ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors (No 2)
[2017] NTSC 11

PARTIES:	ABB Australia Pty Ltd (ABN 68 003 337 611) v CH2M Hill Australia Pty Limited (ABN 42 050 070 892) and UGL Engineering Pty Limited (ABN 96 096 365 972) and KIRKPATRICK, Neil
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	81 of 2016 (21635965)
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JUDGMENT OF:	KELLY J

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BUILDING AND CONSTRUCTION – Building contracts – Payment claims
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STATUTES – Interpretation – (NT) *Construction Contracts (Security of Payments) Act 2004* s 8 – Payment dispute – Determined by reference to terms of the contract between the parties

STATUTES – Interpretation – (NT) *Construction Contracts (Security of Payments) Act 2004* s 48 – Review of adjudicator's decision – Nature of review – Meaning of hearing de novo under s 60

Building and Construction Industry Security of Payment Act 1999 (NSW), s 13
Construction Contracts (Security of Payments) Act 2004 (NT), s 3(2)(b), s 8, s 10, s 28, s 28(1), s 28(1)(a), s 28(1)(d), s 28(2)(a), s 28(2)(b), s 28(2)(c), s 29, s 29(1), s 29(2)(a), s 29(2)(b), s 29(2)(c), s 33(1)(a), s 33(1)(a)(i), s 33(1)(a)(ii), s 33(1)(a)(iii), s 33(1)(a)(iv), s 33(1)(b), s 33(3), s 34, s 34(1), s 34(1)(a), s 34(2), s 34(2)(b), s 34(2)(c), s 34(3), s 34(5), s 46(7), s 46(8), s 48, s 48(1), s 48(2), s 60, s 62(1)(a), s 62(1)(c), s 62(3); Reg 6 and Reg 7
Local Court (Civil Procedure) Act 2015 (NT), s 18

AON Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; *Harris v Caladine* (1991) 172 CLR 84; *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] 1 AC 189; *Totev v Sfar and Another* (2008) 167 FCR 193; *Zdrilic v Hickie* [2016] FCAFC 101, referred to

REPRESENTATION:

Counsel:

Applicant:	A Wyvill SC
First and Second Respondents:	R Fenwick Elliott

Solicitors:

Applicant:	DeSilva Hebron
First and Second Respondents:	Squire Patton Boggs (AU)

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

ABB Australia Pty Ltd v CH2M Hill Australia Pty Limited & Ors (No 2)
[2017] NTSC 11
No. 81 of 2016 (21635965)

BETWEEN:

ABB AUSTRALIA PTY LTD
(ABN 68 003 337 611)
Applicant

AND:

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

AND:

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

AND:

NEIL KIRKPATRICK
Third Respondent

CORAM: KELLY J

REASONS FOR ORDERS

(Delivered 14 February 2017)

Background

[1] On 17 July 2014, the first and second respondents, as joint venturers, and the applicant entered into a construction contract ("the Contract") under

which the applicant was to supply to the joint venture major equipment for the combined cycle power plant at the Ichthys Onshore LNG Facilities at Bladin Point near Darwin. (The first and second respondents as joint venturers [referred to in the Contract as "CH2-UGL JV"] are referred to in this judgment as "JV". The applicant is referred to as "ABB".)

[2] On 19 February 2016 ABB sent JV a payment claim, PC-009 Rev 1, dated 19 February 2016 claiming payment of $2,418,603.99.

[3] By letter dated 2 March 2016, JV advised ABB that ABB was in breach of the security requirement in cl 14 of the Contract and as a result had not met a condition precedent in cl 12.3(c)(2) for the right to deliver a payment claim under cl 12 of the Contract. The letter advised that "(f)ollowing replacement of the Security, (ABB) is required to resubmit its payment claim for certification by (JV) in accordance with Contract clause 12".

[4] ABB provided substitute security and on 7 March 2016, served on JV PC-009 Rev 2 claiming payment of $2,418,603.99 (plus GST). On 15 March 2016 JV issued a payment certificate under the Contract for $908,047.14 of that amount which it then set off against its claim for liquidated damages.[1]

The adjudication application and decision

[5] On 10 June 2016 ABB made application under s 28 of the *Construction Contracts (Security of Payments) Act 2004* (NT) ("the Act") to have the

[1] Clause 12.4 provides: "[JV] may deduct from amounts due and payable from [JV] to [ABB] under or in connection with the Contract, any amounts due and payable from [ABB] to [JV] in connection with the Contract."

payment dispute adjudicated ("Application 1")[2] and the third respondent, Mr Neil Kirkpatrick, was appointed as the adjudicator. (The third respondent is referred to as "the Adjudicator".)

[6] On 23 June 2016, JV delivered its response ("the Response") in which it submitted that the Adjudicator should dismiss Application 1 under s 33(1)(a) of the Act relying on six different grounds. The grounds relied upon by JV did not include a contention that Application 1 had not been brought within time on the basis that a payment dispute had arisen on the rejection of PC-009 Rev 1 by the letter of 2 March 2016.

[7] On 4 July 2016, the Adjudicator sought further submissions in relation to two issues. The first issue related to a contention by the respondent that PC-009 Rev 2 was not a valid payment claim under the Contract. The second issue raised by the Adjudicator was whether PC-009 Rev 1 was a valid payment claim under the Contract and whether the letter of 2 March 2016 amounted to an agreement for the re-submission of a payment claim under the Contract that had already given rise to an entitlement to make an application for adjudication.

[8] On 5 July 2016 solicitors for both JV and ABB provided their submissions on the questions raised by the Adjudicator.

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[2] The application is called Application 1 to distinguish it from a later Application for adjudication under the Contract which has already been the subject of litigation in this Court.

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

[10] The basis of the Adjudicator's Decision was a finding by the Adjudicator that even though PC-009 Rev 1 was not a valid payment claim under the Contract, it was nevertheless a valid payment claim under the Act and that the letter of 2 March amounted to a rejection of that payment claim giving rise to a payment dispute within the meaning of the Act.

[11] The Adjudicator had earlier made the same finding in relation to PC-009 Rev 2. One of the jurisdictional grounds relied on by JV to assert that Application 1 should be dismissed under s 33(1)(a) was that PC-009 Rev 2 was not a valid payment claim as it was not submitted on the first business day of the month or within 30 days after completing a payment milestone as required by cl 12.1(a). The Adjudicator found that although it did not comply with the requirements of the Contract, PC-009 Rev 2 should nevertheless be treated as a valid payment claim for the purposes of the Act. He then determined that PC-009 Rev 1 suffered from the same defect but should be treated the same way – as a valid payment claim for the purposes of the Act.

This proceeding

[12] ABB applied under s 48(1) of the Act to set aside the Adjudicator's Decision and sought an order under s 48(2) of the Act referring Application 1 back to the Adjudicator to be determined under s 33(1)(b). By consent the matter was referred to the Supreme Court pursuant to s 18 of the *Local Court (Civil Procedure) Act 2015* (NT) and listed before me.

[13] On 16 January 2017 I made the following declarations:

(a) PC-009 Rev 1 was not a valid payment claim under the Act.

(b) The letter of 2 March 2016 did not give rise to a payment dispute within the meaning of s 8 of the Act.

[14] In my reasons for decision, I held that the Adjudicator was in error in concluding that PC-009 Rev 1 (which it was agreed was not a valid payment claim under the Contract) was a valid payment claim under the Act. I indicated that I would hear the parties as to the appropriate orders to be made.

[15] The parties have both made submissions in writing as to the orders that should be made. Both claim to be entitled to an order in their favour with the other party to pay their costs.

The submissions of the parties as to the orders that should be made

[16] JV argues that it is clear from the reasons for decision that the Adjudicator made the same error in relation to PC-009 Rev 2 as he was found to have

made in relation to PC-009 Rev 1 (ie treating it as a valid payment claim under the Act despite the fact that it was not a valid payment claim under the Contract). As a result, JV contends that the Adjudicator should have dismissed Application 1 under s 33(1)(a) on that basis and that, therefore, the Adjudicator's Decision was correct - albeit for a different reason than that given by the Adjudicator. Hence, JV submits that it is entitled to judgment.

[17] ABB argues that it was successful in obtaining the declarations it sought in its application for review and submits that, because of the way the issues were defined and the case was argued, it is too late for JV to contend that the Adjudicator's Decision was correct for some different reason.

[18] ABB points to the fact that directions were made on 15 August 2016 requiring JV to file and serve an outline of its submissions in relation to the application for review within a specified time frame. However, JV's outline of submissions dated 22 August 2016 stated at [3]:

> This outline addresses only the basis on which [the adjudicator] dismissed ABB's adjudication application, and not other bases on which he might have reached the same result under section 33(1)(a).

[19] ABB took issue with that approach in its written submissions which specifically drew attention to the six jurisdictional grounds referred to in JV's Response which had all been rejected by the Adjudicator. As a result, by consent, further directions were made, the relevant portion of which reads:

> In the event that [JV] wish[es] to contend that [the Adjudicator's] determination may be supported on a ground or grounds other than the ground relied on by [the Adjudicator], by close of business on 6 September 2016 [it is] to file and serve a notice setting out each such ground with sufficient particulars to enable [ABB] to understand the precise basis on which [JV] will be contending that [the Adjudicator's] determination may be supported in that respect ("the Further Grounds").

[20] In a document entitled "Notice of First and Second Respondents' Further Grounds" dated 6 September 2016, JV confirmed that it relied on its original outline of submissions of 22 August 2016 and the ground that the application should be dismissed without making a determination on the merits because the Adjudicator could not reasonably have been satisfied that it was possible to fairly make a determination because of the complexity of the matter and because the prescribed time or any extension of it was not sufficient. [In relation to the complexity ground, JV stated that it did not actively intend to advance the contention in oral argument unless and until the matter was before the Court of Appeal, given that the same issue is before the Court of Appeal in other proceedings in relation to Application 2.] No other grounds were identified.

[21] ABB submits that the effect of all this is that this matter was conducted on the basis that JV was not putting in issue any of the six jurisdictional arguments in which the Adjudicator ruled against it. That contention is correct. None of those grounds was referred to in submissions by JV (or ABB) and I was not called upon to consider any of them.

[22] ABB submits that the further effect of this is that it is too late for JV to re-open its case to argue that the Adjudicator erroneously determined another jurisdictional issue in ABB's favour: the issues in the case were identified in accordance with the directions of the Court; evidence in relation to those issues has been closed; submissions in relation to those issues have been completed; and judgment in relation to those issues reserved and now delivered.

[23] One of the findings of the Adjudicator which was not challenged by JV in the conduct of this review was that JV had waived strict compliance with the requirements of cl 12.1(a) by issuing a payment certificate on 15 March 2016. The relevant part of the Adjudicator's Decision (at para 63) is as follows:

> I am satisfied that [JV], having assessed and issued a payment certificate, could not reasonably rely on provisions of the contract to subsequently allege that a Payment Claim was defective and must have waived strict compliance with clause 12 of the general conditions of the contract requiring [ABB to] submit its payment claim on a certain day of the month or for the issuing of a tax invoice as a condition precedent for payment to become due on foot of a payment claim previously assessed.

[24] In written submissions ABB has argued that JV did not challenge the correctness of that finding of the Adjudicator in this proceeding – despite the directions referred to above - and that that unchallenged finding is a complete answer to JV's contention that it is entitled to judgment as a consequence of my finding that the Adjudicator erred in treating PC-009

Rev 1 (and by extension PC-009 Rev 2) as a valid payment claim under the Act despite non-compliance with the Contract.[3]

[25] ABB contends that, in addition to the waiver found by the Adjudicator (set out above) there were a number of arguments that it did not put in order to justify the same conclusion, including the correct construction of cl 12.1(a); whether there had in fact been compliance with that clause; estoppel; and a contention that the letter of 2 March 2016 (which stated that ABB should put in a fresh claim after provision of substitute security) amounted to an agreement for a fresh claim. ABB contends that if it had known that JV would seek to re-agitate the correctness of the Adjudicator's findings on cl 12.1(a), it would have put this material before the Court and it would be prejudiced if JV were now permitted to reopen its case.[4]

[26] ABB relies on authorities which refer to the need for finality in litigation and the caution to be exercised by courts in allowing a party to amend its pleading, or change the basis on which its case is to be argued at the eleventh hour. In *Ketteman & Ors v Hansel Properties Ltd & Ors,*[5] in holding that leave should not have been allowed to add a limitation defence in closing arguments the House of Lords said:

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[3] As the review must be by way of a hearing de novo, the finding by the Adjudicator by itself cannot be a complete answer. However I take this to be simply a restatement of the contention that JV is bound by the conduct of its case.

[4] ABB submits that, in any event, even if JV were permitted to re-open its case and seek to support the Adjudicator's Decision on the basis now argued, it would not be entitled to judgment as the finding that JV had waived strict compliance with cl 12 is unarguably correct. This contention is strictly incompatible with its argument that it would be prejudiced if JV were permitted to re-open its case.

[5] [1987] 1 AC 189

> … in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.[6]

[27] In *AON Risk Services Australia Limited v Australian National University*[7] the plurality said:

> Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates. Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment.
>
> … Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court's attention, so that they may be weighed against the effects of any

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6 Ibid at 220 per Lord Griffiths

7 (2009) 239 CLR 175

> delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case.[8]

[28] Counsel for ABB contended that it would have been simple – indeed obvious – for JV to have argued its case in the alternative, that is to say, to contend (as it did) that the Adjudicator was not in error in his treatment of PC-009 Rev 1 but to argue that, if he was, then he made the same error in relation to PC-009 Rev 2 and the Application should have been dismissed under s 33(1)(a) for that reason. (The Adjudicator expressly referred to his reasoning in relation to PC-009 Rev 2 in making his decision based on PC-009 Rev 1.) Had JV done this, ABB would have put forward the arguments referred to above in response. Mr Wyvill SC for ABB pointed out that there has been no explanation put forward by JV for its failure to comply with the direction of the Court to put ABB (and the Court) on notice of the matters it relied upon to support the decision and its failure to run this obvious argument at the trial.

[29] In response to these contentions by ABB, in written submissions JV contended, essentially, that because a review under s 48(1) must be conducted as a hearing de novo of the merits of the decision,[9] JV cannot be held to the conduct of its case in this proceeding. JV relied on *Harris v*

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8 Ibid at 214-215 [102]–[103] per Gummow, Hayne, Crennan, Kiefel and Bell JJ

9 Section 60

Caladine[10] and *Zdrilic v Hickie*[11] for the general propositions that on a hearing de novo there must be a complete rehearing of the facts and the law as they exist when the judge reviews the order in question.[12] The judge reviewing the order begins afresh and the applicant must start again, call witnesses and make out the case for relief.[13] It is not sufficient for the reviewing judge to simply satisfy herself that the Adjudicator made no error. She must look at the criteria in s 33(1)(a) and satisfy herself of the relevant matters.[14]

[30] The submission seemed to be that regardless of the fact that the issues were defined in advance, and that I was asked by the parties to determine the case on the issues so defined, I now have a duty to re-open the case, consider each and every issue raised by the parties in Application 1 and the Response and determine for myself whether the matter should be dismissed under s 33(1)(a). Moreover, the suggestion appeared to be that I should permit the calling of further evidence and the making of further submissions as though the hearing of the case had not occurred and a decision made (albeit no orders pronounced) on the issue that was agreed by the parties to be the relevant one for the purpose of the review.

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10 (1991) 172 CLR 84

11 [2016] FCAFC 101

12 *Harris v Caladine* (1991) 172 CLR 84 at 164 per McHugh J

13 *Totev v Sfar and Another* (2008) 167 FCR 193 per Emmett J at [13]-[14] cited in *Zdrilic v Hickie* [2016] FCAFC 101 at para [29]

14 ibid at [14]

[31] In brief oral submissions on 6 February 2017, Mr Fenwick Elliott for JV confirmed that JV made the following contentions:

(a) Because the review must be a hearing de novo, my duty is to start from scratch, take into account all of the material before the Adjudicator and decide afresh whether Application 1 should be dismissed under s 33(1)(a), considering each of the grounds relied on by JV in its Response.

(b) This is so despite the fact that directions were made that JV identify any alternative ground it relied on to support the decision to dismiss Application 1 and JV identified only one –the complexity ground (and determined not to argue it).

(c) This is so despite the fact that the sole issue argued before me was whether the Adjudicator had made an error of law in characterising PC-009 Rev 1 as a valid payment claim under the Act giving rise to a payment dispute.

[32] When asked whether the effect of these contentions was a submission that because this is a hearing de novo JV is not bound by its conduct of the case at trial, Mr Fenwick Elliott modified this position somewhat. He said that JV was <u>not</u> in fact asking me to reconsider each issue raised by it in its Response. Rather, he said that because the reasoning of the Court in the decision handed down on 16 January in relation to PC-009 Rev 1 led inevitably, as a matter of logic, to the conclusion that PC-009 Rev 2 suffered

from the same defect so that *ipso facto*, the Adjudicator "had no jurisdiction" to make a determination, the Court must follow that logic in order to make a decision in accordance with the law. As I understand it, he conceded that if this was not the effect of my decision of 16 January, he did not seek to re-open the case or pursue any other bases for contending that Application 1 should be dismissed under s 33(1)(a).

[33] Mr Wyvill for ABB agreed that the Court should not make a decision that was not in accordance with the law as determined and applied in the decision of 16 January, but contended that unless this was plainly the case, JV should not be permitted to re-open its case to argue that Application 1 should be dismissed under s 33(1)(a) on a different ground to that argued at the trial.

[34] The end result was that the position of the parties as to what should occur was, in practical terms, quite similar. If the reasoning behind my decision on 16 January 2017 leads to the inevitable conclusion that Application 1 must, as a matter of law, be dismissed on the basis that PC-009 Rev 2 was not a valid payment claim under the Contract, then I should give effect to that reasoning; but otherwise I should make orders based on the declarations I made on 16 January and am not asked to consider whether Application 1 should be dismissed on grounds which were not sought to be agitated by JV.

Does applying the reasoning behind the decision of 16 January to PC-009 Rev 2 require Application 1 to be dismissed?

[35] For the following reasons, I do not think that the reasoning behind my decision of 16 January 2017 leads to the inevitable conclusion that Application 1 must, as a matter of law, be dismissed on the basis that PC-009 Rev 2 was not a valid payment claim under the Contract.

[36] In written submissions JV contended:

> An adjudicator under the Act only has jurisdiction where there has been a payment claim, and this court has decided that that means a payment claim that is valid in accordance with the requirements of the contract. In the absence of a valid payment claim, there is no jurisdiction.

[37] This submission mis-states both the provisions of the Act and the effect of the reasons for decision. The focus of the Act is on the existence of a "payment dispute" not simply a payment claim. In essence, JV is submitting that:

(a) the Adjudicator (and the Court on this review) must look only at the form of the payment claim in determining whether there is a payment dispute within the meaning of the Act; and

(b) the fact that JV issued a payment certificate has no bearing on the matter.

[38] JV submits that that is the effect of the decision I handed down on 16 January. That is not the case. What I said was:

> In the case of a claim by a contractor, in order to determine whether a payment dispute has arisen, the adjudicator must first determine whether the contractor has made a claim under the contract for payment of an amount in relation to the performance by the contractor of its obligations under the contract. **This necessarily entails the adjudicator going to the terms of the contract and asking whether what purports to be a payment claim is capable of giving rise to a liability on the part of the principal to pay.** If not, then there is no "payment dispute" and the adjudicator is required by s 33(1)(a) to dismiss the application without a determination on the merits.
> *[emphasis by underlining in original; emphasis in bold added]*

[39] This is because the definitions of "payment dispute" and "payment claim" in the Act refer back to the terms of the contract between the parties. Whether or not what is presented to a principal by a contractor is capable of giving rise to a liability on the part of the principal to pay may well depend on the actions of the principal. In this case (assuming that PC-009 Rev 2 did not comply with the requirements of the Contract), if JV had done nothing with PC-009 Rev 2, or if it had responded as it did with PC-009 Rev 1 saying (in effect), "I am not considering this. It does not comply with the requirements of the Contract," then no payment dispute within the meaning of the Act would have arisen and the Adjudicator would have been bound to dismiss Application 1 under s 33(1)(a).

[40] JV did not do this. Notwithstanding that there may have been non-compliance with certain requirements under the Contract, JV chose to issue a payment certificate. Clause 12.3 of the Contract provides that JV's liability to make payment does not arise from the receipt of a complying

payment claim but from the issuing by it of a payment certificate.[15] (Clause 12.2(c) makes specific provision for JV to issue a payment certificate if it does not receive a payment claim when one is due to be provided, but the payment certificate issued by JV on 15 March 2016 refers specifically to Payment Claim No PC-009 Rev 2 and addresses the claims made in that document, a copy of which is attached to the certificate.)

[41] JV contends that "the starting point for any entitlement to a determination under the Act is the claimant's payment claim, not the respondent's response to that, certifying what the respondent thinks is owing (if anything)." In my view that kind of formulaic approach is not consistent with a purposive interpretation of the Act. It derives, perhaps, from applying concepts from other jurisdictions, NSW in particular, where the equivalent legislation is differently framed. As has been noted before, the New South Wales legislation is based on payment claims containing statutorily prescribed information.[16] By contrast, the NT Act looks to the contract between the parties to determine whether there is a payment dispute in existence and, if so, when it arose.

[42] The purpose of s 33(1)(a) is to provide a screening process. If the application is not in writing; if the contract in question is not a construction contract; if the strict time limit in the legislation has not been met, then the

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15 ABB must provide a tax invoice within five days of receipt of the payment certificate [cl 12.3(a)] and JV must pay the amount stated as due on the payment certificate within 30 days of receipt of the tax invoice [cl 12.3(b)].

16 *Building and Construction Industry Security of Payment Act 1999* (NSW) s 13

legislation does not give a right to an adjudication. If it is apparent that the claim which the adjudicator is asked to adjudicate cannot give rise to a liability under the contract to make a payment, then there is no point in proceeding to a determination on the merits of the underlying claim. In all such cases, the legislation provides that the adjudicator must dismiss the application without a determination on the merits.

[43] But if what is presented to the adjudicator for determination is something that could give rise to a liability under the contract to make a payment – either because the claim itself conforms with all contractual requirements for making a payment claim; or because the contract contains a provision which requires payment of potentially non-compliant claims in the absence of a notice of dispute;[17] or because (as here) despite apparent formal defects in the payment claim JV has elected to deliver a payment certificate which is the contractual trigger for a contractual obligation to make payment - then the legislative intent, it seems to me, is to provide a right to have the appointed adjudicator determine on the merits how much (if anything) is owing in accordance with s 33(1)(b). In each case one looks to the contract to determine whether a payment dispute has arisen.

[44] The objective of the legislation – to facilitate timely payments between the parties to construction contracts and to provide for the rapid resolution of payment disputes and mechanisms for the rapid recovery of payments under

[17] See s 6 which contains default implied conditions in the Schedule to the Act.

construction contracts[18] - is furthered by such a construction which is entirely consistent with the focus in the Act of defining "payment claim" and "payment dispute" by reference to the contract between the parties. A construction of the Act which would require an adjudicator to dismiss an application for adjudication even though there is a contractual obligation to make payment – just because the original claim for payment did not comply with a term of the contract, and despite the fact that the contract itself makes provision for a liability to pay to arise in such circumstances - would not be consistent with the objects and overall scheme of the Act.

[45] JV argued further that "even if ABB were able to hang its hat on the certificate, rather than its invalid payment claim, it would be stranded with a zero entitlement" as the Contract provides that JV is obliged to pay "the amount on the payment certificate". This is the equivalent of saying that there can be no adjudication of <u>any</u> claim to progress payments under this particular Contract because the obligation under the Contract is always (and only) to pay the amount on the payment certificate. That cannot be right. It would be the equivalent of contracting out of the provisions of the Act which is specifically prohibited by s 10.[19]

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[18] Section 3

[19] It might be argued that where there is a valid payment claim under the Contract, the dispute which arises concerns whether JV <u>should</u> have issued a payment certificate certifying a different amount payable – and that cannot be argued where there was no obligation to issue a payment certificate. However the dispute which arises on the issue of a payment certificate which addresses the claims in a non-conforming payment claim as though it were a conforming claim, is in substance the same – ie given that JV chose to issue a payment certificate which could give rise to an obligation on its part to make a payment, it should have issued the certificate for a different amount.

[46] It is instructive in any case to scrutinise JV's contention that "the amount stated as due on the relevant certificate is zero" by reference to the payment certificate itself. The relevant parts of the payment certificate issued by JV on 15 March 2016, are as follows (formal parts omitted):

> [JV] acknowledges receipt of [ABB's] Payment Claim No PC-009 rev 2, dated the 7th March 2016 and the receipt of [ABB's] replacement Security on the 9th March 2016.
>
> In accordance with Contract clause 12.2, [JV] provides a payment certificate for PC-009 rev 2. [JV] hereby certifies **$908,047.14** of [ABB's] claimed value of $2,418,603.97 with reductions being applied for the following reasons. *[Three reasons are given.]*
>
> With reference to [JV's] demand for liquidated damages in letter ….. dated 26th November 2015, and in accordance with Contract clause 12.4, [JV] will set off the certified value of [ABB's] claim against its debt due to [JV] for liquidated damages. Accordingly [JV] will not make payment against this claim.

[47] On the face of it, the payment certificate refers to PC-009 Rev 2. It states that it is issued "in accordance with Contract clause 12.2" which states (*inter alia*) that "the payment certificate must … set out the Contract Price and other amounts that [ABB] is entitled to be paid in accordance with the Contract". It certifies that that amount (ie the amount that ABB is entitled to be paid under the Contract) is $908,047.14. It gives reasons why it says the balance of the $2,418,603.99 is not (or not yet) owing. It says that ABB is indebted to it for an unspecified amount (presumably detailed in the letter referred to in the certificate) for liquidated damages, and it claims to set off the $908,047.14 against that debt for liquidated damages. Put yet more simply, it admits that ABB has an entitlement to be paid under the Contract

and asserts a right to deduct that money which is (to use the words of cl 12.4) “due and payable” to ABB from amounts it says are due and payable by ABB to it.

[48] If PC-009 Rev 2 had been (for example) submitted on the first day of the month and compliant in every respect with the requirements under the Contract, then presumably JV’s response in the payment certificate would have been exactly the same. There is no logic to the proposition that in that case a payment dispute would have arisen and in the present case it has not. It is more sensible to say that a payment claim which complies strictly with the terms of the contract is <u>always</u> capable of giving rise to a liability to pay because (looking at the particular provisions of this Contract) in such a case JV will be obliged to issue a payment certificate which is the trigger for a liability to pay. Still considering the provisions of this Contract, a payment claim which does not strictly comply may or may not be capable of giving rise to a liability to pay depending on JV’s response. In such a case JV is not contractually obliged to issue a payment certificate (as it did not in the case of PC-009 Rev 1). If it does not, the invalid claim is not capable of giving rise to a liability to pay. But if JV does issue a payment certificate (which is the trigger under the Contract for a liability to pay), then it must be said that the payment certificate <u>was</u> capable of giving rise to a liability to pay. In short, JV’s liability to make payments under the Contract is

triggered by the issue of a payment certificate[20] and I see no reason in law or logic to treat disputes arising out of what is asserted in a payment certificate issued under the Contract any differently because the original payment claim to which the certificate is directed did or did not comply strictly with all of the requirements for claims under the Contract.

[49] It follows that, since the reasoning behind my decision of 16 January 2017 does not lead to the inevitable conclusion that Application 1 must, as a matter of law, be dismissed on the basis that PC-009 Rev 2 was not a valid payment claim under the Contract, the appropriate orders are orders based on the declarations I made on 16 January, and I am not required to consider whether Application 1 should be dismissed on any other grounds. That includes the arguments on waiver contained in the written submissions of both parties directed to the orders which should be made, as the issue of waiver was not argued before me on the hearing of the review.

The nature of a review under the s 48(1)

[50] Before pronouncing the final orders, I wish to make some further remarks about the nature of the review to be conducted under s 48 as it seems to me that the complications which arose in this case are partly due to the fact that inadequate consideration was given to the precise nature of such a review at the outset. (This is not intended as a criticism of the parties. Proceedings were commenced, prosecuted and determined as a matter of some urgency.)

[20] I am not required, for present purposes to consider alternative scenarios under which JV might be in breach of its obligation to issue a payment certificate and how and when a payment dispute may arise in such circumstances.

[51] This case proceeded without any real consideration of the nature of the review being conducted. From the outset it was conducted as if it were an appeal. The focus of the parties' submissions was on identifying (or denying) error of law on the part of the Adjudicator and directions were made (by consent) with a view to identifying and narrowing the issues to be argued on the appeal – directions I was later asked to ignore as incompatible with the nature of a hearing de novo. In accordance with those directions, lengthy outlines of submissions were prepared directed to the question of whether or not there had been an error of law, a hearing was held at which oral argument occurred (similarly directed) without any consideration being given as to whether this was necessary, and a decision was made and reasons prepared directed to the issues so defined. We then entered into a second round of argument directed to what orders should be made given the declarations made following the hearing, during which (for the first time) the issue of the nature of the review came to the fore. I am not certain that (at least in the ordinary case) the procedure adopted in this case is appropriate.

[52] There is no doubt that s 60 of the Act requires a review under s 48(1) to be a review of the merits of the decision by way of a hearing de novo. Nor is there any doubt about what is meant in general terms by "a hearing de novo". The general characteristics of such reviews are summarised above. However, what this entails procedurally must be determined by reference to

the legislation pursuant to which the decision under review was made and, in particular, the nature of the decision under review.

The nature of a decision reviewable under s 48(1)

[53] There is only one kind of decision which is reviewable under s 48(1) – a decision made under s 33(1)(a) to dismiss an application for adjudication without a determination on the merits for one of the reasons set out in that sub-section. To assess the nature of that decision, one needs to look at the processes in the Act which lead to the duty to consider whether to dismiss an application under that sub-section.

[54] To have a payment dispute adjudicated, the applicant must first prepare a written application for adjudication.[21] That application must state the details of (or have attached to it) the construction contract involved (or the relevant extracts) and any payment claim that has given rise to the payment dispute.[22] It must also be prepared in accordance with, and contain the information prescribed by, the Regulations.[23] Of crucial importance, the application must state or have attached to it <u>all</u> the information, documents and submissions on which the party making it relies in the adjudication.[24]

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21 Section 28(1)(a)

22 Section 28(2)(b)

23 Section 28(2)(a). Reg 6 provides that the application must contain the name and contact details of the appointed adjudicator or prescribed appointer; the applicant's name and contact details; and the name and contact details of each other party to the contract.

24 Section 28(2)(c)

[55] The application must be served within 90 days after the dispute arises on each other party to the contract and on a prescribed appointer[25] (or an adjudicator appointed by the parties who has agreed to act).[26]

[56] Next, the respondent must prepare and serve a response.[27] That response 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[28] and state or have attached to it all the information, documents and submissions on which the respondent relies in the adjudication.[29] The response too must be prepared in accordance with, and contain the information prescribed by, the Regulations.[30]

[57] The response must be served on the applicant and on any other party that has been served with the application within ten working days after the date on which the respondent was served with the application.[31]

[58] The time limits are mandatory. There is no discretion to extend time. Likewise, there is no right in either the applicant or the respondent to

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25 either agreed between the parties or chosen by the applicant

26 The applicant must also provide any deposit or security for the costs of the adjudication that the adjudicator or prescribed appointer requires under s 46(7) or (8). [Section 28(1)(d)]

27 Section 29(1)

28 Section 29(2)(b)

29 Section 29(2)(c)

30 Section 29(2)(a). Reg 7 provides that the response must state the name and contact details of the appointed adjudicator or prescribed appointer, the applicant's name and contact details, and the respondent's name and contact details.

31 Section 29(1)

provide further material (by way of evidence or submissions) in support of the application or the response.[32] The only opportunity for the provision of further material is if the adjudicator requests a party (or parties) to make a submission or to provide information or documents under s 34.[33] The adjudicator is not obliged to make such a request.

[59] This then is the context in which the adjudicator is obliged to make a decision under s 33(1)(a). Within ten working days[34] from the receipt of the response (or the date the response was due) the adjudicator must make a decision to dismiss the application under s 33(1)(a) or make a determination under s 33(1)(b) whether on the balance of probabilities any party to the payment dispute is liable to make a payment (or return a security). The only decision which is reviewable is one under s 33(1)(a) to dismiss the application without a determination of the merits.[35]

[60] So, the decision which the Court must review on the merits by way of a hearing de novo is whether – on the material filed and served by the applicant under s 28 and the material filed and served by the respondent under s 29 and any further material requested by the adjudicator under s 34

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[32] Section 34(1)(a)

[33] An adjudicator's power to make a determination is not affected by the failure of either or both of the parties to make a submission or provide information or documents within time or to comply with the adjudicator's request to attend a conference with the adjudicator [Section 34(5)].

[34] Section 33(3). Under s 34(3), the adjudicator may give himself an extension of time for making this decision – but has no power to extend time to either the applicant to make the application or the respondent to file and serve the response.

[35] Section 48

(and nothing else)[36] – one or more of the criteria set out in s 33(1)(a)(i) to (iv) applies.

[61] What, then, does it mean for the court to review the merits of a decision under s 33(1)(a) to dismiss an application without a determination on the merits by way of a hearing de novo? It seems to me that, given the legislative scheme outlined above, it cannot mean that the applicant has to start again with a fresh application and the respondent with a fresh response. If that were the case the fresh application would probably nearly always be out of time and the court would be obliged to dismiss it under s 33(1)(a) even if the original application was within time. That cannot have been the legislative intention: the evident legislative intent was to encourage adjudication of claims. This can be inferred from the fact that a review is available only where an application has been dismissed without a determination on the merits:[37] a decision to adjudicate a claim is specifically said to be non-reviewable.[38] Further, the only orders the court can make on a review under s 48(1) are to confirm the decision[39] or to set the decision

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36 Section 34(1) and (2)

37 Section 48(1)

38 Section 48(2)

39 Section 62(1)(a)

aside[40] and refer the matter back to the adjudicator making a determination under s 33(1)(b)[41] (with any directions the court considers appropriate).

[62] Since the nature of the decision under review is to determine whether one or more of the criteria under s 33(1)(a) apply on the basis of strictly controlled material [ie only that before the adjudicator under ss 28, 29 and 34(2)] it seems to me that, *prima facie*, a hearing de novo would involve the court making a fresh decision on whether to dismiss the application without a determination on the merits on the basis of that material alone (that is to say the equivalent of a rehearing on the material before the adjudicator with the caveat that if the Act were to be amended between the date of the original decision and the date of the decision on review, the law would be applied as at the date of the review).[42] After all, it is that particular decision of the adjudicator which is being reviewed – not some other decision.

[63] The question then is to what extent that *prima facie* position must be modified by the consideration that the review is to be conducted by a court and by the requirements of procedural fairness.

[64] Although there is no need to demonstrate error in the reasoning of the adjudicator and the judge conducting the review decides the question afresh,

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40 Section 62(1)(c)

41 Section 62(3)

42 In general, a hearing de novo also requires a consideration afresh in light of circumstances prevailing at the date of the rehearing. So, there might conceivably be circumstances where it is necessary or appropriate for the court reviewing the decision to receive further evidence in relation to matters that have transpired between the date of the original decision and the date of the review, eg the making of an order, judgment or a finding by a court, arbitrator or other body. See s 33(1)(a)(iii)

in practical terms the reviewing judge will often be assisted by submissions as to why the applicant for review says the decision should not have been made – and of course submissions by the respondent as to why it should stand, but what sort of submissions?

[65] Does the fact that the review is to be conducted by a court (perhaps in conjunction with the use of the term "hearing de novo") imply that there should be a right to a hearing? My initial view would be no. "Hearing de novo" is a technical term that implies that the original decision should be made again from scratch and in this case the original decision is ordinarily made on the papers. If he considers it necessary, the adjudicator may request the parties to attend a conference[43] which may be considered the functional equivalent of a hearing given the informal nature of the process[44] but the adjudicator is directed by the legislation, if possible, to make the decision on the basis of the application and the response.[45]

[66] Given that the objects of the legislation include providing for the rapid resolution of payment disputes[46] it seems to me that there is no automatic right to a hearing and that ordinarily the judge reviewing the decision would invite written submissions on any issues which she or he considers necessary and then decide the matter on the material before the adjudicator

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[43] Section 34(2)(b). [The adjudicator may also arrange for inspections, testing and expert reports unless all parties object: s 34(2)(c)]

[44] Section 34(1)(a)

[45] Section 34(1)(a)

[46] Section 3(2)(b)

and such additional written material if any. (If the application for review contained contentions as to why the adjudicator's decision was in error, natural justice would require that the respondent be asked to make submissions on that issue unless the reviewing judge considered the application for review to be plainly hopeless and responding submissions unnecessary.) Of course, in appropriate cases the reviewing judge might consider it appropriate to hold a hearing and would have the power to admit further evidence – at least of the kind that the adjudicator has power to request under s 34.

[67] ORDERS:

(a) the decision of the Adjudicator on 11 July 2016 to dismiss Application 1 under s 33(1)(a) is set aside;

(b) Application 1 is referred back to the Adjudicator to make a determination under s 33(1)(b);

(c) JV is to pay ABB's costs of and incidental to this review.