CITATION:	*Canstruct Pty Ltd v Floreani KC & Anor* [2024] NTSC 104
PARTIES:	CANSTRUCT PTY LTD v FLOREANI KC, Nicholas and RSA CONTRACTORS PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2023-02843-SC
DELIVERED:	11 December 2024
HEARING DATES:	29 April 2024 & 30 April 2024
JUDGMENT OF:	Burns J

CATCHWORDS:

CONTRACT LAW – Construction contract – Administrative Law – Jurisdictional error – Adjudication – *Construction Contracts (Security of Payments) Act 2004* (NT) – Whether the Adjudicator's failure to determine the date on or before which the adjudicated amount to be paid was fatal to the validity of the determination – Whether the Adjudicator made a jurisdictional error in failing to determine whether a payment claim complied with the requirements of the contract – Whether the Respondent is bound by its election to commence a second application – the Adjudicator fell into jurisdictional error by misconceiving his jurisdiction by determining that the contractual prerequisites for the making of a payment claim were irrelevant

Building and Construction Industry Security of Payment Act 1999 (NSW) s 29
Building and Construction Industry Security of Payment Act 2002 (Vic)
Construction Contracts (Security of Payments) Act 2004 (NT) ss 3, 7A, 8, 10, 11, 18, 27, 28, 29, 31, 33, 34, 35, 38, 39, 41, 43, 44, 45, 46, 49
Construction Contracts Act 2004 (WA)
Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 7th ed, 2022)

Acohs Pty Ltd v Ucorp Pty Ltd (2012) 201 FCR 173; *Alliance Contracting Pty Ltd v James* [2014] WASC 212; *Cat Protection Society (Vic) v Arvio Pty Ltd* [2018] VSC 757; *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215; *Central Australian Frack Free Alliance Inc v Minister for Environment & Anor* [2024] NTSC 75; *CH2M Hill Australia Pty Ltd & Another v ABB Australia Pty Ltd & Another* (2016) 41 NTLR 1; *Commonwealth v Verwayen* (1990) 170 CLR 394; *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386; *Express Newspapers plc v News (UK) Ltd* (1990) 18 IPR 201; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510; *Hossain v Minister for Border Protection and Anor* [2018] HCA 34; 264 CLR 123; *James Engineering Pty Ltd v ABB Australia Pty Ltd and Another* (2019) 42 NTLR 51; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Another* (2011) NTLR 1; *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2008) 38 WAR 276; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Rojo Building Pty Ltd v Jillcris Pty Ltd* [2006] NSWSC 309; *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346; *Timbarra Protection Coalition Inc v Ross Mining NL and Ors* [1999] NSWCA 8; 46 NSWLR 55; *Total Eden Pty Ltd v Charteris* [2018] WASC 60; *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 20]* [2023] WASC 124, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Alistair Wyvill SC with J Mitchenson
First Defendant:	No appearance
Second Defendant:	Mark Ambrose KC with T Ambrose

Solicitors:

Plaintiff:	Thomson Geer Lawyers
First Defendant:	No appearance
Second Defendant:	Batch Mewing Lawyers

Judgment category classification:	C
Judgment ID Number:	Bur2410
Number of pages:	70

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

Canstruct Pty Ltd v Floreani KC & Anor [2024] NTSC 104
No. 2023-02843-SC

BETWEEN:

CANSTRUCT PTY LTD
Plaintiff

AND:

NICHOLAS FLOREANI KC
First Defendant

AND:

RSA CONTRACTORS PTY LTD
Second Defendant

CORAM: BURNS J

REASONS FOR JUDGMENT

(Delivered 11 December 2024)

Introduction

[1] The plaintiff (Canstruct) and the second defendant (RSA) are parties to a construction contract ('the contract') for RSA to undertake subcontract work for Canstruct as head contractor in respect of a prawn aquaculture project near Katherine in the Northern Territory. RSA commenced work on site on 24 June 2021. On 23 December 2021, Canstruct suspended work on the site and subsequently terminated the contract for convenience, as permitted by

the terms of the contract, by notice on 28 April 2022 effective from 1 May 2022.

[2] On 15 December 2022, RSA issued a claim for payment of works said to have been completed by it under the contract. This claim, described as Payment Claim 17 ('PC 17'), claimed a sum of $5,344,831.94. Prior to PC 17, Canstruct had approved and paid RSA $22,860,307.38 under the contract. The terms of the contract permitted RSA to make periodic claims against Canstruct for work performed under the contract, subject to certain conditions being met. RSA also had a right to claim periodic payments for such work, and Canstruct had an obligation to pay, pursuant to the *Construction Contracts (Security of Payments) Act 2004* (NT) ('the Act'). (All references to sections in this judgment are references to sections of the Act unless otherwise stated).

[3] In response to PC 17, Canstruct certified that of the amount claimed in PC 17, only $53,760.74 was owing to RSA under the contract. In its response to PC 17, Canstruct alleged multiple failures by RSA to provide supporting documentation as required by the contract.

[4] On 12 April 2023, RSA submitted an adjudication application under the Act in respect of the asserted payment dispute arising from Canstruct's rejection of the bulk of the monies claimed in PC 17. The first defendant (the Adjudicator) was duly appointed as an adjudicator to determine the payment

dispute. In submissions to the second defendant, Canstruct submitted, inter alia, that the second defendant did not have jurisdiction to hear the dispute.

[5] On 12 June 2023, the Adjudicator purportedly made a Determination ('the First Determination') under s 33(1) requiring Canstruct to pay RSA $2,265,417.20 of the amount claimed in PC 17 ('the adjudicated amount'). In doing so, the Adjudicator rejected Canstruct's jurisdictional arguments.

[6] One of the matters which the Adjudicator was obliged to determine on the application for adjudication was the date "on or before which" the adjudicated amount must be paid.[1] Canstruct took the view that in the First Determination, the second defendant had failed to determine the date on or before which the adjudicated amount must be paid, and asserted that the First Determination was therefore invalid.

[7] RSA requested the Adjudicator to rectify the First Determination by specifying a date for the adjudicated amount to be paid as required by s 33(1)(b)(ii). On 12 July 2023, the Adjudicator delivered a "Supplemental Determination & Corrigendum" ('the Supplemental Determination') purporting to determine the date on or before which the adjudicated amount must be paid as 17 January 2023. This date was approximately 5 months before the Adjudicator delivered the First Determination. As I understand it, this was the date that Canstruct had been contractually required to make the progress payment. From this point on, reference to the "First Determination"

1 s 33(1)(b)(ii).

includes the Supplemental Determination, except if it is necessary to distinguish between those documents.

[8] RSA attempted to enforce the First Determination, resulting in action being taken in this Court to prohibit RSA enforcing that Determination. This resulted in Canstruct paying $2,338,531.71 into Court (being the adjudicated amount plus interest) and RSA undertaking not to take any further step to enforce the First Determination until the present proceedings are determined.

[9] In the meantime, on 27 June 2023, RSA made another application for an adjudication under the Act ('the Second Application') in the same terms as the prior application which had resulted in the First Determination. As I understand it, the Second Application was lodged in order to protect RSA's position should the First Determination be ruled invalid.

The present proceedings

[10] By an amended originating motion, Canstruct seeks to permanently restrain RSA from asserting the validity of, or moving to enforce, the First Determination. The grounds advanced by Canstruct for the making of these proposed orders is that the First Determination is invalid for the following reasons:

> *Ground 1*: the Adjudicator's failure to determine, and specify in the First Determination, the date on or before which the adjudicated amount was to be paid as required by ss 33(1)(b)(ii) and 38(1)(b)(ii) of

the Act was fatal to the validity of the First Determination and this failure could not be cured once the time for making the determination had expired. In addition, the sections of the Act referred to require the Adjudicator to specify a date on or after the determination is made, not one 5 months earlier as the Adjudicator did on this occasion.

Ground 2: the Adjudicator failed to assess whether PC 17 was a valid "payment claim" under the contract which could give rise to a "payment dispute" upon which the Adjudicator was authorised to adjudicate under the Act. The basis for this Ground was an allegation that PC 17 contained "repeat claims" which may not have been permitted under the contract. The failure of the Adjudicator to determine whether repeat claims were permitted under the contract was said to be a jurisdictional error.

Ground 3: the Adjudicator made a jurisdictional error in failing to determine whether PC 17 complied with the requirements of the contract for a valid payment claim.

Ground 4: RSA is bound by its election to commence and press the Second Application based on the invalidity of the First Determination and it cannot, in the present proceedings, assert that the First Determination is valid.

The Act

[11] The expressed object of the Act is to "promote security of payments under construction contracts".[2] That object is to be achieved by:

> (a) facilitating timely payments between the parties to construction contracts; and
>
> (b) providing for the rapid resolution of payment disputes arising under construction contracts; and
>
> (c) providing mechanisms for the rapid recovery of payments under construction contracts.[3]

[12] For the purposes of the Act, a "payment claim" is a claim for payment made under a construction contract.[4] The term "construction contract" is defined in s 5, but it is presently unnecessary to consider that provision.

[13] A "payment dispute" for the purposes of the Act arises where, relevantly for present purposes, a payment claim has been made under a contract and has been rejected or wholly or partly disputed.[5]

[14] Where a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under the Act unless, relevantly, the matter has already been the subject of a valid determination.[6] An application for adjudication must state or have attached to it details of the construction contract involved or relevant extracts of it, any payment claim that has given rise to the payment dispute, and state or have attached

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2 s 3(1).

3 s 3(2).

4 s 7A.

5 s 8.

6 s 27.

to it all the information, documents and submissions on which the party making the application relies in the adjudication.[7]

[15] Within 15 working days after the date on which a party to a construction contract is served with an application for adjudication, the party must prepare and serve a written response to the application which must state the details of, or have attached to it, any rejection or dispute of the payment claim that has given rise to the dispute and state or have attached to it all the information, documents and submissions on which the party making the response relies in the adjudication.[8]

[16] The adjudicator's functions are set out in s 33, which provides:

> **33 ADJUDICATOR'S FUNCTIONS**
>
> (1) An appointed adjudicator must, within the prescribed time or any extension of it under section 34(3)(a):
>
> (a) dismiss the application without making a determination of its merits if:
>
> (i) the contract concerned is not a construction contract; or
>
> (ii) the application has not been prepared and served in accordance with section 28; or
>
> (iia) the dispute that is the subject of the application is also the subject of another application that has not been dismissed or determined; or
>
> (iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or
>
> (iv) satisfied it is not possible to fairly make a determination:
>
> (A) because of the complexity of the matter; or

7 s 28(2).

8 s 29.

(B) because the prescribed time or any extension of it is not sufficient for another reason; or

(b) otherwise – 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, if so, determine:

(i) the amount to be paid, or security to be returned, and any interest payable on it under section 35; and

(ii) the date on or before which the amount must be paid or the security must be returned.

(1A) Despite subsection (1)(a), the appointed adjudicator may proceed to determine an application that contains technical deficiencies if those deficiencies do not affect the merits of the application, and the Act has been substantially complied with.

(1B) If the construction contract provides for liquidated damages, an amount determined under subsection (1)(b) to be payable may include an amount assessed as liquidated damages.

(2) If the application is not dismissed or determined under subsection (1) within the prescribed time, or any extension of it under subsection (2B) or section 34(3)(a), the application is taken to be dismissed when the time ends.

(2A) Despite subsection (2), an application is not taken to be dismissed when the time ends if proceedings have been commenced in the Supreme Court in relation to the matter the subject of the application.

(2B) The appointed adjudicator may, without the consent of the parties, extend the prescribed time by an additional 5 working days if the adjudicator is satisfied an extension of time is necessary to ensure procedural fairness in the making of a determination.

(3) In this section:

prescribed time means:

(a) if the appointed adjudicator is served with a response under section 29(1) – 10 working days after the date of the service of the response; or

(b) otherwise – 10 working days after the last date on which a response is required to be served under section 29(1).

[17] An appointed adjudicator may, with the consent of the Construction Contracts Registrar appointed under s 49 of the Act ('the Registrar'), extend the time for making a determination under s 33(1).[9]

[18] If an adjudicator dismisses an application under s 33 (1)(a), the adjudicator must provide written notice of the decision and the reasons for it to the parties and to the Registrar. If an application for an adjudication of a payment dispute is taken to be dismissed under s 33(2), the provisions of Part 3 do not prevent a further application being made for an adjudication of the dispute, and any such further application must be made within 20 working days after the previous application is taken to be dismissed.[10]

[19] An appointed adjudicator's decision made under s 33(1)(b) must state the amount to be paid and the date on or before which it must be paid.[11] The decision must also provide reasons for the determination.[12]

[20] A party that is liable to pay an amount under a determination must do so on or before the date stated in the determination.[13] It is appropriate to set out the terms of s 41:

> **41 PAYMENT OF AMOUNT DETERMINED AND INTEREST**
>
> (1) A party that is liable to pay an amount under a determination must do so on or before the date stated in the determination.

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9 s 34(3).

10 s 39(2).

11 s 38(1)(c)(i).

12 s 38(1)(d).

13 s 41(1).

(2) Unless the determination provides otherwise, interest at the rate prescribed by the Regulations must be paid on the part of the amount that is unpaid after the date stated in the determination.

(3) The interest forms part of the determination.

(4) If, under section 45(1), a judgment is entered in the terms of a determination, interest under subsection (2) ceases to accrue.

[21] If on the adjudication of a payment dispute the adjudicator makes a determination, the adjudicator cannot subsequently amend or cancel the determination except with the consent of the parties.[14] In addition, a party to the dispute cannot later apply for an adjudication of the dispute.[15] Notwithstanding the provisions of s 43(1)(a), an adjudicator may correct an accidental slip or omission, a material arithmetic error, or a material mistake in the description of any person, thing or matter in a determination.[16]

[22] A party entitled to be paid an amount under a determination may enforce the determination in a court of competent jurisdiction.[17]

Ground 1- the Adjudicator's determination is invalid because of the failure to specify a valid date on or before which Canstruct was to pay the determined amount

Canstruct's submissions

[23] Canstruct submitted that s 33(1)(b) is expressed in mandatory language, strongly suggesting that its requirements are essential for a valid determination under the Act. Similarly, s 38(1)(c) is in mandatory terms and requires an adjudicator's decision under s 33(1)(b) to state the amount to be

14 s 43(1)(a).

15 s 43(1)(b).

16 s 43(2).

17 s 45.

paid and the date on or before which it must be paid. Section 41 provides that a party that is liable to pay an amount under a determination must do so on or before the date stated in the determination.

[24] In addition, Canstruct noted that s 11 gives a contractor the right to suspend work following notice if "the principal does not pay in accordance with the determination".

[25] Canstruct submitted that the Act requires that a determination must specify two things, namely, the amount which has to be paid and the date by which it must be paid. Canstruct submitted that if the determination does not specify a date on or before which payment is to be made, it is impossible to know whether s 41(1) has been complied with. It would also be impossible to calculate interest on the determined sum for the purposes of s 41(2) or to know whether a contractor may suspend the performance of their obligations under s 44 or when they may commence enforcement action under s 45.

[26] Canstruct accepted that the First Determination set out the amount to be paid by Canstruct to RSA. In that regard, the First Determination satisfied the requirements of s 33(1)(b)(i). It did not, however, satisfy the requirements of s 33(1)(b)(ii) because it did not determine the date on or before which that amount must be paid to RSA. Canstruct submitted that "It is well established that compliance with s 33(1)(b) is an "essential condition" for a

valid determination under the Act", citing *James Engineering Pty Ltd v ABB Australia Pty Ltd and Another*.[18]

[27] Canstruct submitted that these cases demonstrate that compliance with s 33(1)(b)(ii) by specifying a date on or before which the determined amount must be paid is an essential condition for a valid determination under s 33(1)(b). Consequently, it was submitted, there had been no valid determination of the application within the "prescribed time" for the purposes of s 33(2) and the application was taken to be dismissed by force of that section. Canstruct submitted that the prescribed time expired on 12 June 2023, well before the Supplemental Determination was made on 12 July 2023. It follows, Canstruct submitted, that it was not open to the Adjudicator to utilise the power granted by s 43(2) to correct accidental slips or omission as there was no valid determination upon which the Adjudicator could act pursuant to that power. Canstruct submitted that upon the expiration of the prescribed period, the application was taken to be dismissed and the Adjudicator was *functus officio*.

[28] In support of its submissions, Canstruct referred to the decision in *Alliance Contracting Pty Ltd v James*,[19] where Beech J, considering what was said to be a similar provision to s 33 in the *Construction Contracts Act 2004* (WA), stated, at [69]:

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18 (2019) 42 NTLR 51 ('*James Engineering*') at [59]-[60]. See also *CH2M Hill Australia Pty Ltd & Another v ABB Australia Pty Ltd & Another* (2016) 41 NTLR 1 ('*CH2M Hill*') at [112].

19 [2014] WASC 212.

> In my view, the scheme of the Act deliberately imposes strict time limits for all steps in respect of adjudication applications. To my mind, the Act does not reveal an intention that the strictness of these time limits is qualified by the potential revival of the right to obtain an adjudication determination after expiration of the time limit.

[29] Canstruct also referred me to two cases regarding the operation of s 33(1)(b) of the now repealed *Construction Contracts Act 2004* (WA) – *Total Eden Pty Ltd v Charteris*,[20] and *Cooper & Oxley Builders Pty Ltd v Steensma*.[21] That provision, in summary, required an adjudicator to determine whether any party to a dispute *is liable to make a payment*, and, if so, the amount to be paid and the date on or before which the amount is to be paid.

[30] In *Charteris*, Pritchard J said, at [67] – [71]:

> Section 31(2)(b) clearly requires that an adjudicator determine the question of the liability of any party to make a payment as at the date of the adjudicator's determination. That conclusion is supported by four considerations.
>
> First, the terms of s 31(2)(b) are expressed in the present tense. The adjudicator is to determine, on the balance of probabilities, whether any party to the payment dispute *is liable* to make a payment.
>
> Secondly, if the question for the adjudicator was whether liability existed at a date prior to the date of the determination, it would have been necessary to very clearly identify that point of reference. Neither s 31(2)(b), nor any other provision of the Act, identifies an alternative point at which liability for the purposes of s 31(2)(b) is to be ascertained.
>
> Thirdly, if it were the case that the adjudicator was required to focus on liability at some point prior to the adjudicator's determination, that could potentially result in absurd outcomes, such as in a case where a party failed to pay a payment claim when payment fell due, but paid the amount of the payment claim in full, together with interest, shortly prior to the determination. In a case of that kind, an adjudicator would

20 [2018] WASC 60 (‘*Charteris*’).

21 [2016] WASC 386 (‘*Steensma*’).

not be entitled to take that payment into account in determining liability to pay the payment claim.

Finally, authority supports the conclusion that the determination of liability is to be made as at the date of the adjudicator's determination. In ***Hamersley HMS Pty Ltd v Davis***, Beech J held that the Act requires an adjudicator to determine the question of liability as at the date of the adjudication, and not at the date of the application for adjudication (as had occurred in that case). Justice Le Miere expressed the same view in ***Cooper and Oxley Builders Pty Ltd v Steensma***.

(Footnotes omitted)

[31] The relevant portion of the judgment of Le Miere J in *Steensma* is found at [33]:

> The Second Adjudicator wrongly made a determination of liability as at 4 January 2016. He should have made the determination as at the date of the determination. Section 31(2)(b) of the Act requires the adjudicator to determine whether any party to the payment dispute *is liable* to make a payment, not to determine whether any party was at some anterior time liable to make a payment. Furthermore, as counsel for Cooper & Oxley, Mr Ellis, submitted the legislature cannot have intended that an adjudicator should ignore an event which has occurred after the payment dispute first arose, such as payment of part or whole of the claim or compromise of the payment dispute. Nor should be imputed to the legislature an intention that evidence about liability which emerges after the date of the dispute is not to be considered by the adjudicator. In determining liability as at 4 January 2016 rather than at the time the determination was made on 24 February 2016, the adjudicator misunderstood his function under s 31(2)(b) of the Act and made a jurisdictional error. The adjudicator's error significantly affected the determination because it led the adjudicator to exclude or not take into account material relevant to determining the amount of Cooper & Oxley's setoff as at 24 February 2016. For example, the adjudicator had no regard to Cooper & Oxley's claim for liquidated damages which Cooper & Oxley asserted to be $891,488 as at the date of determination.

RSA's submissions

[32] RSA accepted that the Act required the Adjudicator, having found Canstruct liable to make a payment to RSA, to determine the amount to be paid and

the date on or before which payment must be made. There was similarly no dispute that the Adjudicator's decision was required to state those matters. Canstruct argued that this raised two issues for this Court to determine:

(a) Did the adjudicator comply with the provisions of ss 33(1)(b)(ii) and 38(1)(c)(i) by:

(i) determining the date on or before which the adjudicated amount must be paid by Canstruct; and

(ii) stating this date for payment in the Determination?

(b) Whether, in the event that the Adjudicator did not comply with these provisions, such non-compliance had the effect of invalidating the Determination.

[33] On the first of these issues, RSA submitted that the Adjudicator did comply with the relevant provisions by specifying the amount Canstruct was required to pay RSA in the First Determination and stating the date on which Canstruct was required to pay in the Supplemental Determination.

[34] RSA submitted that the Adjudicator was permitted to state as the date for payment the date that the contract required the payment to be made. This is what occurred in the present case. RSA submitted that the Act permitted the Adjudicator to state dates both before and after the date of the determination as the date for payment. This is so, RSA submitted, notwithstanding the requirement found in s 41 that a "party liable to pay an amount under a

determination must do so on or before the date stated in the determination." The effect of a party failing to pay the adjudicated amount, it was submitted, did not include any penalty other than the incurring of the obligation to pay interest.

[35] While a failure to pay an adjudicated amount on or before the date stated in the adjudication may also entitle a contractor to suspend works under the contract, this right is conditional on the contractor giving at least 3 working days' notice of the date upon which it intends suspending work.[22]

[36] RSA also submitted that an interpretation of the Act permitting the Adjudicator to state a date for payment predating the date of the determination did not cause problems regarding the enforcement provisions found in s 45 of the Act. The date for payment, RSA submitted, was not a relevant matter for the operation of s 45. The section operated such that a determination is taken to be an order of the court in which the determination is filed from the date of filing, and not from any earlier date for payment stated in the determination.

[37] Turning to the second issue raised by RSA, whether any failure by the Adjudicator to state the date on or before Canstruct was required to pay the adjudicated amount to RSA rendered the first determination invalid, RSA submitted that any such failure did not render the determination invalid.

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22 ss 44(2)(b) and (c).

This, RSA submitted, was a consequence of the proper interpretation of the Act.

[38] RSA referred me to the well-known decision of *Project Blue Sky Inc v Australian Broadcasting Authority*[23] where the High Court (McHugh, Gummow, Kirby and Hayne JJ) observed, at [91]:

> 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 on whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> (Footnotes omitted)

[39] Later, at [93], the High Court continued:

> … A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute".
>
> (Footnotes omitted)

[40] RSA submitted that it would be extraordinary if the legislation had intended to invalidate a determination of the amount owing to a contractor under the

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23 (1998) 194 CLR 355 ('*Project Blue Sky*').

Act simply because an adjudicator failed to specify the date upon or before which the amount was to be paid. This was particularly so, RSA submitted, where such a failure would not result in any practical effect detrimental to the party required to make the payment.

[41] RSA submitted that matters pointing towards a legislative intention that a failure by an adjudicator to specify the date on or before which payment of the adjudicated amount was to be paid did not invalidate the determination included:

a) the requirement to determine and state a date on or before which payment must be made is not a requirement that imposes essential preconditions to the exercise of the adjudicator's functions, but, rather, regulates the exercise of functions already conferred on the adjudicator;[24]

b) invalidity would be inconsistent with the object of the Act, being the promotion of security of payments under construction contracts;[25]

c) to deny the applicant and the respondent the benefit of an adjudication determination which deals with the merits of the payment dispute, particularly after exchanging substantial legal submissions and lay witness evidence in the application and

24 *Project Blue Sky* at [94].

25 s (3)(1).

response, will result in inconvenience to those parties, who are not responsible for the non-compliance, and the costs of the adjudication being thrown away;[26] and

d) s 45 of the Act provides for the enforcement of money payable under a determination by filing a copy of the "determination" in a court of competent jurisdiction. The term "determination" is defined in the Act as meaning "a determination made on an adjudication under Part 3 of the merits of a payment dispute". The date on or before which payment is due is unrelated to the merits of a payment dispute such that there is no reason why absence should prevent the determination from being enforced.

[42] RSA submitted that there is no discernible legislative purpose for invalidating a determination by an adjudicator who, having grappled with the merits of a payment dispute and determined that an amount was liable to be paid under the contract, has not then identified a date on or before which the amount is to be paid.

[43] RSA submitted that neither *James Engineering* nor *CH2M Hill* supported Canstruct's submissions.

[44] Finally, RSA submitted that it is difficult to conceive how any error by the Adjudicator in determining, or failing to determine, the date for payment of the adjudicated amount could amount to a jurisdictional error such as to

26 *Project Blue Sky* at [97]-[98]. See also *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510.

invalidate the determination. It submitted that any error of reasoning made by the Adjudicator in deciding to resolve the payment dispute will necessarily be an error that is made within the Adjudicator's jurisdiction, taking into account:

a) there is no issue that a payment dispute exists and the Adjudicator has jurisdiction, and as a result is obliged to determine that payment dispute;

b) the Adjudicator made a bona fide attempt to discharge their duty and determine the payment dispute; and

c) the terms of that determination are in accordance with s 33(1)(b) in that they identify that Canstruct, as a party to the payment dispute, is liable to make a payment, the amount it is liable to pay, and the date on which it was due to be paid.

Consideration

[45] In the Supplemental Determination, the Adjudicator argued that he had, in fact, complied in the First Determination with the requirement that he state a date on or before which Canstruct was obliged to pay the adjudicated amount. In the First Determination, under the heading "Interest", the Adjudicator said, at [239] – [242]:

> Pursuant to section 35(1) of the Act, an Adjudicator may determine that interest must be paid on the amount the subject of the determination, either in accordance with the terms of the relevant contract or otherwise from the date the payment dispute arose up to the date of the

> determination at a rate not greater than that prescribed by the Regulations.
>
> There is no prescribed rate in the Subcontract. clause (sic) 7 of the Schedule to the Act provides that interest to be paid from the day after the relevant amount is due until it is paid. The rate of interest is that prescribed by the Regulations. Regulation 9 prescribes the rate as that applicable under section 85 of the *Supreme Court Act 1961* (NT), which is currently 8% per annum.
>
> I am satisfied that the appropriate rate is that prescribed by the Regulation.
>
> Therefore, under section 35(1)(a) of the Act, Canstruct should pay interest at the rate of 8% per annum on the GST exclusive amount, not the GST inclusive amount from 15 Business Days after 23 December 2022 onwards, being the date that payment was due, but not pay in accordance with clause 42.1 of the Subcontract.

[46] In the Supplemental Determination, the Adjudicator referred to paragraph 242 of the First Determination, set out above, and went on to say, at [23] – [25]:

> On the basis of the above paragraph, I consider I have determined the due date for payment. However, I accept that it is not clear because I have neglected to include the actual date. This was an accidental slip or omission.
>
> 15 Business Days after 23 December 2022 is 17 January 2023.
>
> In exercise of section 43(2)(a) of the Act I determine for the purpose of section 38(1)(c)(i) that the due date for payment is and was 17 January 2023.

[47] RSA did not embrace the Adjudicator's assertion that he had, in paragraph 242 of the First Determination, complied with his obligation to determine the date on or before which the adjudicated amount was to be paid. This is not surprising as paragraph 242 of the First Determination addresses the provisions of s 35 of the Act which, for its purposes, makes no reference to the date on or before which it has been determined the

adjudicated amount must be paid. In any event, s 38(1)(c) makes it clear beyond any doubt that a determination must be in writing and must state the amount to be paid and the date on or before which it must be paid.

[48] It is beyond doubt that the First Determination did not comply with the requirements of ss 33(1)(b)(ii) and 38(1)(c) that a date be stated on or before which Canstruct was obliged to pay the adjudicated sum to RSA. One may infer from the manner in which the Adjudicator dealt with the question of interest in the First Determination that the Adjudicator had turned his mind to the issue of when the adjudicated sum was to be paid, and intended that it should be paid on a date 14 business days after the payment was due under the contract. Regrettably, however, the First Determination did not expressly state the date on or before which payment was due.

[49] What is the consequence of the Adjudicator's failure in the First Determination to state the date on or before which payment of the adjudicated sum was due? The submission made by Canstruct was that the First Determination was invalid such that no determination under the Act had been made within the prescribed time for the purposes of s 33(2) with the consequence that the application was taken to be dismissed prior to the Supplemental Determination, with the consequence that the Supplemental Determination could have no effect.

[50] The foundation for Canstruct's submission is that the Adjudicator's failure in the First Determination to state the date on or before which payment of

the adjudicated sum was due resulted in invalidity of the First Determination. In my opinion, this is not correct. The clearly stated objective of the Act is to promote security of payments under construction contracts. To that end, the Act provides a mechanism for rapid resolution of payment disputes arising under a construction contract. It is obvious that the primary obligation of an Adjudicator exercising jurisdiction under the Act is to determine whether any sum is owing under the contract and, if so, how much is owing. The determination of the date on or before which the adjudicated sum is to be paid is subsidiary to this primary obligation, although undoubtedly important in its own right.

[51] An application for adjudication under the Act will very frequently require the parties to the application to expend considerable time and expense in preparing for and prosecuting the application. I see nothing in the Act to suggest that it was the intention of the legislature that a determination which addressed the merits of the application by determining that an amount was owing under a construction contract would be rendered invalid by a failure to state the date on or before which the adjudicated sum must be paid.

[52] What is the purpose of the Act requiring that an Adjudicator determine a date on or before which the adjudicated sum must be paid and state that date in writing in the determination? The Act reveals that this requirement is for the purposes of allowing interest on the adjudicated sum to be determined and to allow enforcement of payment of that sum. These purposes are

subsidiary to the primary purpose of an adjudication, being determination of any amount owing under the construction contract.

[53] The failure of the Adjudicator to state in the First Determination the date for payment of the adjudicated sum does not render the First Determination invalid. It remained effective as a Determination of the amount owing by Canstruct to RSA. The failure of the Adjudicator to state a date for payment meant that the First Determination could not be enforced by the means provided by ss 44 or 45. The failure of the Adjudicator to state the date for payment in the First Determination is precisely the kind of accidental slip or omission that the power given to the Adjudicator by s 43(2) was intended to remedy.

[54] The Adjudicator was entitled to exercise the power given by s 43(2) to make the Supplemental Determination stating a date on or before which the adjudicated sum must be paid.

[55] The next issue to be considered is whether the Act permitted the Adjudicator to state a date for payment which was prior to the delivery of the First Determination. From a textual perspective, the high point of Canstruct's case on this issue is the imperative language in which the Act casts the obligation of a party liable to make a payment under a determination on or before the date stated in the determination.[27] It will also be observed that this section refers to a date "on or before which" payment is to be made.

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27 See s 41(1).

Canstruct submitted that compliance with this statutory obligation is impossible if an adjudicator is permitted to set a date prior to the delivery of the determination.

[56] This submission has some superficial attraction, but I am ultimately convinced that the language in which s 41(1) is cast does not evince a legislative intention that a date for payment must be on or after the date of delivery of the determination. In that regard I found the decisions in *Charteris* and *Steensma* to be of little assistance. Those decisions were directed to a different issue, being the obligation of an adjudicator to determine the state of liability between the parties as at the date of the determination. This requires the adjudicator to bring to account any relevant payments made between the commencement of the application and the publication of the determination.

[57] What is the effect of a party failing to comply with s 41(1) by not making a payment "on or before the date stated" in a determination? The Act does not create an offence of failing to comply with the section. The only practical effect is found in the manner in which interest may accrue on the adjudicated sum, and this may depend on the terms of the construction contract itself.

[58] The stating of a date in a determination on or before which an adjudicated sum must be paid also has an effect on the rights of a party to enforce the determination. It is, however, self-evident that setting a date for payment

prior to the date of publication of the Determination will have no practical effect on the exercise of the contractor's rights under s 44 because those rights operate not from the date specified for payment but from 3 days after written notice is given under that section. Similarly, a party cannot seek to enforce payment of the adjudicated sum under s 45 until the determination is published, so that stating a date for payment preceding the date of publication of the determination cannot detrimentally affect the other party.

[59] The provisions of the Act regarding the adjudication of payment disputes apply to all construction contracts, some of which will have terms dealing with progress payments and some which do not. Those contracts which include written terms relating to progress payments will often specifically address the issue of when a progress payment is to be made. It may also stipulate how interest is to be calculated on any overdue progress payment. If an appointed adjudicator determines that a party to a payment dispute is liable to make a payment, the adjudicator may also determine that interest is to be paid on that amount to the date of the determination in accordance with the terms of the contract.[28] This, of course, can only apply where the contract addresses this issue.

[60] In the present case, the contract provided a mechanism for progress claims to be made to Canstruct by RSA. The contract provided a mechanism for certification of amounts which Canstruct was liable to pay to RSA in any

28 s 35(1)(a).

such claim. The certified amount was required to be paid within 10 business days of the certificate. The contract provided that interest was payable on any amount that was not paid in accordance with the terms of the contract. The rate of interest was set out in an Annexure to the contract.

[61] The provisions of the Act allow an adjudicator to adopt the provisions of a contract when determining the amount of interest payable on an adjudicated sum up until the date of determination.[29]

[62] Where a contract does not contain a written term permitting progress payments to be made, such a condition is implied by the Act.[30] The form of the implied term is found in Schedule 1, Division 3 of the Act. Also implied into such a contract is an obligation on the party receiving the claim for a progress payment to pay the claim in full if it has not disputed the claim within 20 working days after receipt of the claim.

[63] A provision regarding the payment of interest on overdue payments is implied into a contract which does not contain a written term governing progress payments.[31] The provision prescribes that interest is payable on an amount payable under the contract "on a certain date" from the day after the date on which the payment is due until it is paid at the rate prescribed by Regulation. The "certain date" is the date for payment set by the adjudicator.

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29 s 35(1)(a).

30 s 18.

31 Schedule 1, Division 6 of the Act.

[64] The differential approach in s 35 between contracts which specifically provide for a mechanism for progress payment claims and contracts which do not evidences a legislative intention to ensure that the parties to a construction contract retain the benefits of the bargain they have struck to the extent that this is consistent with the objects of the Act. Accepting that proposition, and accepting that the stating of a date on or before which the adjudicated amount must be paid only has practical application in determining how interest on the adjudicated sum is to be calculated, the proposition that the legislature intended that the date to be stated by the adjudicator on or before which payment was to be made must be a date post-dating the publication of the determination seems very unlikely.

[65] In summary, I am satisfied:

a) That the First Determination was not rendered invalid by the Adjudicator's failure to state a date on or before which the adjudicated sum was to be paid;

b) The Adjudicator was entitled to correct that omission using the power granted in s 43(2); and

c) The Adjudicator was entitled by reference to the terms of the contract to state a date on or before which the adjudicated sum was to be paid which preceded the publication of the First Determination.

[66] I do not uphold Ground 1 of the application.

Ground 2- the Adjudicator failed to determine whether PC 17 was a valid payment claim under the contract by reason of the inclusion of repeat claims.

[67] This ground was abandoned by Canstruct.

Ground 3- the Adjudicator made a jurisdictional error in failing to determine whether PC 17 complied with the requirements of the contract for a valid payment claim

Canstruct's submissions

[68] Canstruct submitted that for PC 17 to be a valid "payment claim" under the Act, and therefore capable of giving rise to a "payment dispute" within the meaning of s 8 of the Act, it must have been made "under" the contract. Canstruct submitted that it followed that RSA was required to satisfy any contractual preconditions to the exercise of the right to serve PC 17.

[69] Canstruct submitted that there were a number of contractual preconditions RSA was required to satisfy before it could serve a payment claim under clause 42.1 of the contract. In particular:

(a) clause 27B provides that RSA must provide a report to Canstruct in relation to the performance of the work during the previous four weeks (or two weeks in some cases) addressing certain matters. Clause 27B goes on to provide:

> The Subcontractor shall not be entitled to submit any Claim for payment, whether under the Subcontract or otherwise, for any month (or fortnight) in which it has not provided to the Superintendent the report required by this Clause, and the provision of such a report at least one Business Day before the applicable progress payment is a Claim Precondition.

(b) clause 42.1B(e) of the contract provides that, as a "Claim Precondition", one business day prior to the submission of a claim for a progress payment, RSA must submit a completed statutory

declaration in the terms set out in Annexure Part K relating to that claim.

[70] Canstruct observed that the term "Claim Precondition" is defined in clause 2 of the contract to mean:

> …any condition or occurrence of any event that is a precondition to the date on which a claim for progress payment (including the final payment claim) may be made, including:
>
> …
>
> (d) the Subcontractor has submitted the completed statutory declaration in accordance with Clause 42.1B (e);
>
> (e) that at least one Business Day before the applicable progress payment claim, the Subcontractor has submitted every report that is required by the Subcontract in respect to either the progress payment, all the work under the Subcontract that is the subject of the progress payment, including the report in accordance with Clause 27B…

[71] RSA, Canstruct said, did not submit a completed statutory declaration or a report in relation to the performance of the work the subject of PC 17. Canstruct submitted that it follows that RSA had failed to satisfy clauses 27B and 42.1B(e) prior to issuing PC 17 which were essential preconditions to the exercise of the right under clause 42.1 to make a progress payment claim.

[72] In the First Determination, the Adjudicator referred to Canstruct's submission that he lacked jurisdiction because PC 17 did not comply with these contractual preconditions. At [57] – [60], the Adjudicator rejected this submission, stating:

> The difficulty with Canstruct's submission regarding the Claim Preconditions is that the terms operate to exclude, modify or restrict the operation of the Act and as such have no effect pursuant to section 10 of the Act.
>
> Section 10 provides that a provision in an agreement or arrangement (whether a construction contract or not and whether in writing or not) that purports to exclude, modify or restrict the operation of the Act has no effect. The section applies unless the contract is a "high value construction contract" to which section 10A of the Act applies.
>
> The construction contract in this case is not a high value construction contract and therefore, section 10 of the Act will have the effect that those clauses specifying Claim Preconditions will be rendered of no effect.
>
> I do not accept this challenge to jurisdiction.

[73] Canstruct submitted that, in the above, the Adjudicator fell into error as contractual preconditions for the service of a valid payment claim do not attract the operation of section 10 of the Act. Canstruct cited the decision in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Another*[32] as authority for the proposition that to be a valid payment claim under s 7A, the payment claim must comply with the requirements of the contract.

[74] Canstruct submitted that because the Adjudicator concluded that the preconditions did not apply because of the provisions of s 10, the Adjudicator failed to consider whether RSA has satisfied clauses 27B and 42.1B(e) of the contract prior to issuing PC 17. Had the Adjudicator done so, Canstruct submitted, he may have concluded that PC 17 was not a valid payment claim under the contract because those preconditions had not been satisfied. It was submitted that this would lead to a conclusion that PC 17

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32 (2011) NTLR 1 ('*K & J Burns*').

was not a "payment claim" and could not give rise to a "payment dispute" under the Act and for that reason the Adjudicator would have lacked jurisdiction to determine the application on its merits. For this reason, Canstruct submitted, the First Determination is invalid.

RSA's submissions

[75] RSA submitted that the Adjudicator's reasons do not reveal any *failure* on the part of the Adjudicator to consider whether PC 17 complied with the requirements of the contract. This issue was dealt with specifically in section 7 of the Adjudicator's decision. That part of section 7 of the Adjudicator's report in which he rejects Canstruct's submission is set out at [72] above, and the rejection is based on the application of s 10 of the Act.

[76] RSA submitted that if the Adjudicator did fall into error in determining that s 10 applied to make any failure by RSA to comply with the terms of clauses 27B and 41B irrelevant, this was an error within jurisdiction. RSA submitted that s 33(1)(a) specifically authorised the Adjudicator to decide whether RSA's application had been prepared and served in accordance with s 28, including if and when a payment dispute had arisen. Therefore, RSA submitted, any error not to dismiss the application is an error within the Adjudicator's jurisdiction.

[77] In the alternative, RSA submitted that, as a question of fact, PC 17 was a valid payment claim under the contract. RSA submitted that Canstruct's submission to the contrary was based upon an alleged failure by RSA to

comply with clauses 27B and 42.1B(e) of the contract. It is useful to set out the terms of these clauses.

[78] Clause 27B relevantly provides:

> The Subcontractor shall, within the times and in the format determined under Clause 6A (or if no times are determined, then 8 Business Days prior to the date specified in Annexure Part A for submitting payment claims), provided to the Main Contractor's Representative a report in relation to performance of the work under the Subcontract by the Subcontractor and secondary subcontractors, as applicable, during the prior four weeks (or 2 weeks as the case may be)…

[79] RSA submitted that, as a matter of construction, there was no obligation on RSA to submit "a report in relation to the performance of the work" as a precondition to making PC 17 unless work had been performed by RSA or its subcontractors in the proceeding four weeks. The contract had been terminated seven months earlier, so no reporting obligation arose.

[80] Clause 42.1B(e) relevantly provides:

> In addition to the provisions of Clauses 42.1 and 42.5:
>
> …
>
> (e) as a Claim Precondition, the Subcontractor shall submit, one Business Day prior to the submission of a claim for a progress payment, a completed statutory declaration in the terms set out in Annexure Part K relating to that claim for a progress payment or the final payment claim and any other information required under Clause 43.

[81] RSA submitted that the contract does not contain an "Annexure Part K". It follows, RSA submitted, that there could not have been any obligation on RSA to submit a statutory declaration in a form that did not exist.

[82] The contract does have an "Annexure Part H" which is a form of statutory declaration. RSA submitted that the reference to "Annexure Part K" could not be taken to be a reference to "Annexure Part H". That annexure provided the form of statutory declaration that RSA was required to use under clause 43 if a report under that clause was requested by Canstruct's representative. That did not occur in the present case.

[83] In any event, RSA submitted, even if the reference to "Annexure Part K" should be taken to be a reference to "Annexure Part H", the provision of the form of statutory declaration referred to in that Annexure Part or that referred to in clause 43(b) did not operate as a condition precedent to RSA's entitlement to make a payment claim. Any failure on the part of RSA to provide either form of statutory declaration, RSA submitted, only went to Canstruct's right to withhold payment.[33]

[84] In the further alternative, RSA submitted, if the reference to "Annexure Part K" is to be taken as a reference to "Annexure Part H", then clause 42.1B(e) was complied with as, following the termination of the Contract, and prior to making PC 17, RSA submitted a statutory declaration in substantial compliance with Annexure Part H. Having provided that statutory declaration, and no further work having been performed, it was not necessary for RSA to submit another statutory declaration.

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33 Clause 43(c).

[85] As a final alternative, RSA submitted that any non-compliance by RSA with the requirements under the contract for making a payment claim was a "technical efficiency" within the meaning of s 33(1A) which did not affect the merits of the application such that the Adjudicator was entitled to proceed to determine the application despite PC 17 not strictly complying with the contract.

Canstruct's submissions in reply

[86] Canstruct submitted that RSA's arguments as to why Ground 3 did not establish jurisdictional error was in three parts:

a) the *first* is that, as the Adjudicator did in fact *bona fide* consider whether RSA satisfied the contractual preconditions to the exercise of its right to serve PC 17, his error was within jurisdiction;
b) the *second* is that, in any event, PC 17 is in fact a valid payment claim under the Contract and, regardless of the First Adjudicator's reasons, there is no jurisdictional error; and
c) the third is that any non-compliance by RSA with the contractual preconditions for making a payment claim is a "*technical deficiency*" within the meaning of s 33(1A) of the Act and the First Adjudicator was authorised to proceed to determine the merits of the First Application.

[87] Canstruct submitted that the second and third of these matters may be dismissed as RSA did not make these submissions before the Adjudicator and some of the material RSA relies upon was not before the Adjudicator. With regard to the third matter in particular, Canstruct submitted that the Adjudicator had made no findings that RSA's non-compliance did not affect the merits of the application, that the provisions of the Act had been substantially complied with, or that the Adjudicator considered it

appropriate to exercise his discretion to proceed to determine the application on its merits.

[88] Canstruct accepted that s 31(1)(a)(ii) expressly authorises an adjudicator to determine their own jurisdiction. In the present case, Canstruct submitted, that decision was based upon the application and the response made by Canstruct. Canstruct submitted that the Adjudicator's determination cannot be further supported, or challenged, after the event by reference to arguments and material that were not before him or based on findings he did not make. Canstruct submitted that such matters are irrelevant to the presence or otherwise of jurisdictional error in an adjudicator's decision to dismiss an application under s 31(1)(a) or to determine an application under s 31(1)(b), nor could they be relevant to whether or not any such error was material.

[89] Canstruct submitted that RSA bore the onus of proving to the Adjudicator that PC 17 complied with the contract or that he should proceed in any event under s 31(1A). It was submitted that RSA did not raise either the second or third matters in the proceedings before the Adjudicator.

[90] With regard to the first matter, Canstruct submitted that RSA, in its submissions, appeared to accept that the reasons given by the Adjudicator for deciding that the contractual preconditions for a valid payment claim were unenforceable were erroneous, but this was an error within jurisdiction. Canstruct submitted that a necessary precondition for the

exercise of the Adjudicator's power pursuant to s 33(1)(b) is the existence of a "payment dispute". It submitted that a payment dispute can only arise if RSA served a valid payment claim under the contract. In the present case, Canstruct submitted, the Adjudicator did not engage in the process of determining whether a valid payment claim had been made under the contract because he misconstrued s 10. This meant that the Adjudicator did not turn his mind to whether an essential precondition for the exercise of his power existed.

[91] Whilst the primary submission of Canstruct regarding the second matter referred to at [86] above is that the matter is irrelevant because it was never advanced to the Adjudicator, Canstruct nevertheless provided submissions on the merits of that matter if I did not accept its primary position.

[92] The first submission made by Canstruct on this matter is that the appropriate question to ask is whether Canstruct has shown that, had the Adjudicator acted in accordance with the law, there is a realistic possibility that a different decision could have been made.

[93] Canstruct submitted that it cannot be said that no other decision could have been made because:

(a) the evidence now relied upon by RSA does not prove compliance with clause 42.1B(e) for the purposes of PC 17. This is because the statutory declaration RSA seeks to rely upon was filed in support of PC 13 on 15 July 2022 and states that the matters therein are accurate up to 11 July 2022. Canstruct submitted that there was no dispute between the parties that after PC 13, RSA served PC 14,

PC 16 and PC 17, the last of which was served on 15 December 2022 and included costs after 15 July 2022;

(b) RSA's interpretation of clauses 27B and 42.1B(e) are, in any event, incorrect. Canstruct submitted that Clause 27B is expressed in mandatory terms, and provides that RSA shall, prior to serving a payment claim, provide a report to Canstruct "in relation" to the performance of the work under the contract during the previous four weeks (or two weeks as the case may be) that includes the matters set out in that clause. The report is to include, amongst other things, an estimate of the value of RSA's next payment claim. Canstruct submitted that whether or not work was actually being performed, clause 27B required RSA to provide a report "in relation" to the performance of the work. This included a requirement that RSA provide an estimate of the amount of its next payment claim. Canstruct submitted that this construction is supported by the contractual bar in clause 27B which provides that RSA shall not be entitled to submit any claim for payment for any month (or fortnight) in which it had not provided the report required by the clause. Clause 42.1B (e) is similarly expressed in mandatory terms;

(c) with regard to RSA's submission that it was under no obligation to comply with clause 42.1B(e) because the contract does not contain an Annexure Part K, Canstruct submitted that it is apparent that the reference to "Annexure Part K " in clause 42.1B(e) was intended to be a reference to Annexure Part H and that clause 42.1B(e) can, and therefore should, be given effect. Canstruct submitted that this was supported by the fact that:

    (i) the only statutory declaration annexed to the contract is in Annexure Part H;

    (ii) on their proper construction, clauses 42.1B(e) and 43 have different purposes and can be read together – namely:

        (A) clause 42.1B(e) requires that RSA provide a statutory declaration in the form of Annexure Part H (assuming Canstruct's primary submissions is correct), relating to the payment of subcontractors, to Canstruct one business day prior to submitting its claim for a progress payment; and

        (B) clause 43(a) provides that Canstruct may request RSA to provide the same statutory declaration, and evidence of payment, not less than five days before the payment certificate is due;

(d) contrary to RSA's submission, non-compliance with the contractual preconditions for the service of a valid payment claim

> is not a "technical deficiency" within the meaning of s 33(1A). Section 7A, Canstruct submitted, defines a payment claim by reference to the terms of the contract and the Adjudicator must go to the contract to determine whether there is a payment claim and, ultimately, a payment dispute.

Consideration

[94] It is convenient to commence with a brief consideration of the concept of jurisdictional error. In the present case what is in issue is the jurisdiction (or authority) given by the Act to the Adjudicator to determine whether Canstruct was liable to make a progress payment to RSA. The jurisdiction vested in the Adjudicator is circumscribed by the terms of the Act. In summary, it is a jurisdiction to determine the merits of a payment dispute arising from the complete or partial rejection of a payment claim under a construction contract. It may well be thought that determining whether an Adjudicator was acting within the authority vested in them by the Act would be a relatively simple exercise, but this has not proven to be the case historically. As the majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said, regarding errors of law on the face of the record and jurisdictional errors generally, in *Kirk v Industrial Court (NSW)*[34] at [56]:

> References to "error of law on the face of the record" and "jurisdictional error" suggest a degree of certainty about what is the relevant "record" and what is meant by "jurisdictional error" that examination of the decided cases reveals to be unwarranted.

34 [2010] HCA 1; 239 CLR 531 ('*Kirk*').

[95] Later, after noting that the decided cases reveal a degree of uncertainty regarding the meaning of "jurisdictional error", the majority said, at [57]:

> In part, perhaps in large part, these difficulties stem from the existence of unresolved competition between two opposing purposes for the grant of certiorari. As Professor Sawer wrote, more than 50 years ago, the English common law courts sought to control inferior courts by "keeping the inferior tribunal within its 'jurisdiction' [which] may be equated with compelling the inferior tribunal to observe 'the law', ie, what the superior tribunal considers the law to be". Yet at the same time "it [was] usually desired, for reasons of expediency, to give the inferior decision some degree of finality, or, as is often said, some jurisdiction to go wrong". These two purposes pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied. As Sawyer wrote, "it is plain enough that the question is at bottom one of policy, not of logic".
>
> (Footnotes omitted)

[96] More recently, the concept of jurisdictional error was considered by the High Court in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs,*[35] where the plurality said, at [2] – [8]:

> Jurisdictional error can refer to breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force attributed to exercise of that authority by statute. Though a decision affected by jurisdictional error is a decision in fact, it is "in law ... no decision at all" and is in that sense "void".
>
> Because an express or implied condition of a statutory conferral of decision-making authority can take many different forms, and because breach can occur in many different circumstances, the categories of jurisdictional error are not closed. Jurisdictional error can result from breach by a third party of a condition of a statutory process preceding a decision, but more often results from breach by a statutory decision-maker of a condition of the making of a decision. Jurisdictional error on the part of a statutory decision-maker in making a decision can include: misunderstanding the applicable law; asking the wrong

35 [2024] HCA 12.

question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.

A statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition. Only by construing the statute so as to understand the limits of the statutory conferral of decision-making authority is it possible to determine, first, whether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory conferral of decision-making authority) and, second, whether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force).

Determining whether an error exists as well as whether it is jurisdictional starts with an analysis of the nature of the error alleged in the statutory context within which the decision has been made. Given the broad range of decisions in which errors might be made, the large variety of statutory schemes in which those decisions might be made, and the range of circumstances which may attend the making of any particular decision, it is impossible to divine a rigid classification of the errors that constitute jurisdictional errors. There are no bright lines to be drawn – "[t]he nature of the error has to be worked out in each case concerning a specific decision under a particular statute".

In some cases, where an error is established, the error will be jurisdictional irrespective of any effect that the error might or might not have had on the decision that was made in fact. In other cases, the potential for an effect on the decision will be inherent in the nature of the error. An example of the former is apprehended or actual bias. An example of the latter is unreasonableness in the final result. In such cases, the error necessarily satisfies the requirement of materiality.

In most cases, however, an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred. That is because it is now accepted that a statute which contains an express or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating such a "threshold of materiality" in the event of non-compliance.

(Footnotes omitted)

[97] Many of the submissions advanced by the parties in the present proceedings were directed to identifying which statutory preconditions to making a merits determination prescribed in the Act were jurisdictional and which were not. What distinguishes a jurisdictional error from a non-jurisdictional error is a legislative intention that the former error results in an invalid decision, whereas the latter does not. It follows that not every statutory provision circumscribing the exercise of a statutory function is jurisdictional, in the sense that an error in approach to, or satisfaction of, the provision will result in the exercise of the power being invalid.

[98] There can be no doubt that the legislature can provide that the power to make a decision is conditional upon the existence of particular facts (which may include events or circumstances) or the satisfaction of certain conditions. As the learned authors of Judicial Review of Administrative Action and Government Liability[36] expressed it, at [5.480]:

> Parliament is free to make the validity of any reviewable decision conditional upon the existence of a particular fact, regardless of whether the decision-maker is an administrator, a tribunal, or an inferior court. To be more precise, Parliament can provide that a reviewable decision is to be treated as invalid if a fact does not exist. Explicit provisions of that kind are exceptional. In the absence of an explicit provision, the question boils down to an assessment of the pros and cons of *implying* that Parliament intended to make validity conditional upon the objective existence of particular facts.

[99] Examples abound of cases in which it has been determined that facts circumscribing the valid exercise of a legislatively vested power must be

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36 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 7th ed, 2022).

objectively demonstrated to exist. One such case is *Timbarra Protection Coalition Inc v Ross Mining NL and Ors*.[37] The facts of the case are adequately set out in the head note, which states:

> The Respondent was granted a development consent by the Tenterfield Shire Council pursuant to the *Environmental Planning and Assessment Act 1979* (EPA Act). S 77(3)(d1) of the EPA Act requires a Species Impact Statement (SIS) to be submitted with an application for development consent if, inter alia, the development is "likely to significantly affect threatened species". The respondent did not submit a SIS. Talbot J who heard the Class 4 proceedings in the Land and Environment Court held that the decision of the Council to accept the application without a SIS was not reviewable as it was not an error of jurisdictional fact and, accordingly, refused to admit evidence on the issue of "likely to significantly affect threatened species".

[100] Spigelman CJ, with whom Mason P and Meagher JA agreed, said, at [36] – [44]:

> If the fact in issue in the present case is a jurisdictional fact, then evidence of the existence or non-existence of that fact was admissible in the Land and Environment Court: see, eg, *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors & Draughtsmen of Australia* [1950] HCA 40; (1954) 82 CLR 54 at 91-92; *R v Ludeke; Ex parte Queensland Electricity Commission* [1985] HCA 55; (1985) 159 CLR 178 at 183-184; *DMW v CGW* [1982] HCA 73; (1982-83) 151 CLR 491 at 510. Accordingly, if Talbot J erred in the construction of s 77(3)(d1), his rejection of relevant evidence means that this appeal must be allowed and the matter remitted to the Land and Environment Court.
>
> The issue of jurisdictional fact turns, and turns only, on the proper construction of the statute: see, eg, *Ex parte Redgrave; Re Bennett* [1945] NSWStRp 39; (1946) 46 SR (NSW) 122 at 125. The parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality): *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [91] – [93].

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37 [1999] NSWCA 8; 46 NSWLR 55.

“Objectivity” and “essentiality” are two inter-related elements in the determination of whether a factual reference in a statutory formulation is a jurisdictional fact in the relevant sense. They are inter-related because indicators of “essentiality” will often suggest “objectivity”.

Any statutory formulation which contains a factual reference must be construed so as to determine the meaning of the words chosen by parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation. There is nothing special about the task of statutory construction with regard to the determination of the issue whether the factual reference is a jurisdictional fact. All the normal rules of statutory construction apply. The academic literature which describes "jurisdictional fact" as some kind of "doctrine" is, in my opinion, misconceived. The appellation "jurisdictional fact" is a convenient way of expressing a conclusion - the result of a process of statutory construction.

Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.

Where the process of construction leads to the conclusion that parliament intended that the primary decision-maker could authoritatively determine the existence or non-existence of the fact then, either as a rule of the law of statutory interpretation as to the intent of parliament, or as the application of a rule of the common law to the exercise of a statutory power – it is not necessary to determine which, for present purposes – a court with a judicial review jurisdiction will inquire into the reasonableness of the decision by the primary decision maker (in the *Wednesbury* sense *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), but not itself determine the actual existence or non-existence of the relevant facts.

Where a factual reference appears in a statutory formulation containing words involving the mental state of the primary decision maker – "opinion", "belief", "satisfaction" – the construction is often, although not necessarily, against a conclusion of jurisdictional fact, other than in the sense that that mental state is a particular kind of jurisdictional fact: see Craig, *Administrative Law*, 3rd ed (1994) at 368-370; *Minister for Immigration and Ethnic Affairs v Teo* (1995) 57 FCR 194 at 198C. Where such words do not appear, the construction is more difficult.

As Sir Frederick Jordan said in *Ex Parte Mullen; Re Hood* [1935] NSWStRp 34; (1935) 35 SR (NSW) 289 at 298:

> "When the jurisdiction of a court is limited, the question whether a particular matter is one the actual existence of which, notwithstanding any decision of that court, is a condition of its

> having jurisdiction to proceed to determine the matters which lie within its general jurisdiction, or is merely one of the matters which arise for its decision in the exercise of its general jurisdiction, is frequently one of considerable difficulty. It commonly arises in relation to a statute conferring jurisdiction in which the legislature has made no express pronouncement on the subject, and in which its intention has therefore to be extracted from implications found in inferences to be drawn from the language it has used."
>
> The authorities suggest that an important, and usually determinative, indication of parliamentary intention, is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised by the primary decision-maker or, in some other way, necessarily arises in the course of the consideration by that decision-maker of the exercise of such a power. Such a factual reference is unlikely to be a jurisdictional fact. The conclusion is likely to be different if the factual reference is preliminary or ancillary to the exercise of a statutory power. The present case is, so far as I have been able to discover, unique in that the one statutory regime contains the same factual reference in *both* kinds of provisions.

[101] Accepting that some legislative preconditions to the exercise of a power must be established objectively, who is to determine whether the legislative preconditions have been satisfied in a particular case? Of necessity, at first instance the authority to decide such matters vests in the person exercising the power. But what about on an application for judicial review of the original decision? It is trite that the nature of judicial review differs from that of merits review. Merits review involves a determination of the factual and legal correctness of the original decision as assessed by the reviewer. In such a case the reviewer may make their own findings of fact from the evidence, which may differ from those made by the original decision maker. Judicial review, in contrast, is concerned not with the correctness of the

original decision but with the legality of the procedure by which the original decision maker came to their decision.

[102] This clear theoretical distinction between the nature of merits review and that of judicial review breaks down when a court, in the process of judicial review, determines that a legislative precondition imposed on a decision maker is a jurisdictional fact which must be objectively established. In *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority*,[38] Edelman J (as his Honour then was) said, at [115] – [116]:

> The concept of a jurisdictional fact is related to, but distinct from, the other grounds of jurisdictional error described above. In his submissions, including in relation to review based upon the existence of a jurisdictional fact, senior counsel for the Regulator submitted that the exercise of judicial review should not become an exercise of merits review.
>
> It is not necessary for the purposes of this case to decide whether senior counsel's assertion about the limits of jurisdictional fact review is correct. It suffices to say that, putting aside the difficulties with the label 'merits review', there are powerful arguments to the contrary which recognise an important difference between jurisdictional facts and other types of jurisdictional error. As Justice Leeming has observed, the process of 'jurisdictional fact' review is not 'something approaching merits review; it *is* merits review' (original emphasis). And in ***Minister for Immigration and Citizenship v SZMDS***, Gummow A-CJ and Kiefel J, although dissenting in the result of the case, explained that
>
> > apprehensions respecting 'merits review' assume that there was jurisdiction to embark upon the determination of the merits. But the same degree of caution as to the scope of judicial review does not apply when the issue is whether the jurisdictional threshold has been crossed.
>
> (Footnotes omitted)

38 [2014] WASC 346.

[103] Similarly, in *Cat Protection Society (Vic) v Arvio Pty Ltd*,[39] in proceedings concerning the operation of the *Building and Construction Industry Security of Payment Act 2002* (Vic), Digby J said, at [30] – [32]:

> This trial addressed the plaintiff's Originating Motion for Judicial Review. In this regard I note the following observation by Gaudron J as to the Court's power to review and determine the existence of jurisdictional facts in *Corporation of the City of Enfield v Development Assessment Commission* (***City of Enfield***):
>
> > Where the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility.
>
> The point was explained further by Warren CJ and Tate JA in *Saville v Hallmarc Construction Pty Ltd*:
>
> > If an issue amounts to a jurisdictional fact it is reviewable by a superior court to determine if the decision maker was correct in finding that the pre-condition of its jurisdiction was satisfied and thus that its statutory power was enlivened. Moreover, it is reviewable, in effect, de novo, that is, by reference to the evidence available to the reviewing court.
>
> The power to review the existence of jurisdictional facts has been recognised as a qualification to the principle that judicial review does not entail reconsideration of the 'merits' of an administrative decision. The existence of relevant jurisdictional facts determines the underlying legality of the power and processes that are presently subject to judicial review.
>
> (Footnotes omitted)

[104] These cases recognise that, of necessity, a decision maker in whom legislation vests the authority to make a final or ultimate decision which is the subject of the legislative authority will need to determine for itself those preliminary facts upon which its authority to make the final or ultimate

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39 [2018] VSC 757.

decision is predicated. In other words, the decision maker is vested with the authority to determine itself whether it has jurisdiction to make the final or ultimate decision.

[105] The following principles may be extracted from the above:

a) The categories of jurisdictional error are not closed. Jurisdictional error on the part of a statutory decision maker in making a decision can include: misunderstanding the applicable law; asking the wrong question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.

b) The legislature may (and usually will) provide parameters within which a legislatively vested power may be exercised. These parameters, or conditions, are often referred to as “facts”, in the broad sense of including events and circumstances.

c) The legislature may make the *valid* exercise of a power conditional upon the objective existence of a particular “fact” or “facts”, or, in other words, the objective satisfaction of the conditions.

d) Where the legislature intended that the primary decision maker could authoritatively determine the existence or non-existence of a “fact”, any error made by the decision maker in determining the fact will not

render the decision invalid so long as the decision maker has made a bona fide attempt to exercise the jurisdiction and the decision is not legally unreasonable. It is not an error which goes to jurisdiction but is an error within jurisdiction.

e) Whether the non-existence of a particular "fact" (or a failure to comply with a condition) is such as to render the purported exercise of the power invalid is a matter of implication from the terms of the statute and, presumably, any extraneous material that may be legitimately used in construing the statute.

f) The statute conferring authority is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance which would not ordinarily be met "if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made".[40]

g) Where such a "fact" is identified, the decision maker has authority (and a duty) to determine whether that fact is objectively established.

h) On appeal from the exercise of the power, an appellate court may determine for itself whether such a "fact" is objectively established. This may include, where necessary, taking further evidence on the issue. If it is not objectively established, the exercise of the power is invalid. The error by the original decision maker in finding that the

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40 *Hossain v Minister for Border Protection and Anor* [2018] HCA 34; 264 CLR 123 at [30].

"fact" objectively existed is a jurisdictional error because the legislature has provided that the objective existence of that fact is a necessary precondition to the exercise of the power. Another way of expressing it is that such a "fact" is an *essential* fact, the non-existence of which was intended by the legislature to render the exercise of the power invalid.[41]

i) Where the legislative parameters include "facts", the non-existence of which does not render the exercise of the power invalid, any error by the decision maker in determining the existence of that fact does not render the exercise of the power invalid.

[106] In the present case, it is unnecessary for me to reach a conclusion as to whether a determination that PC 17 was a valid payment claim capable of being the basis of a payment dispute for the purposes of the Act was a fact that had to exist objectively and which would result in the invalidity of the Determination in the event of error in determining that fact. This is because the Adjudicator never came to consider that issue because of the view which he took of the operation of s 10.

[107] Section 10 provides:

10 No contracting out

(1) Subject to section 10A, a provision in an agreement or arrangement (whether a construction contract or not and whether in

41 See *Central Australian Frack Free Alliance Inc v Minister for Environment & Anor* [2024] NTSC 75 at [84] onwards.

writing or not) that purports to exclude, modify or restrict the operation of this Act has no effect.

(2) A provision in an agreement or arrangement that has no effect because of subsection (1) does not prejudice or affect the operation of other provisions of the agreement or arrangement.

(3) Any purported waiver (whether in a construction contract or not and whether or not in writing) of an entitlement under this Act has no effect.

[108] It is apparent that the Adjudicator fell into error in determining that s 10 operated to render ineffectual the contractual preconditions to RSA making a claim for payment. The contractual preconditions do not "exclude, modify or restrict" the operation of the Act. This is so because the Act incorporates such preconditions into the definition of the term "payment claim" found in s 7A by, in part, defining the term as meaning a "claim made *under* a construction contract".

[109] In *K & J Burns*, Olsson AJ (with whom Kelly J agreed) said, regarding a submission that the word "under" was intended to convey no more than a causal requirement that a payment claim be issued in respect of the prescribed genus of contract, at [234] – [240]:

> In my opinion such an approach has the practical effect of ignoring the existence and significance of the word "under" in the statutory definition of "payment claim".
>
> According to its normal English connotation, that word signifies "in accordance with", "governed or controlled or bound by", "on condition of" or "subject to", to list but a few of the many applicable dictionary expressions of meaning.
>
> Applying the concepts of such meanings to the relevant definition in s 4 of the statute, the clear intent of the definition is that, to constitute a payment claim, the claim must be shown to be a claim for moneys in accordance with or subject to the conditions of a construction contract.

> In other words, it is not merely a claim at large in respect of works under a construction contract, it must be one that can properly be categorised as a genus of claim provided for by that contract. The existence of a mere causal nexus with a construction contract is plainly not what is in contemplation by the legislation.
>
> Moreover, as a matter of simple logic, a dispute can only arise under s 8 of the statute when a payment claim is properly said to be due to be paid under the relevant construction contract and has been disputed and/or not fully paid. That situation can only arise in relation to a payment claim that purports to be of a genus recognised and provided for by the contract, that is, in the instant case, one that, on the face of it, complies with and answers the description in the mandatory provisions of cl 12.2 of the sub-contract.
>
> The statutory construction embraced by Mr Roper would ignore the real significance of the specific contractual terms and conditions negotiated by the parties, in the sense that a principal could be compulsorily drawn into an adjudication without the claimant having demonstrated any prima facie basis of potential liability to pay in accordance with the contract.
>
> Whilst the statute certainly sets out to cater for contractual relationships that are not prescriptive in detail and, in effect, provides an implied series of terms in absence of relevant contractual provisions, it also recognises the fact that many commercial contracts contain rigorous and highly prescriptive preconditions for the making of valid payment claims and also for payment.

[110] Earlier, at [151], Kelly J said:

> It simply cannot be right that an adjudicator must accept as a valid payment claim anything which happens to be a claim for payment for an amount of work performed by virtue of a construction contract, regardless of the requirements of the particular contract for making such claims…

[111] Clause 12.2 of the contract in *K & J Burns* provided requirements that needed to be satisfied by the sub-contractor when making a payment claim. In that regard, the situation in *K & J Burns* bears similarity to the present case. The difference between *K & J Burns* and the present case is that the adjudicator in *K & J Burns* made a determination based on the contractual

provisions in clause 12.2 that no payment claims for the purposes of the Act had been delivered and, accordingly, there was no payment dispute; in the present case, the Adjudicator did not consider the relevant contractual provisions in the mistaken belief that they were irrelevant.

[112] In the present case, the Adjudicator did not consider the contractual preconditions which determined whether a progress payment claim was permitted under the contract. The Adjudicator wrongly concluded that such preconditions were invalid by operation of s 10. The Adjudicator thus proceeded to determine that a "payment dispute" existed between the parties for the purposes of the Act without considering the provisions of the contract governing the making of payment claims. This was not a case where the Adjudicator considered the operation of the contract provisions and made a conclusion that they did not apply to the claim brought by RSA, or that the contractual provisions had or had not been satisfied. Because of an erroneous interpretation of s 10, the Adjudicator simply did not have regard to the contractual provisions.

[113] I have no doubt that the Adjudicator was obliged by the terms of the Act to consider whether the contractual preconditions to the delivery by RSA of a valid claim for payment had been satisfied. This was a necessary part of determining whether there was a payment dispute.

[114] The present case is one where the Adjudicator misconceived their jurisdiction by determining that the contractual prerequisites for the making

of a payment claim were irrelevant. By doing so, the Adjudicator failed to take into account relevant material (the provisions of the contract) in determining that payment claims under the contract had been delivered, and accordingly that there was a payment dispute for the purposes of the Act.

[115] This was a material error. If the Adjudicator had taken the contractual provisions into account, he may have reached a different conclusion as to whether PC 17 was a payment claim under the contract and, accordingly, whether there was a payment dispute. The submissions on the part of RSA to the effect that any such error by the Adjudicator was immaterial should be rejected.

[116] The submission that this Court should, itself, determine that PC 17 is a valid payment claim should not be accepted. The arguments advanced by RSA in support of that proposition were not put before the Adjudicator. The jurisdiction to make that determination is vested in the Adjudicator by the terms of the Act. This Court should not be expected to determine the materiality of the Adjudicator's error where the factual issues which underpin the submission of immateriality were not canvassed before the Adjudicator.

[117] The submission by RSA that any non-compliance by it with contractual preconditions for making a payment claim is a "technical deficiency" within the meaning of s 33(1A) not affecting the merits of the application should also be rejected. Any non-compliance by RSA potentially goes to the heart

of the question whether there was any payment claim that could give rise to a payment dispute permitting the appointment of an Adjudicator with authority to decide whether any monies were owing by Canstruct to RSA.

[118] In summary, on Ground 3 I have determined:

a) That the Adjudicator fell into jurisdictional error by misconceiving his jurisdiction by determining that the contractual prerequisites for the making of a payment claim were irrelevant.

b) This was a material error.

c) It is unnecessary to determine what provisions of the Act circumscribing the jurisdiction of the Adjudicator are jurisdictional facts that must be shown to objectively exist.

[119] I uphold this Ground.

Ground 4 - RSA is bound by its election to commence and press the Second Application based on the invalidity of the First Determination and it cannot, in the present proceedings, assert that the First Determination is valid.

Canstruct's submissions

[120] On 27 June 2023, RSA lodged the Second Application pursuant to s 39(2). Canstruct submitted that RSA's claim, on its face, was premised on the fact that the Second Application was made "within 20 working days after the previous application (was) taken to be dismissed" because the First Determination had not been made within time. This was, Canstruct

submitted, an essential precondition and a necessary jurisdictional fact which had to exist for the power granted by the Act to be engaged.

[121] By asserting its statutory entitlement under s 39(2) to make the Second Application, Canstruct submitted, RSA secured the appointment of the Second Adjudicator and Canstruct has been obliged through its solicitors to engage with the Second Adjudicator resulting in costs being incurred by Canstruct. At the same time, Canstruct said, RSA has moved under s 45 to register the First Determination as a judgment of this Court and to obtain registration of that judgment in Queensland.

[122] Canstruct submitted that RSA, having accepted the benefit (commencing the Second Application) given to it as a consequence of the invalidity of the First Determination, cannot now allege the validity of the First Determination. In support of that submission, Canstruct referred to the judgment of Brennan J in *Commonwealth v Verwayen*,[42] at 421 – 422:

> Election consists in a choice between rights which the person making the election knows he possesses and which are alternative and inconsistent rights… A doctrine closely related to election, and sometimes treated as a species of election, is the doctrine of approbation and reprobation. This doctrine precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he exercised as, e.g., where a person "having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit"… An election is binding on the party who makes it once it is made overtly – or, at all events, not later than on the communication of the election to the party or parties affected thereby… It is binding whether or not others who are affected by the election have acted in reliance on it.

42 (1990) 170 CLR 394 ('*Verwayen*').

[123] Brennan J's judgment in *Verwayen* was cited by McLure JA in *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission,*[43] at [109] – [110]:

> There is authority in Australian law for an independent doctrine of approbation and reprobation: *Commonwealth v Verwayen* (1990) 170 CLR 394 at 421-422 per Brennan J; *Fried v National Australia Bank Ltd* [2000] FCA 910. The doctrine is summarised in *Halsbury's Laws of Australia*, Vol 190 [190-35] as follows:
>
> > A person may not "approbate and reprobate", meaning that a person, having a choice between two inconsistent courses of conduct and having chosen one, is treated as having made an election from which he or she cannot resile once he or she has taken some benefit from the chosen course.
>
> In *Halsbury's Laws of England*, Vol 60 [962] the authors state:
>
> > Thus a claimant, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

[124] Canstruct also referred to the decision in *Acohs Pty Ltd v Ucorp Pty Ltd*,[44] where the Full Federal Court (Jacobson, Nicholas and Yates JJ), at [200], quoted with approval the remarks of Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd*,[45] at 210:

> There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.

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43 (2008) 38 WAR 276.

44 (2012) 201 FCR 173.

45 (1990) 18 IPR 201.

[125] The final decision of substance referred to by Canstruct was *Rojo Building Pty Ltd v Jillcris Pty Ltd*,[46] where Einstein J said, at [39]:

> Many of the authorities have focused upon the strictures imposed by the Act and upon the need for formal compliance with the provisions of the Act. The scheme of the Act is unforgiving in terms of the technicalities which required to be observed. There is no room for a claimant to approbate and reprobate. There is another party to be considered. There is no room for a claimant to leave a respondent in any form of doubt as to precisely what course is being followed by the claimant. Nor is there any room for a respondent to leave a claimant in any form of doubt as to precisely what course is being followed by the respondent.

[126] Canstruct submitted that RSA has sought to avail itself of two inconsistent statutory entitlements at the same time. On the one hand, it is seeking to obtain an advantage by relying upon the statutory rights under s 39(2) to lodge the Second Application. That right can only exist if the First Determination is invalid and taken to be dismissed. On the other hand, RSA now urges the Court to find that the First Application was not dismissed but was, instead, validly determined by the First Determination and RSA is entitled to enforce the First Determination under s 45.

RSA's submissions

[127] RSA directed the Court to the relevant statutory provisions and the factual context in which the Second Application was made. The Act prescribes a period, described in s 33(1) and (3) as the "prescribed time", within which

46 [2006] NSWSC 309.

an adjudicator must determine an application. The prescribed time is 10 working days after the adjudicator is served with the response as required by s 29(1). However, under the Act this time can be extended in two circumstances:

a) where the adjudicator is satisfied an extension of time is necessary to ensure procedural fairness in making the determination;[47] and

b) with the consent of the Construction Contracts Registrar.[48]

[128] Section 33(2) provides that if an application is not dismissed under s 33(1)(a) or determined on its merits under s 33(1)(b) within the prescribed time, or any extension of it under the provisions set out in the preceding paragraph, the application is taken to be dismissed when the time ends. Section 39 deals with "dismissed applications". This section relevantly provides:

> (2) If, under section 33(2), an application for an adjudication of a payment dispute is taken to be dismissed:
>
> (a) this Part does not prevent a further application being made under this Part for an adjudication of the dispute; and
>
> (b) any further application must be made within 20 working days after the previous application is taken to be dismissed.

[129] RSA submitted that the following timeline was relevant:

- on 20 June 2023, the Adjudicator released the First Determination;

47 s 33(2B).

48 s 34(3)(a).

- on 23 June 2023, RSA wrote to Canstruct demanding payment of the adjudicated amount;
- on 27 June 2023, Canstruct wrote to RSA seeking RSA's undertaking not to enforce the First Determination because it was liable to be set aside. The basis for this contention included that the application was taken to be dismissed under s 33(2) because the Adjudicator had not determine the matter within the prescribed time.

[130] In the letter dated 27 June 2023, the lawyers for Canstruct expressed their contention regarding the asserted invalidity of the First Determination in the following way:

> 1.8 Further, the Adjudicator did not make a determination within the prescribed time or any extension of it under section 34(3)(a) of the Act.
>
> 1.9 On 8 May 2023, pursuant to section 34(3)(a) of the Act, the Adjudicator requested the consent of the Registrar to extend the time for the Adjudicator to make a determination until 29 May 2023. On 9 May 2023, the Registrar provided his consent.
>
> 1.10 On 24 May 2023, pursuant to section 34(3)(a) of the Act, the Adjudicator requested the consent of the Registrar to further extend the time for the Adjudicator to make a determination until 5 June 2023. The Registrar did not provide its consent.
>
> 1.11 On 30 May 2023, pursuant to section 34(3)(a) of the Act, the Adjudicator requested the consent of the Registrar to further extend the time for the Adjudicator to make a determination until 12 June 2023. On 30 May 2023, the Registrar provided his consent.
>
> 1.12 The 30 May 2023 extension request from the Adjudicator, and the subsequent consent from the Registrar, is invalid because the time for the Adjudicator to make a determination elapsed on 29 May 2023.

1.13 Accordingly, the time for the Adjudicator to make a determination was by 29 May 2023.

1.14 The Purported Determination was received by the prescribed appointer, RICS Dispute Resolution Service, and then released to the parties on 20 June 2023.

1.15 Section 33(2) of the Act expressly sets out the consequences of the Adjudicator failing to make a determination within the prescribed time or any extension of it under section 34(3) of the Act, which is the application is dismissed.

[131] RSA submitted that the date 20 working days from 29 May 2023, taking into account a public holiday on 12 June 2023, was 27 June 2023, the date of Canstruct's letter disputing the validity of the First Determination. Accordingly, if the First Determination were taken to be dismissed under the Act because the Registrar had not consented to the extension requested by the Adjudicator on 24 May 2023, the last day for RSA to make a further application pursuant to s 39(2)(b) was 27 June 2023.

[132] On 27 June 2023, RSA made the Second Application. The letter enclosing that application relevantly provided:

> **The Applicant says that the decision of Mr Floreani dated 12 June 2023 (NT 42-23-01) (Determination) was made on time and within jurisdiction**.
>
> However, earlier today we received correspondence from the Respondent's representatives, disputing the validity of the Determination on the basis that it was ought to be made on or before 29 May 2023. By the Respondent's reasoning the Applicant's first adjudication application was taken to be dismissed when no determination was made by 29 May 2023.
>
> **While our client maintains the Determination was made within time, our client has not had the time to consider the Respondent's arguments in any depth.**
>
> Accordingly, an out of an abundance of caution, the Applicant resubmits its adjudication application pursuant to section 39(2) of the

Construction Contracts (Security of Payments) Act 2004 (NT). **This submission should not be seen as prejudicing the Applicant's primary position that the Determination is valid.**

(Emphasis as per RSA's submissions)

[133] On 29 June 2023, the Registrar wrote to RSA, Canstruct and the Adjudicator confirming that he had consented to each of the Adjudicator's requests for extension of time under s 34(3)(a), such that RSA's application could not be taken to have been dismissed under s 33(2) by virtue of the Determination not having been made on or before 29 March 2023. The registrar's email to the Adjudicator by which he consented to the May 2023 extension was not copied to the representatives of RSA or Canstruct, meaning that RSA could not have known whether its first application had been taken to be dismissed under the Act before it made its cautionary further application.

[134] In addition, RSA submitted, its subsequent conduct was consistent with it treating the First Determination as valid, including:

a) RSA's request to the Adjudicator dated 29 June 2023 under the slip rule;

b) RSA's advice to Canstruct on 12 July 2023 of its intention to enforce the First Determination;

c) RSA's maintenance that the First Determination is valid in its correspondence with the second adjudicator; and

d) RSA's actions on 19 July 2023 in enforcing the First Determination in this Court.

[135] In addition to referring to the decision of Brennan J in *Verwayen*, RSA referred to the decision in *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 20]*,[49] where Smith J described the "preconditions" to the application of the doctrine of approbation and reprobation as follows (at [87]):

> (1) The approbating party must have elected, that is made his or her choice clearly and unequivocal, by an approbating act or conduct. This has the practical advantage of enabling a proper comparison to be made with the latter allegedly reprobating act, to see if the latter is truly inconsistent with the former.
> (2) The party in question must have gained or taken some benefit from the approbation.
> (3) The reprobating act or conduct must be clearly inconsistent with the earlier approbating act or conduct.
>
> (Footnotes omitted)

[136] RSA submitted that none of these "preconditions" have been satisfied in the present case. First, understood in the context set out above, the alleged approbating conduct of RSA cannot reasonably be characterised as an unequivocal election by it to treat the First Determination as invalid. RSA submitted that the opposite is true, and that in all correspondence it has maintained the validity of the First Determination.

[137] Secondly, RSA has not taken any benefit from having made the second application. The second application has been, in effect, stayed pending the outcome of the present proceedings. In any event, RSA submitted, if the

49 [2023] WASC 124.

First Determination is valid, the second application is a nullity which could not have produced a benefit to RSA.

[138] Thirdly, the alleged reprobating conduct of RSA is not clearly inconsistent with the alleged approbating conduct.

Consideration

[139] I am satisfied that the submissions made by RSA are clearly correct. The chronology of events demonstrates that RSA's action in making the Second Application was precautionary; it was intended to meet the possibility raised by Canstruct that the First Determination was deemed to be dismissed under s 33(2). It was clearly not an election on the part of RSA to accept the invalidity of the First Determination and to proceed with another application. Canstruct can have been under no misapprehension in that regard. This Ground fails.

Costs of the adjudication

[140] In its written submissions, RSA submitted that if I were to find that the First Determination is affected by jurisdictional error, Canstruct should still be required to pay its share of the Adjudicator's fees. RSA submitted that it has paid all of the Adjudicator's fees and it should be reimbursed by Canstruct for its share from the moneys paid into Court.

[141] The issue of the costs of an adjudication are addressed by s 46 of the Act, which is relevantly in the following terms:

46 Costs of adjudications

(1) This section applies if:

(a) an adjudicator is appointed to adjudicate a payment dispute; and

(b) one of the following applies:

(i) the party who applied for the adjudication withdraws the application under section 28A;

(ii) the adjudicator dismisses the application for adjudication under section 33(1)(a);

(iii) the adjudicator makes a determination of the dispute under section 33(1)(b).

(1A) The adjudicator is entitled:

(a) to be paid for the adjudicator's work:

(i) at a rate agreed between the adjudicator and the parties that is not more than the maximum rate prescribed by the Regulations; or

(ii) if a rate is not agreed – at the rate published under section 55 for the adjudicator; and

(b) to be reimbursed any expenses reasonably incurred in connection with the work.

(2) An appointed adjudicator who is disqualified under section 31 has the entitlements in subsection (1A) for any adjudication work done before the disqualification is notified to the parties.

(3) Despite subsection (1A), an appointed adjudicator may refuse to give notice of the adjudicator's decision or determination under section 33(1) or 36(2) or subsection (9) until the adjudicator has been paid and reimbursed in accordance with subsection (1A).

(4) The parties involved in a payment dispute are jointly and severally liable to pay the costs of an adjudication of the dispute.

(5) As between themselves, the parties involved in a dispute are liable to pay the costs of an adjudication of the dispute in equal shares.

.....

(12) In this section:

costs of an adjudication means:

(a) the entitlements of the appointed adjudicator under subsection (1A); and

(b) the costs of any testing done, or of any expert engaged, under section 34(2)(c)(ii) or (iii).

[142] Canstruct submitted that if I found that the First Determination was invalid by reason of jurisdictional error on the part of the Adjudicator, I should decline to make any orders regarding payment of the Adjudicator's fee as none of the requirements of s 46 (1)(b) were satisfied. In other words, there had been no *valid* determination of the dispute under s 33 (1)(b) and none of the other circumstances referred to in s 46 (1)(b) were relevant.

[143] A similar argument was advanced in *Ceerose Pty Ltd v A-Civil Aust Pty Ltd*.[50] In that case, a single judge of the Supreme Court of New South Wales (the primary judge) set aside part of an adjudicator's determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act') for jurisdictional error. In doing so, the primary judge ruled that no fees were payable to an adjudicator whose determination was affected by jurisdictional error.

[144] On appeal, Ceerose submitted that by making a determination which was affected by jurisdictional error, the adjudicator had, in effect, failed to make a determination within the time prescribed by the NSW Act. Section 29(4) of the NSW Act provided that fees were not payable to an adjudicator who failed to make a determination within the time prescribed. In rejecting that submission, Payne JA, with whom Ward ACJ and Basten AJA agreed, said, at [129] – [135]:

50 [2023] NSWCA 215 ('*Ceerose*').

In *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* (2019) 99 NSWLR 317; [2019] NSWCA 11, Sackville AJA (with the agreement of four other members of the Court) said this:

> "165 Characterising a determination affected by jurisdictional error as invalid does not necessarily mean that the determination has no legal consequences. In *Chase Oyster Bar* Basten JA quoted a passage from a Federal Court judgment which was expressly approved by Gleeson CJ in *Minister for Immigration and Ethnic Affairs v Bhardwaj* as follows:
>
> > 'There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside.'
>
> Basten JA therefore contemplated that an adjudication determination affected by jurisdictional error, although liable to be set aside by the Supreme Court in its supervisory jurisdiction, can have consequences for the parties." (footnotes omitted)

McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525 observed as follows:

> "One of the basic doctrines of common law jurisprudence is that the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependent on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine." (Emphasis in original.)

Sackville AJA in *Seymour White* said of this observation by McHugh JA:

> "175 Despite the apparently unqualified observations of McHugh J in *G J Coles*, a decision affected by jurisdictional error – even a failure to comply with a "mandatory" statutory precondition to the exercise of a power – is not necessarily devoid of legal consequences. In *New South Wales v Kable*, Gageler J speaking of an invalid law said:

> ‘Yet a purported but invalid law, like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a “nullity” in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself.’”

An adjudication determination affected by legal error is not necessarily void for all purposes. One of those purposes is the obligation to pay costs of the adjudication provided in s 29(1)-(3). The adjudicator’s right to be paid is based on a fact: the adjudicator is “entitled to be paid for adjudicating an adjudication application”.

To paraphrase Gageler J in *New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 at [52], the action so taken, adjudicating an adjudication application, has consequences for the creation of legal rights and legal obligations, as set out in s 29, which consequences do not depend on the legal force of the adjudication decision itself.

The obligation of the parties to pay the “the adjudicator’s fees and expenses” being the subject matter of s 29(1), either “jointly and severally” (s 29(2)), or “in such proportions as the adjudicator may determine” (s 29(3)) is based on the fact underlying s 29(1), that the adjudicator is “entitled to be paid for adjudicating an adjudication application”. If that work is done, that remains a fact whether or not the decision is subsequently set aside for jurisdictional error.

In context, s 29(4) is not engaged in a case where an adjudicator’s decision is subsequently struck down, in whole or in part, for jurisdictional error. Section 29(4) provides an exception to an adjudicator’s entitlement to be paid “if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3)” (10 business days from the trigger event(s) in the section unless extended by agreement). The fact that an adjudicator has adjudicated an adjudication application creates rights to payment which do not depend on the legal force of the adjudication decision itself.

[145] Although the relevant provisions of the NSW Act are different to those in the Act, this does not, in my opinion, affect the relevant principles. It is implicit in the terms of the Act that an adjudicator is entitled to be paid for undertaking the adjudication. For the reasons expressed in *Ceerose*, that remains the case whether or not the decision is subsequently set aside for jurisdictional error. RSA, having paid the fees of the Adjudicator, is entitled to receive 50% of the fees it paid from Canstruct.

Orders

[146] The adjudication decision of the first defendant made 12 June 2023, as supplemented by the first defendant on 12 July 2024, is void and of no effect. Parties are to prepare appropriate orders to give effect to my judgment. The matter may be relisted on short notice if the parties cannot agree.

[147] Within 28 days of the publication of these orders and reasons, the plaintiff may file and serve submissions regarding costs of no more than four A4 pages.

[148] Within 21 days of the receipt of the plaintiff's submissions on costs, the second defendant may file and serve submissions regarding costs of no more than four A4 pages.

[149] If necessary, within 14 days of the plaintiff receiving the second defendant's submissions on costs, the plaintiff may file submissions in reply of no more than two A4 pages.

[150] The question of costs will then be determined on the papers.
