaintiff's] schedule requirements."[55]

(b) He then deposes to negotiations, to the issue of notices of default due to the defendant's delay, and to his view that, "the primary cause of [the defendant's] delay related to [the defendant's] inability to fabricate at the frequency dictated by their original Rev A Schedule of up to six building modules at one time".[56]

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54 paras 287 to 304

55 par 290

56 par 298

How these issues are dealt with in Determination 2

[72] In Determination 2, the adjudicator sets out formal matters, then deals with jurisdictional issues.[57] At par 52 the adjudicator states:

> In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:
>
> - the application and its attachments; and
> - the further written submissions validly made by the parties.[58]

The adjudicator does not mention that he took into account the Response provided by the plaintiff and its attachments, as he was obliged to do under s 34(1)(a)(ii). However, I do not take this to be a statement by the adjudicator that he did not take that material into account at all – rather a slip or error in the preparation of the Determination. Determination 2 contains numerous references to material in the Response although not, as explained below, to the material in the Response and its attachments dealing with **the notice issue**, **the James Engineering issue** and **the delay issue**.[59]

[73] At paras 55 and 56 the adjudicator identifies the issues in dispute and correctly includes "Extension of Time Entitlement and Delay Costs" and "Deduction of Liquidated Damages". He then goes on to consider each of

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[57] paras 12 to 51

[58] This is a reference to the parties' responses to a request from the adjudicator pursuant to s 34(2)(a) for further submissions. He received submissions from both parties and noted that some of the submissions from the respondent were unsolicited. (Determination par 7)

[59] By way of example, there are references in Determination 2 to the Jewell statutory declaration at paras 58, 63, 67, 71, 76, 80, 88, 96, 104, 112, 124, 132, 141 and 142 but none in that part of Determination 2 dealing with the EOT claims.

the claimed variations. The plaintiff makes no complaint about the adjudicator's treatment of the technical matters relating to the claimed variations.

[74] At page 23 of Determination 2 there is a heading: "**ii. Extension of Time Entitlement and Delay Costs**". This section begins with an introduction:

> 145 The applicant is submitting two Extension of Time claims. One dated 30th September 2015 in the sum of $1,943,300.00 (excl GST) and one dated 4th March 2016 in the sum of $144,000.00 (excl GST). *[sic]*
>
> 146 The respondent in the adjudication response states that the Extension of Time events should be rejected for the following reasons and will be addressed individually under each delay impact: *[sic]*
>
> i. The applicant fails to comply with the strict provisions of the Extension of Time clause 7 of the General Conditions of Contract
>
> ii. Inherent problems with the applicant's Expert Delay Report [*punctuation in original]*

[75] This is followed by the adjudicator's determination in relation to each of the defendant's claims in Sections 9.1 and 9.2 and 9.4 to 9.10 of Application 2 (referred to by description rather than by reference to the Part or Section number in Application 2 and described as "Delay impacts" rather than "Extension Events"). These determinations are discussed in detail below at [83] to [87] below.

Issues before the adjudicator

[76] It can be seen from the outline above that the issues before the adjudicator in relation to the defendant's EOT claims were these.

(a) Were there in fact delays which were the responsibility of the plaintiff which would *prima facie* entitle the defendant to EOTs under the Contract? There are two general sub-issues involved in making this determination:

(i) establishing the factual matrix, and

(ii) conducting a delay analysis to establish the effect of the delays in question on the project in order to determine how many days EOT (if any) should be allowed.

(b) Was the defendant responsible for concurrent delay which would disentitle it to an EOT under cl 7.6 (in particular in relation to **the James Engineering issue**)?

(c) Was strict compliance with cl 7.1(b) in relation to the types of detail to be provided in the notice a precondition of the right to an EOT?

(d) In relation to each of the nine Extension Events relied on by the defendant in Part 9 of Application 2, was notice of the delay given to the plaintiff in accordance with cl 7.1 of the Contract?

(e) In relation to two of those Extension Events (those in Sections 9.5 and 9.7), did the plaintiff waive strict compliance with cl 7.1, and/or was the plaintiff estopped from relying on strict compliance?

[77] The adjudicator correctly identified the bulk of these issues.[60] However, he dealt with them in a very cursory fashion.

[78] On the question in [76](a): "were there delays which were the responsibility of the plaintiff which would *prima facie* entitle the defendant to EOTs under the Contract", the material before the adjudicator was as follows:

(a) the contentions in Application 2,

(b) the Price statutory declaration deposing to the relevant facts from the point of view of the defendant,

(c) the Diab report (relied on by the defendant),

(d) the contentions in the Response to Application 2,

(e) the Jewell statutory declaration deposing to the relevant facts from the point of view of the plaintiff,

(f) the King report obtained by the plaintiff in which Mr King comments upon the methodology used in the Diab Report and provides his own

[60] At par 146 he identifies in general terms the reasons why the plaintiff submits that the claimed EOTs should not be allowed. At par 56 he identifies "Extension of Time Entitlement and Delay Costs" as an issue to be determined. He again identifies the waiver and estoppel issues under part 6 of the section on jurisdiction under the (somewhat curious) heading: *"Alleged Waiver of Notice Requirements, No Estoppel Arises and Set-Off"* in the following terms (at par 28): "As I don't see these as overarching Jurisdictional issues but more specific to the Variation claims and Extension of Time claims, I shall address these issues below under each relevant section in **Issues in Dispute**." (However the issue of waiver and/or estoppel is not in fact dealt with under the relevant sections.)

analysis and opinion on the questions of critical delay overall and in relation to each claimed Extension Event, and

(g) many folders of documents - reference to individual documents being made in all of the above material.

[79] On the question in [76](b): whether the defendant was responsible for concurrent delay which would disentitle it to an EOT under cl 7.4 (in particular in relation to **the James Engineering issue**) the adjudicator had before him (at least)[61] the contentions in the Response and the material in the Jewell statutory declaration at paras 287 to 304.

[80] On the question in [76](c): whether strict compliance with cl 7.1(b) in relation to the types of detail to be provided in the notice was a precondition of the right to an EOT, the adjudicator had the opposing contentions in Application 2 and the plaintiff's Response, as well as explanations in the Jewell statutory declaration and (almost certainly) contrary contentions in the Price statutory declaration.[62]

[81] On the question in [76](d): whether, in relation to each of the nine Extension Events relied on by the defendant in Part 9 of the Application, notice of the delay was given to the plaintiff in accordance with cl 7.1 of the Contract, the adjudicator had before him:

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[61] I am unaware whether there was also material in Application 2 and/or other material relied upon by the defendant relating to this issue. I was not referred to such material and there is no mention of any such in Determination 2.

[62] Again, I was not referred to material in the Price statutory declaration and there is no mention of it in the relevant parts of Determination 2.

(a) the opposing contentions in Application 2 and the plaintiff's Response; and

(b) the material in the Jewell statutory declaration referred to at [66], [68] and [69] above (and no doubt material contending otherwise in the statutory declaration of Mr Price).

[82] On the question in [76](e): whether the plaintiff had waived strict compliance with cl 7.1, and/or was estopped from relying on strict compliance with that clause in relation to the claimed Extension Events in Sections 9.5 and 9.7 of Application 2, the adjudicator had before him (at least) the opposing contentions in Application 2 and the plaintiff's Response.[63]

[83] The adjudicator dealt with these issues in Determination 2 in the following way. In paras 148 to 153, he set out his determination in relation to "**Delay impact 1 – NOD1 and NOD2 Delays to general arrangement drawings and design freeze".** (This equates to the Extension Events claimed by the defendant in Sections 9.1 and 9.2 of the Application, responded to by the plaintiff in the Response at paras 20.14 and 20.15 and paras 20.16 and 20.17.)

(a) In par 148 the adjudicator says:

[63] I have not checked the statutory declarations of Mr Price and Mr Jewell to see whether they also contain material relevant to the determination of this issue. Unlike "**the delay issue**", "**the notice issue**" and "**the James Engineering issue**", this particular sub-aspect of **the notice issue** has not been urged by the plaintiff as a particularly crucial or key issue which was ignored by the adjudicator. Had the adjudicator determined that there had in fact been strict compliance, it would not have been necessary to consider waiver or estoppel, and in any event, in relation to one of the two relevant claimed Extension Events (that in Section 9.7 of Application 2), the adjudicator found that there had been no critical delay.

> In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to these delay events. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.

(b) In paras 149 and 150, he provides a brief summary of the defendant's claims in the two notices of delay relied upon by the defendant.

(c) In par 151 he says:

> Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by Expert George Diab in analysing the impact of these delays. *[sic]*

(d) In par 152 he states: "I therefore concur with [Mr Diab's] analysis …" and then sets out the days critical delay for these Extension Events from the Diab Report.

(e) In par 153 he states:

> The information provided in the Gerard King delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur *[sic]*. In fact, paragraph 33 of this Expert Report makes reference to *"Clause 34 of the General Conditions establishes* ***Golding's*** *entitlement to EOT"* which is clearly a cut and paste typo and reduces the credibility of the level of detail relating to this specific adjudication.

[84] The adjudicator's determinations in relation to the Extension Events claimed in Sections 9.4, 9.5, 9.6 and 9.9 of Application 2 follow the same pattern.[64]

[85] The determination in relation to Section 9.4 (referred to by the adjudicator as "Delay impact 2") is at paras 154 to 159.

(a) Paragraph 154 is a cut and paste of par 148.

(b) Paragraph 155 sets out in one sentence the substance of the defendant's claim for an EOT.

(c) Paragraph 157 is a cut and paste of par 151, including the punctuation error.

(d) Paragraph 158 begins with the same words as par 152, and then sets out the days critical delay for the Extension Event in question from the Diab report.

(e) Paragraph 159 is a cut and paste of par 153, including the error in the first sentence.

[86] The structure of Determination 2 in relation to Section 9.5 (referred to in the Determination as "Delay impact 3") is the same, as is the wording, except that the final paragraph (par 164) contains a shortened version of par 153 (159), deleting the second sentence. (The error in the first sentence is retained.)

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[64] Section 9.3 did not claim an EOT. The adjudicator disallowed the claims in Sections 9.7, 9.8 and 9.10 on the ground, in each case, that, "The expert analysis undertaken by George Diab for the applicant concluded that this delay event had **no critical impact** to any of the batch delivery dates." (Determination 2 paras 172, 174 and 181)

[87] The structure and wording of the determinations in relation to Sections 9.6 and 9.9 ("Delay impacts 4 and 7") are exactly the same as for Section 9.5.

[88] In my view, the reasons in Determination 2 are fundamentally inadequate.

[89] The defendant contends that the reasons are adequate by the standard to be expected of an adjudicator working under the conditions and time constraints necessarily imposed by the Act. I disagree.

[90] In support of the defendant's contention, counsel submitted that the Act provides "a rough and ready procedure"[65] where adjudicators – who do not need to be and often are not legally qualified - are given a short period of time (10 working days[66] unless extended under s 34(3)) to make their determination. Counsel for the defendant pointed out that no objective limit is specified in the Act in relation to either the quantum of the payment disputes which may be adjudicated, or the scale or complexity of the issues and material which may be involved.[67] He pointed out too, that parties may not be legally represented in this procedure, hearings are not contemplated,[68] and an adjudicator will not have the benefit which a court often enjoys of hearing over several hours or perhaps days the evidence of the relevant witnesses and the written and oral submissions of experienced legal

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65 relying on *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [208] Comments of a similar nature have from time to time been made by this Court.

66 Section 33(3)

67 although s 33(1)(a)(iv) provides that an adjudicator must dismiss an application without proceeding to a determination on the merits if he/she is of the opinion that it is too complex to be dealt with fairly on adjudication

68 A "conference" may be requested by an adjudicator under s 34(2)(b).

practitioners based on that evidence. The defendant contends that, in these circumstances, by necessity, an adjudicator's determination will often be based on matters of impression or on an extrapolative judgment based on experience.

[91] Granted the defendant's characterisation of the nature of the adjudication process, and even (for the purposes of the argument) the defendant's characterisation of the adjudicator's determination as being, by necessity, based (in some circumstances and on some issues) on matters of impression and experience, the adjudicator is nevertheless obliged to make a *bona fide* attempt to perform the functions conferred on him by the Act. That includes making a *bona fide* attempt to provide reasons for the determination.[69]

[92] In *Pittwater Council v Keystone Projects Group Pty Ltd*[70] the Supreme Court of New South Wales addressed the requirement under the New South Wales Act for an adjudicator to give reasons in the following terms:

> The reasons should show that the adjudicator has turned his, or her, mind to the dispute and has addressed the issues raised by the parties in support of, and in opposition to, the Payment Claim. He or she should analyse each of the documents to the best of his, or her, ability for the purposes of identifying the claims made by the plaintiff in its response to the adjudication application.[71] *[emphasis added]*

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69 Section 38(1)(d)

70 [2014] NSWSC 1791

71 at [129] The New South Wales requirement for the adjudicator to give reasons is not relevantly different from the Northern Territory legislation.

[93] In *Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd*[72] Sackar J said:[73]

> The content of the adjudication is obviously the most relevant source as to whether the adjudicator has or has not performed the relevant statutory functions. It is to be recalled that the process may or may not be interactive and will be conducted generally, entirely in writing. Provided it is apparent that the adjudicator has considered pertinent issues in good faith, very considerable latitude in my view should be afforded to an adjudicator as to the manner and form of the determination. To become too pedantic about the way in which the adjudicator has drafted a determination is to introduce an element of artificiality such as might well defeat the object and purpose of the [Payments Act] and the aim of the process entirely. On the other hand the mere fact an adjudicator blandly says he or she has read 'all of the submissions and accompanying documents' or simply that he or she is 'satisfied' without more in relation to a particular issue under consideration may not, subject to viewing the determination as a whole survive as adequate reasons. As I have said it will always be a matter of degree. [*references and citations omitted] [emphasis added]*

[94] In *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury*[74] Basten JA considered the content of the obligations of the full bench of the Industrial Relations Commission to provide reasons for its decisions in the following terms:

> The content of reasons sufficient to satisfy the obligation will vary, depending on the issues in dispute, the subject matter of the dispute, the urgency in reaching a decision and a variety of other factors. However, some guidance may be obtained from standard statutory provisions which require that written reasons "set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based": cf *Acts Interpretation Act* 1901

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72 [2012] NSWSC 1466

73 at par [38]

74 (2014) 242 IR 318; [2014] NSWCA 112 at [46] to [58]

> (Cth), s 25D. Generally, the concept of "reasons" requires an explanation connecting any findings of fact with the ultimate decision.[75] *[emphasis added]*

[95] In *Shell Refining (Australia) Pty Limited v A J Mayr Engineering Pty Limited*[76] Bergin J in the Supreme Court of New South Wales considered the effect of a "catch-all" phrase in an adjudication determination to this effect: "I have considered all the material. The fact that I do not specifically refer to any submission or document must not be taken as any indication that I have not considered it." Bergin J commented:

> It is perhaps understandable that some adjudicators whose determinations have been the subject of administrative law challenge may regard it as appropriate to utilise a catch-all statement, similar to the one used in the Determination, to fend off an allegation that they have failed to consider a relevant matter. Notwithstanding the somewhat pressure cooker environment in which adjudicators provide their determinations, it seems to me that it would be unhelpful for adjudicators to develop such a practice. It is assumed that adjudicators will comply with their statutory duties under s 22(2) of the Act, which sets out the matters to which they are to give consideration. A consideration of whether they have so complied is made from the content of their determinations rather than from a statement or claim by the adjudicator in the determination that he/she has so complied. I am not persuaded that the defendant is able to obtain any assistance or support for its submissions from this statement by the adjudicator on the first page of the determination.[77]

[96] It seems to me that, viewed objectively, Determination 2 does not give reasons for the adjudicator's determinations that the defendant is entitled to EOTs under the Contract, in particular in relation to **the delay issue**, **the**

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75 at [46]

76 [2006] NSWSC 94

77 at [27]

notice issue and **the James Engineering issue**. It certainly does not rise to the standard set out in *Pittwater Council v Keystone Projects,* and fails even to set out findings of fact let alone connect findings of fact with the ultimate decision.

[97] The statement at par 148 "Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied" is the functional equivalent of saying, "I am satisfied" without more in relation to the notice issue.[78]

[98] The statement in Determination 2 par 151 (and paras 157, 162, 168 and 177): "Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant", is devoid of information. It does not set out the adjudicator's reasoning process. It provides no "reason" at all why the applicant's argument is preferred. The generalised comments in the following sentence fragment in par 151 (and paras 157, 162, 168 and 177) and in par 153 (repeated in paras 159, 164, 170 and 179) to the effect that the adjudicator prefers "the time impact analysis technique adopted by Expert George Diab", and that "the Gerard King delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur", add

[78] As discussed in *Avopiling* see [93]

nothing. The adjudicator provides no reason at all for his preference or for why the King report failed to "dissuade" him (presumably he meant "persuade" him) that the critical delays did not occur.

[99] In this case, the adjudicator has not simply added to an otherwise reasoned determination a "catch all" sentence to the effect that "he has considered everything"; in that part of Determination 2 in which he deals with the defendant's claims for EOTs, essentially the sum total of his reasoning is that "he has considered everything", prefers the defendant's arguments, rejects the King report, and adopts the conclusions in the Diab report.

[100] In relation to **the delay issue**, the adjudicator did not refer to any of the reasoning in the King report as to why Mr King considered the methodology adopted in the Diab report to be inappropriate, or Mr King's opinion that that methodology had in any event been misapplied. Nor did he address in any way the alternative delay analysis provided by Mr King or set out his reasons for preferring Mr Diab's approach.

[101] Further, the adjudicator did not refer at all to the many pages of evidence provided by Mr Jewell in relation to the plaintiff's contention that there had not in fact been delays which were the responsibility of the plaintiff which would *prima facie* entitle the defendant to EOTs under the Contract. Nor did the adjudicator refer to the material supplied by the defendant on this

issue.[79] The adjudicator did not set out findings of fact in relation to **the delay issue** by reference to the material in Application 2 and the plaintiff's Response or the statutory declarations of Mr Price and Mr Jewell and/or the documents referred to therein. He appears, from the reasons, as the plaintiff submitted, to have simply uncritically adopted the conclusions in the Diab report without referring to any of the relevant material or providing any reasons for doing so.

[102] Likewise, Determination 2 makes no reference to any of the plaintiff's material on **the James Engineering issue**,[80] in fact does not even identify it as an issue at all. Determination 2 makes no reference to the concept of concurrent delay, or to the plaintiff's contention that the defendant had been responsible for substantial delays due to the inability of the defendant's sub-contractor, James Engineering, to fabricate modules required to be delivered in the time provided for in the Contract.

[103] Determination 2 is similarly devoid of reasons in relation to **the notice issue**. The adjudicator did not refer to any of the detailed material in the statutory declaration of Mr Jewell in which he attempted to show by reference to the documents that in some instances no notice of delay had been given at all, in some cases notice had been given outside the 10 days provided for in cl 7.1(a), and in all cases, inadequate detail had been given

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[79] The defendant provided detailed material in relation to the merits of its claim for delay costs in its application at paras 774 to 801, and in Mr Price's statutory declaration at paras 29 to 40. [defendant's submissions par 50(a)]

[80] in paras 287 to 304 of the Jewell statutory declaration

which failed to comply with cl 7.1(b) and did not enable the plaintiff to make a reasonable determination of the validity of the alleged Extension Event.

[104] Nor does Determination 2 deal with the issues of whether strict compliance with the notice provisions was necessary or with the issues of waiver and estoppel raised by the defendant in Application 2 – despite the statement in par 28 of Determination 2 that he "would address these issues below under each relevant section in **Issues in Dispute".**

[105] The question then arises whether this failure to give reasons is one which renders the adjudicator's Determination 2 void. The defendant relied on *Project Blue Sky Inc v Australian Broadcasting Authority*[81] and submitted that it cannot have been the intention of Parliament that any inadequacy in reasoning as to the merits of the payment dispute would result in invalidity. So much can be accepted.

[106] Counsel for the defendant submitted that, to amount to a failure to comply with the obligation to give reasons under s 38, the failure to deal with issues would need to be equivalent to a failure by the adjudicator make a *bona fide* attempt to discharge his function. He submitted that that had not been established in this case, and that the most that could be established was that in coming to his decision in relation to the entitlement of the defendant to EOTs under the Contract, the adjudicator had not set out his detailed

[81] (1998) 194 CLR 355; [1998] HCA 28 at [93]

reasoning for every minor step in the process of arriving at his determinations. He characterised "**the delay issue**", "**the notice issue**" and "**the James Engineering issue**" as matters of detail to be dealt with under the heading of each delay claim.

[107] Counsel for the defendant conceded that if the matters which the adjudicator failed to deal with in his reasons were critical issues, fundamental to determining the defendant's right to the claimed EOTs, then failure to deal with those issues in the reasons would amount to a failure to comply with the requirements of s 38.

[108] In my view the failures by the adjudicator set out above do amount to a constructive failure to give reasons for his decision in relation to the nine claimed EOTs. **The delay issue** (ie whether there were in fact critical delays which were the responsibility of the plaintiff) **the notice issue** (ie whether the defendant had complied with the notice provisions in the Contract that were expressed to be a condition precedent to the right to claim EOTs) and **the James Engineering issue** (ie whether the defendant had been responsible for delays which would disentitle it to EOTs by virtue of cl 7.6) were critical issues, fundamental to the adjudicator's determination. **The delay issue** and **the notice issue**, if decided in favour of the plaintiff, would have been a complete answer to the defendant's claim to the EOT being considered and **the James Engineering issue** would have

been at least a partial answer (depending on the numbers),[82] and together, those issues constitute the whole of the dispute between the parties in relation to the claimed EOTs. Looking at the adjudicator's determination of the individual EOT claims in Sections 9.1 and 9.2 and 9.4 to 9.10, one sees not simply a failure to provide details of some part of the reasoning process, but a failure to provide reasons at all.

[109] Counsel for the defendant contended that even if there had been a failure to comply with the obligation in s 38 to provide reasons for the determination, that did not necessarily render Determination 2 invalid, and that, *prima facie*, the appropriate remedy for a failure to give reasons was an order in the nature of mandamus requiring that reasons be given. Counsel relied on *Public Service Association v Secretary of the Treasury*,[83] on the distinction made in *Project Blue Sky* "between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority",[84] and on the statement by the majority in *Project Blue Sky* that:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with that condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the

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82 It may have been a complete answer. I was not referred to the figures and have not had the time (and was not asked by the parties) to dig through the documents to ascertain this.

83 at [46] to [58]

84 at [92]

consequences for the parties of holding void every act done in breach of the condition.[85]

[110] Counsel also referred to *Sierra Property Qld Pty Ltd v National Construction Management Pty Ltd & Ors*[86] in which this principle from *Project Blue Sky* was discussed and applied to the Queensland equivalent to the Act.[87] In that case, applying the criteria in the above passages from *Project Blue Sky*, Jackson J in the Supreme Court of Queensland held that compliance with the statutory requirement under the Queensland legislation to give reasons for a determination was a condition of the power to make a determination and failure to do so would invalidate the determination,[88] for reasons which include the fact that the exercise of the power to order payment of a progress payment has serious commercial consequences for both parties;[89] that "[i]t is a fundamental part of the processes under [the Act] that … the adjudicator's decision is constrained by the contentions which have been properly raised and the range of matters that are the only matters to be considered";[90] and that "although the consequence of invalidity … is that the decision of the adjudicator is void, the loss to the claimant is

85 at [91]

86 [2016] QSC 108

87 *The Building and Construction Industry Payments Act 2004 (Qld)*

88 *Sierra Property* at [56]

89 at [58]

90 at [59]

only of one progress payment" and "the final rights of the parties under the contract are not affected".[91]

[111] I am inclined to the view that, for the same or similar reasons, a failure to make a *bona fide* effort to comply with the requirement in s 38 to provide reasons for a determination would, in itself, amount to a jurisdictional error which would render the determination void as, in those circumstances, the adjudicator would have failed to comply with an essential pre-requisite for the existence of a determination under the Act. However, it is not necessary for me to decide that question conclusively. The failure to provide reasons for the relevant decisions in Determination 2 points to other, more fundamental, failures to comply with essential pre-requisites for the existence of a valid determination under the Act.

[112] As set out above (at [43]),in order for there to be a valid determination within the meaning of the Act, the adjudicator must make a *bona fide* attempt to comply with the essential requirements of the Act. The essential requirements under the Act must include the requirement under s 33(1)(b) to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment (or to return any security and to determine the other subsidiary matters set out in that section); and the requirement under s 34(1)(a) to make that determination on the basis of the application and its attachments and the Response and its attachments.

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91 at [60]

[113] In the New South Wales case of *Bauen Constructions v Westwood Interiors*[92] McDougall J said:[93]

> Although adjudicators work under considerably greater time pressures that judges, and their reasons should not be scrutinised with the attention to detail to which the reasons of trial judges and intermediate appellate courts are subjected in ultimate courts of appeal, nonetheless the reasons must indicate why it was that the adjudicator arrived at the determination given in accordance with s 22(1). Just as there is with judges, so too with adjudicators there is a presumption that the stated reasons are all of the reasons for coming to the conclusion expressed. *[emphasis added]*

[114] In *Public Service Association v Secretary of the Treasury*, the appellant challenged a decision of the full bench of the Industrial Relations Commission (*inter alia*) on the basis of failure to provide adequate reasons. As in this case, the contention was that the reasons were so inadequate as to fail to satisfy the basic duty to give a reasoned decision. The appellant advanced two propositions:

(a) that failure to provide adequate reasons constituted jurisdictional error in its own right (the case which has been considered above), and

(b) that the reasons were so inadequate as to demonstrate a failure to address the relevant issues in the case.[94]

This second ground, "namely that the inadequacy of the reasons demonstrated that not all matters which should have been taken into account

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92 [2010] NSWSC 1359

93 at [23]

94 at [39]

were taken into account and that the issues which were required to be addressed were not addressed" was described by the New South Wales Court of Appeal to be "more conventional" than the first. [95]

[115] Basten JA set out the relevant principles in the following passage:[96]

> There can be no doubt that "if the decision-maker does not give any reason for his decision, the Court may be able to infer that he had no good reason":[97] As further stated by Brennan J in O'Brien,[98] echoing the reasoning of Dixon J in Avon Downs Pty Ltd v Federal Commissioner of Taxation:[99]
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> > *"If a failure to give adequate reasons for making an administrative decision warrants an inference that the tribunal has failed in some respect to exercise its powers according to law (as, for example, by taking account of irrelevant considerations or by failing to consider material issues or facts), the court may act upon the inference and set the decision aside. In such a case, the exercise of the statutory power to make a decision is held invalid not because of a failure to state the reasons for making the decision, but because of a failure to make the decision according to law ...."*

[116] In my view, the inescapable conclusion to be drawn from the failure by the adjudicator to address **the delay issue**, **the notice issue** and **the James Engineering issue** in Determination 2, is that he failed to consider those issues and failed to take into account the plaintiff's material relating to those issues. As I have already stated, I am also of the opinion that the

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95 in the judgment of Basten JA (with whom Ward JA and Bergin CJ in Equity agreed) at [40]

96 at [59]

97 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656; [1986] HCA 7 at 663-664; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] AC 997 at 1053-1054; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Palme* (2003) 216 CLR 212; [2003] HCA 56 at [39]

98 *Repatriation Commission v O'Brien* (1985) 155 CLR 422; [1985] HCA 10 at 446

99 (1949) 78 CLR 353; [1949] HCA 26 at 360

issues which the adjudicator failed to address were critical issues, fundamental to the defendant's asserted right to the EOTs under consideration, and not mere matters of detail as contended by the defendant.

[117] The result is that, in my view, the adjudicator has failed to comply with basic requirements of the Act in s 34 to consider the Response to the adjudication and its attachments, and hence has failed to comply with the basic requirement in s 33(1)(b) to determine on the balance of probabilities whether the plaintiff is liable to make a payment to the defendant. He has not meaningfully engaged with the issues raised by the plaintiff in its Response or the material provided by the plaintiff in relation to those issues, and thus not made a *bona fide* attempt to deal with critical issues in the adjudication. Accordingly, Determination 2 is not in fact a determination within the meaning of the Act and is void and of no effect.

[118] For the sake of completeness I also consider that the failure to address the plaintiff's contentions and the material in support constitutes a substantial failure to accord natural justice and is void for that reason also. "A purported determination would be void (or 'not a determination under the Act'), if there were a substantial denial of natural justice."[100]

[119] It is not necessary for me to make a determination in relation to the subsidiary issues of unreasonableness and error of law raised by the plaintiff

[100] *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 per Barr J at [34]; See also *Trans Australian Constructions Pty Limited v Nilsen (SA) Pty Ltd and Another* (2008) 23 NTLR 123; [2008] NTSC 42 at [43] (Southwood J); *Independent Fire Sprinklers (NT)* at [49] (Mildren J); and *A J Lucas* at [29] (Kelly J) and *Brodyn Pty Ltd v Davenport* at [55] (Hodgson JA) all referred to in footnote 41 of *Hall Contracting v Macmahon Contractors*.

as the matters relied on in support of those contentions are adequately dealt with under the analysis above.

[120] I make an order in the nature of *certiorari* under O 56 of the *Supreme Court Rules* quashing Determination 2.