

CITATION: *Costojic Pty Ltd v Whatareya Pty Ltd & Anor* [2023] NTSC 32

PARTIES: COSTOJIC PTY LTD
(ACN 601 969 064)

v

WHATAREYA PTY LTD
(ACN 128 309 857)

AND

DEO, Jaswant

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 2022-02553-SC

DELIVERED: 12 April 2023

HEARING DATE: 6 March 2023

JUDGMENT OF: Brownhill J

CATCHWORDS:

BUILDING AND CONSTRUCTION – Adjudication – Judicial review – Payment claims – Time in which claim is brought – Statutory precondition to the exercise of the power to adjudicate – Where construction contract allows a repeat claim to be made – Ground of review not made out.

BUILDING AND CONSTRUCTION – Adjudication – Judicial review – Payment claims – Procedural fairness – Whether actual or reasonable notice

of determination based on issue or principle – Ground of review not made out.

BUILDING AND CONSTRUCTION – Adjudication – Judicial review – Payment claims – Procedural fairness – Whether opportunity to be heard in relation to an award of interest – Ground of review not made out.

K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd (2011) 29 NTLR 1, applied.

Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd (2014) 34 NTLR 17; *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 41 NTLR 149; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190, referred to.

AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd (2009) 25 NTLR 14, distinguished.

Construction Contracts (Security of Payments) Act 2004 (NT) ss 3, 4, 7A, 8, 27, 28, 29, 33, 34, 35, 39

Construction Contracts (Security of Payments) Legislation Amendment Act 2019 (NT)

Department of the Attorney-General and Justice, *Review of the Construction Contracts (Security of Payments) Act (NT)* (Issues Paper, October 2017)

Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019* (Report, August 2019)

Explanatory statement, *Construction Contracts (Security of Payments) Legislation Amendment Bill 2019*

Northern Territory, *Parliamentary Debates*, Legislative Assembly, 14 August 2019, 6774 (Natasha Fyles, Minister for Justice and Attorney-General)

REPRESENTATION:

Counsel:

Plaintiff:	JW Roper SC
First Defendant:	T Ambrose
Second Defendant:	No appearance

Solicitors:

Plaintiff:	Maher Raumteen Solicitors
First Defendant:	Baker Merz Lawyers
Second Defendant:	No appearance

Judgment category classification:	B
Judgment ID Number:	Bro2305
Number of pages:	42

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

Costojic Pty Ltd v Whatareya Pty Ltd & Anor [2023] NTSC 32
No. 2022-02553-SC

BETWEEN:

COSTOJIC PTY LTD
(ACN 601 969 064)
Plaintiff

AND:

WHATAREYA PTY LTD
(ACN 128 309 857)
First Defendant

AND:

JASWANT DEO
Second Defendant

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 12 April 2023)

- [1] This is an application for judicial review of a determination by an adjudicator under the *Construction Contracts (Security of Payments) Act 2004* (NT) ('the Act'). The issues are whether the adjudicator should have dismissed the application for adjudication because it related to a payment claim made out of time, whether the adjudicator denied the parties natural justice by making part of the determination on a basis not put to him by

either party, or by determining interest payable at a rate not put to him by either party.

Background

- [2] The following facts are not in dispute.
- [3] The plaintiff ('Costojic') was responsible for a subdivision of land in Zuccoli into 10 separate lots. On 12 October 2020, Costojic and the first defendant ('Whatareya') entered into a contract under which Whatareya was to undertake earth and drainage works for the subdivision. The contract was a fixed price contract for a lump sum of \$438,819.15. The contract comprised a short instrument of agreement ('IOA') executed by the parties, with three attachments comprising: (i) the 'AS4000-1997 General Terms and Conditions' ('T&Cs'¹); (ii) drawings and technical specifications; and (iii) a costs agreement framework.
- [4] An engineering company ('ADG') were appointed as the superintendent under the contract.
- [5] Up to September 2021, Whatareya issued four progress claims to ADG under the contract for works in the period up to April 2021. A total of \$324,517.59 was allowed and paid by Costojic to Whatareya. After allowed variations, retentions and deductions, the remaining value of the contract was some \$135,381.38.

1 References in these reasons to clauses of the contract are references to the clauses in the T&Cs.

- [6] On 11 January 2021, Whatareya encountered a water main in excavating for sewerage works. It contacted ADG by phone and then sent an email to ADG informing ADG of the presence of the water main.
- [7] The water main was not shown on any of the drawings forming part of the contract. Its presence caused delay to the works on the subdivision. The parties were in dispute about whether it was Costojic's obligation to identify the existence of the water main (by inclusion in the drawings) or whether it was Whatareya's obligation to identify its existence by undertaking a 'Dial Before You Dig' search before performing the works. The parties were also in dispute about the extent and nature of the delay caused.
- [8] In October 2021, Whatareya issued a progress claim ('payment claim 5') to ADG, which allowed a discount of \$40,000 to its claim for payment as liquidated damages on account of the water main. On 22 October 2021, ADG certified the amount payable for payment claim 5 as \$128,067.28. That amount was not paid by Costojic within the time provided for by the contract or prior to Whatareya's application for the adjudicator's determination.
- [9] On 23 November 2021, ADG issued a certificate of practical completion.
- [10] On 17 June 2022, Whatareya issued a progress claim ('payment claim 6') which included a claim for \$172,260.61 in respect of the claim under payment claim 5, and a claim for \$101,515.77 for 'disruption claims'

referable to the water main, of which only the claim in relation to
'Disruption 1' ('Disruption Claim 1') is in issue in these proceedings.

- [11] On 30 June 2022, ADG rejected payment claim 6 in its entirety and stated the sum of \$140,944.45 comprised the value of the unpaid works under the contract.
- [12] Under cl 37.2 of the contract, Costojic was required to pay either: (a) the amount certified by ADG as payable in respect of a progress claim, within seven days of receipt of ADG's progress certificate; or (b) if ADG did not issue a progress certificate within 14 days of receiving the progress claim, the amount claimed in the progress claim, within 21 days of ADG's receipt of the progress claim. There was a different process under the contract for any final payment claim (cl 37.4).
- [13] The parties agree that payment claim 5 was not a final payment claim within cl 37.4. By virtue of cl 37.2, a payment dispute (see below) arose in respect of payment claim 5 on or about 29 October 2021.
- [14] On 8 July 2022, Whatareya made a written application for an adjudication under the Act in respect of payment claim 6.
- [15] On 13 July 2022, the second defendant ('the adjudicator') was appointed to adjudicate the payment dispute. The adjudicator has indicated he has no wish to be heard in this proceeding and will abide by the Court's orders.

- [16] On 28 July 2022, Costojic served a written response to the adjudication application.
- [17] Between 28 July and 6 August 2022, there were various exchanges between the parties and the adjudicator which resulted in: (a) the adjudicator providing both Whatareya and Costojic with an opportunity to provide further written submissions; and (b) Whatareya providing the adjudicator with some information related to part of its Disruption Claim 1.
- [18] The adjudicator's determination was delivered on 17 August 2022. The adjudicator concluded that payment claim 6 was a valid claim and the application in respect of it was made within time. He assessed the amount payable with respect to payment claim 5 as \$116,257.19, dealt with Disruption Claim 1 on the basis that the water main issue resulted in delays permitting Whatareya a variation of the contract under cl 36.1, dismissed the disruption claim in relation to 'Disruption 2' and assessed interest payable on the outstanding amounts at 18% per annum.
- [19] Without prejudice to its arguments in the proceedings, Costojic has paid \$154,000 to Whatareya in satisfaction of payment claim 5 and the balance of the determination amount is held in Costojic's solicitor's trust account pending the outcome of these proceedings.

Relief sought

[20] By its originating motion and summons on originating motion, Costojic seeks:

- (a) an order in the nature of certiorari that the adjudication determination be quashed;
- (b) alternatively, a declaration that the adjudication determination is void and of no force or effect; and
- (c) an order that Whatareya pay Costojic's costs of and incidental to the proceedings, as taxed or agreed.

Ground 1 – Was the adjudication application made out of time?

Statutory precondition to the exercise of the power to adjudicate

[21] Section 33(1)(a)(ii) of the Act requires an adjudicator to dismiss an application for adjudication if the application has not been prepared and served in accordance with s 28. The criteria in s 33(1)(a)(ii) are jurisdictional facts (or statutory preconditions to the lawful exercise of the power) and it is a jurisdictional error to make a determination on the merits if the jurisdictional facts do not exist.² The satisfaction of the adjudicator as to the existence of these facts must be both reasonable and founded upon a

² *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 ('*AJ Lucas v Mac-Attack*') at [32] per Southwood J (Riley J agreeing). See also *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 ('*K & J Burns v GRD*') at [85], [107], [125]-[145] per Kelly J, at [249]-[251] per Olsson AJ.

correct understanding of the law.³ The adjudicator cannot give himself or herself jurisdiction by erroneously deciding that the facts exist.⁴

[22] Section 28(1) of the Act provides (relevantly) that, to apply to have a payment dispute adjudicated, a party to the contract must, within 65 working days after the payment dispute arises, prepare a written application and serve it on each other party to the contract.

[23] A ‘payment dispute’ arises if: (a) a payment claim has been made under a contract and either: (i) the claim has been rejected or wholly or partly disputed; or (ii) when the amount claimed is due to be paid, the amount has not been paid in full; or (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or (c) when any security held by a party under the contract is due to be returned, it has not been returned (s 8).

[24] ‘Payment claim’ is defined to mean (relevantly) a claim made under a construction contract: (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or (b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract (s 7A(1)).

³ *AJ Lucas v Mac-Attack* at [33] per Southwood J (Riley J agreeing).

⁴ *Ibid*, citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [127] per Gummow J, *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 214 per Gibbs J.

[25] Section 7A(2) is in the following terms:

- (2) A payment claim may include a matter:
 - (a) that was included in a previous payment claim; and
 - (b) that has not been the subject of a determination under s 33(1)(b).

Examples for subsection (2)

- 1 An amount that was included in a previous payment claim but was not dealt with at that time.*
- 2 An amount that was included in a previous claim, but that has been subsumed into a later claim (such as a rolling claim).*
- 3 An amount that was included in a claim that was not dealt with substantively because of procedural non-compliance.*

[26] The parties agree that the application for adjudication of payment claim 6 was made outside of the time limit prescribed by s 28 for making an application in respect of payment claim 5, but within the time limit prescribed by s 28 for making an application in respect of that part of payment claim 6 that did not relate to payment claim 5.

[27] The dispute centres around whether the inclusion of a claim in respect of payment claim 5 in payment claim 6 rendered the due date for the making of the application for adjudication the date prescribed by s 28 for the making of an application in respect of payment claim 5 or in respect of payment claim 6.

[28] Costojic argued that the time limit in s 28 operates in respect of payment claims such that if a payment claim is made that includes an amount from an earlier payment claim that has not been adjudicated, the payment dispute

arises when the amount claimed in the earlier payment claim was not paid when due and the time limit in s 28 runs from the date the earlier payment claim was due. Whatareya argued that the time limit in s 28 operates in respect of payment claims such that if a payment claim is made which includes an amount from an earlier claim that has not been adjudicated, the payment dispute arises when the amount claimed in the subsequent payment claim was not paid when due and the time limit in s 28 runs from the date the subsequent payment claim was due.

The scheme of the Act and its objects

[29] The Act is an Act to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts, and for related purposes (long title). The object of the Act is to promote security of payments under construction contracts (s 3(1)). The object of the Act is to be achieved by: (a) facilitating timely payments between the parties to construction contracts; (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 (s 3(2)). The rapid resolution process involves an adjudication (Part 3) in which a third party adjudicator decides whether a payment is owed by one party to another and, if so, the amount to be paid. In making the determination, the adjudicator: (a) must act informally and, if possible, make the determination on the basis of the application and its attachments and, if a response has been prepared and served in accordance with s 29, the

response and its attachments; and (b) is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate (s 34(1)). The adjudicator may seek further information or submissions from the parties (s 34(2)). If the application is not dismissed or determined within the prescribed time, the application is taken to be dismissed (s 33(2)). The adjudicator may extend that time by five working days (s 33(2B)).

[30] If a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated under Part 3 unless: (a) the matter has already been the subject of a valid determination made on an adjudication under Part 3 of the merits of a payment dispute; or (b) the dispute is the subject of an order, judgment or other finding by an arbitrator or other person or a court or other body dealing with a matter arising under the contract (s 27).

[31] In *AJ Lucas v Mac-Attack*, Southwood J (with Riley J agreeing) observed (at [34]-[35]) that the criteria in s 33(1)(a)(i) to (iv) are aimed at ensuring the application to be adjudicated is about a payment dispute in respect of a payment claim made under a construction contract, the application has been commenced reasonably promptly and the subject matter of the application is not too complex and its resolution will not take too long. His Honour said the object of the adjudication is to determine the dispute fairly and as rapidly, informally and inexpensively as possible. Further, the Act is

essentially aimed at maintaining a contractor's or sub-contractor's cash flow during the course of a construction contract.

The previous form of the Act

[32] Before its amendment commencing on 3 February 2020,⁵ the Act did not include s 7A, s 27(a) provided that any party could apply to have the payment dispute adjudicated under Part 3 unless 'an application for adjudication has already been made by a party (whether or not a determination has been made)', and the time limit in s 28 for the service of the application was 90 days rather than 65 working days.

[33] The Act did not include s 33(1A), which provides that, despite s 33(1)(a), the adjudicator may proceed to determine an application that contains technical deficiencies, if they do not affect the merits of the application, and the Act has been substantially complied with. Neither party referred to s 33(1A) or submitted that it had any impact on the propositions set out in paragraph [21] above. I simply note it, and proceed on the basis that the time limit prescribed by s 28 is a matter that must be complied with in order for the adjudicator to have jurisdiction to determine the application.

Authorities about the effect of ss 28 and 33(1)(a)

[34] Costojic relied on the decision of the Court of Appeal in *AJ Lucas v Mac-Attack*. That case concerned a contract under which the appellant hired earth

⁵ The Act was amended by the *Construction Contracts (Security of Payments) Legislation Amendment Act 2019* (NT) ('Amendment Act').

moving equipment from the first respondent. The contract provided for monthly accounts to be sent by the first respondent to the appellant, with payment to be made by the appellant within 30 days. The first respondent sent invoices from time to time, some of which were not paid by the appellant. The first respondent then sent an invoice summarising the amounts outstanding under all previously rendered invoices, seeking payment within seven days. The first respondent's claim in this invoice was disputed and not paid by the appellant. The first respondent applied for an adjudication of the payment dispute by an application that attached a tax invoice which was different to the summary it had previously sent, but which related to the unpaid invoices it had previously sent, which were payment claims themselves, most of which had fallen due for payment more than 90 days before the service of the application. The adjudicator determined the application on the basis that there was nothing to stop the service of a repeat payment claim. The Court of Appeal allowed the appeal, concluding that the adjudicator did not have jurisdiction to determine the application because (relevantly) the payment claim the subject of the application related to previous payment claims in respect of which a payment dispute had arisen more than 90 days before the application was made.

[35] Mildren J held (at [11]) that the Act did not envisage that a payment claim which includes a claim which has already been the subject of a previous payment claim, but which is out of time for the purposes of s 28, to be

available for adjudication. His Honour held that, if the Act intended repeat claims could be adjudicated, it would defeat the purpose of the 90 day time limit. His Honour thought it important that the Act made no provision for the extension of the time for making an application, save that s 39(2) permitted a further application to be made within 28 days if the adjudicator failed to dismiss or adjudicate the application within the time prescribed under s 33(2). His Honour said (at [12]), there is no other provision of the Act allowing for a further application in respect of the same payment claim and no power in anyone to extend the 90 day time limit.

[36] Southwood J (with Riley J agreeing) held (at [45]) that the relevant payment claims which gave rise to the payment disputes were each of the original invoices sent by the first respondent from time to time during the hire of the equipment and unpaid by the appellant. The document attached to the application did not describe those payment claims, but reformulated the payment claim for the total amount outstanding under all previously rendered invoices. It made a repeat claim for payment for the performance of obligations under the construction contract which had already been invoiced. His Honour held (at [48]) that the application was not made within the time set out in s 28(1) because time ran from the time each original invoice was unpaid when due. His Honour held (at [49]) that the construction contract did not permit the first respondent to make repeat claims and there was no basis for implying such a provision into the standard hire agreement, and further, s 8 of the Act does not permit a

payment dispute to be retriggered by the making of a repeat payment claim in respect of the performance of the same obligations under a construction contract.

[37] In *K & J Burns v GRD*, the Court of Appeal held, distinguishing *AJ Lucas v Mac-Attack*, that the Act does not preclude payment claims from including amounts in previous payment claims where the contract permits such payment claims to be made. In that case, the construction contract provided that payment claims could be made which set out the total value of the work completed to the date of the claim, the amount previously paid and the amount then claimed. Such payment claims were referred to as ‘rolling claims’. Justice Kelly held (at [123]) that there was nothing in the Act which rendered that form of contractual provision unenforceable or took it outside the power of an adjudicator to adjudicate upon. Her Honour agreed (at [124]) with Southwood J’s view (at [52]) that a payment dispute does not come to an end – or a fresh payment dispute necessarily arise – simply because a further claim is presented seeking payment of precisely the same amounts for precisely the same work,⁶ but her Honour also agreed with Olsson AJ’s view (at [261]) that there is no reason why a contract could not authorise the inclusion in a progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day

⁶ Justice Southwood held (at [56]) that the right to apply for adjudication was conditioned upon the 90 day time limit, which could not be revived or retriggered by the making of another payment claim for the same amount for the same construction work, and the filing of a repeat payment claim comprised of claims for the identical amounts for the identical work cannot operate to revive a right which the Act has terminated or destroyed. In this respect, his Honour was in the minority.

period. Her Honour was of the view that, in most contracts, a repeat invoice claiming no new work and simply served in an attempt to ‘re-set the clock’ for the purpose of an application for adjudication would not have the desired effect, but there are contracts, for example, where the contractor is permitted to put in a final claim setting out all amounts claimed, which may have been the subject of one or more progress claims, and there may have been no new work done. Her Honour held it was always a matter of going to the contract to determine when the payment dispute arose according to the express and/or implied terms of the contract.

[38] Acting Justice Olsson held (at [260]-[261]) that, while s 8 does not make any provision for the re-triggering, by a repeat payment claim, of a payment dispute in respect of a payment claim that had been made earlier, as to which the 90 day limit had expired, nevertheless, it does not prohibit such a practical solution arising if such a situation is expressly stipulated for by the construction contract. His Honour saw no reason why such a contract could not authorise the inclusion in a new progress payment claim of earlier unpaid amounts, so as to generate a new payment claim, attracting a fresh 90 day period. That was not the situation arising in *AJ Lucas v Mac-Attack*. His Honour held (at [265]) that, because the contract permitted it, the adjudication application in relation to the summary invoice was brought within time notwithstanding that it contained repeat payment claims in respect of moneys that were the subject of an earlier payment dispute.

The 2019 amendments to the Act

[39] Amongst other things, the Amendment Act:

- (a) inserted s 7A, which defines the meaning of the term ‘payment claim’;
- (b) amended s 27, to replace s 27(a) thereby removing the reference to the making of an application for adjudication having been made, whether or not determined;
- (c) amended s 28:
 - (i) to change the time limit for the making of an adjudication application from 90 days to 65 working days; and
 - (ii) to replace s 28(3) thereby removing reference to disputes arising within the 90 day period immediately preceding commencement of s 28(3) and providing that the first day of the time period in s 28(1) is the day after the payment dispute arises according to s 8; and
- (d) amended s 33(1):
 - (i) to add reference to the dispute the subject of the application also being the subject of another application that has not been dismissed or determined;
 - (ii) to add s 33(1A), permitting the adjudicator 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'; and

(iii) to add s 33(1B), so that if the construction contract provides for liquidated damages, the adjudicator may include in the amount payable an amount assessed as liquidated damages.

[40] The meaning of the term 'payment claim', the content of the new s 7A(1), was previously found in the definition of 'payment claim' in s 4, which made no reference to whether a payment claim may consist of previous payment claims. Relevantly then, the Amendment Act inserted a new provision in the form of s 7A(2). In relation to s 7A, the Explanatory Statement to the Bill for the Amendment Act ('Explanatory Statement') stated that s 7A clarifies 'that a payment claim may consist of any amount owing under a construction contract in relation to the performance or non-performance of an obligation under that contract unless the matter has already been the subject of a determination under section 33(1)(b)'.

[41] In relation to the new s 27(a), the Explanatory Statement stated that the amendment 'seeks to clarify that unless the matter has already been dealt with through an adjudicator determining the dispute, a party should be able to make an application for adjudication' including (but not limited to): (a) where a further payment dispute has arisen before the current application has been determined (enabling the party to include both matters in the one application, such as, eg, where the contract permits rolling invoices); (b)

where a previous application was dismissed without determination; and (c) where the party has withdrawn the application before it was determined (such as where the party has identified a defect in the application and wishes to submit a compliant application).

[42] In relation to the amendment to s 28, the Explanatory Statement stated that the amendment to s 28(3) was to clarify that the timeframe in which to make an application for adjudication starts on the day after the event giving rise to the payment dispute (for example, the timeframe would start the day after the due date of an invoice if the party who was sent the invoice had not paid it by that due date).

[43] Essentially, the Second Reading Speech to the Bill for the Amendment Act repeated the matters set out in the Explanatory Statement, emphasised that an efficient and speedy process for adjudication of payment disputes within the construction industry was important and noted that ‘the requirements about contractor payment claims is [sic] being modified to make it fairer to the contractor seeking payment’.⁷ The Second Reading Speech stated:⁸

Currently if a contractor makes an application to have a payment claim adjudicated, the adjudication can only occur if the payment claim and the application have been made within strict time frames and in accordance with all requirements of the Act.

If the criteria is not met the adjudicator must dismiss the application and the contractor is precluded from making another application on the

⁷ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 14 August 2019, 6784 (Natasha Fyles, Minister for Justice and Attorney-General).

⁸ Northern Territory, *Parliamentary Debates*, Legislative Assembly, 14 August 2019, 6784-6785 (Natasha Fyles, Minister for Justice and Attorney-General).

outstanding amount, because the Act prohibits further application from the same issues regardless of whether or not it has been determined.

If a contractor's application has a minor defect such as referring to another party's trading name, rather than a legal name, the contractor will not be able to seek adjudication under the Act. They will instead have to pursue the outstanding amount through the courts as a breach of contract. The amendments will allow contractors in such situations to seek adjudication where the defect would not prevent proper consideration of the issues on its merits. Under the circumstances provided, the Act had been substantially complied with and the contractor would be able to undertake the adjudication process, rather than the expensive and time consuming court action.

The contractor who the payments claim is made against – the respondent – would not be unduly affected by these changes, as the respondent would already be on notice of the nature of the issue. Being a party to the construction contract, receiving an invoice and subsequently being served with an adjudication ... application, the respondent is well and truly aware of the issue. Under the circumstances, it is unfair that a contractor is prevented from pursuing a quick and inexpensive resolution due to a minor technical matter.

The bill gives reasoning to this effect by ... moving the definition of 'payment claim' from the general definition section under section 4 to a stand-alone section 7A. It clarifies that a payment claim may consist of any amount owing under a construction contract in relation to the performance or non-performance obligation accrued under the contract unless the matter has already been the subject of a determination under section 33(1)(b).

[44] The Second Reading Speech noted that the Legislative Assembly had referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report. The Committee prepared a Report on its Inquiry into the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019 of August 2019 ('Report'). The Second Reading Speech noted that the Report recommended passage of the Bill and recommended certain amendments to it. As regards proposed s 7A(2), the Report referred to a submission that the proposed amendment made the timing of when a

payment dispute arises and consequently when a party must lodge an application for adjudication uncertain. The submission said proposed s 7A(2) was unclear as to whether it was intended to allow a contractor to bring an adjudication application for a rolled-up amount included in a later payment claim, even though part of that amount was included in an earlier payment claim, and that part would otherwise be out of time. That submission was referred to the Department of the Attorney-General and Justice for advice. The Department advised that the earlier payment claim amount could be included in the application for adjudication provided that the amount in the first payment claim had not been paid in full or a determination made on it. The Department advised that, where a contract allows for rolling invoices and a previous payment claim has been made which has not been subject to an adjudication determination, the new invoice will set the timeframe for subsequent payment claims and an application for adjudication. The Report noted that this issue of rolling invoices was raised in the Department's 2017 issues paper, which stated as follows:⁹

The ... Act seeks to ensure that proceedings under it commence within a specified time of when a payment is due. Often a construction contract will include terms where consolidated invoices or payment claims can be issued. Such terms allow rolling invoices that pick up outstanding amounts under previous payment claims.

⁹ Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Construction Contracts (Security of Payments) Legislation Amendment Bill 2019* (Report, August 2019) 18, citing Department of the Attorney-General and Justice, *Review of the Construction Contracts (Security of Payments) Act (NT)* (Issues Paper, October 2017) 20-21.

The latest payment claim in a series of rolling payment claims supersedes all past claims, resulting in previous outstanding amounts forming part of the latest claim. This has an impact on assessing when the applicable time period is for the lodging of a payment dispute application.

The ability to reissue a payment claim on a rolling basis extends the time to make an application to the payment dispute arising from the latest rolling claim, rather than an earlier one. The matter of *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTCA 1 suggests that where a contract provides for rolling invoices, the result may be that the contract permits the same unpaid moneys to be the subject of more than one payment dispute.

- [45] After reference to the proposed amendments to s 27, the Report concluded that the drafting of the amendments and the advice provided by the Department were sufficiently clear ‘in relation to the inclusion of amounts from a previous payment claim where a contract permits rolling invoices and the amounts have not been paid or subject to an adjudicator’s determination’.

The effect of s 7A(2)

- [46] If a payment dispute arises under a construction contract, any party may apply to have the dispute adjudicated (s 27). The adjudicator’s power to determine an adjudication application turns on (relevantly) the service of the application in accordance with s 28 (s 33(1)(a)(ii)). Section 28(1) requires a party to serve an application for adjudication within 65 working days after the payment dispute arises. A payment dispute arises if a payment claim has been made *under a contract* and the claim has been rejected or disputed or, when the amount claimed is due to be paid, it has not been paid in full (s 8). A payment claim is *a claim under a construction contract* for payment of an

amount in relation to the performance or non-performance of the obligations under the contract (s 7A(1)) and may include a matter that was included in a previous payment claim and has not been the subject of an adjudication determination on the merits (s 7A(2)).

[47] After the decisions in *AJ Lucas v Mac-Attack* and *K & J Burns v GRD*, the law was that, *if the contract permitted it*, a subsequent payment claim could include an amount included in a previous payment claim, and the time limit in s 28 would run from the time a payment dispute arose in respect of the subsequent payment claim, whereas, if the contract did not, expressly or impliedly, permit the making of subsequent payment claims which included amounts in previous payment claims, the time limit in s 28 would run from the time a payment dispute arose in respect of the previous payment claim, not the subsequent payment claim. There was no suggestion, in either case, that a party could, by submitting another payment claim not authorised by the contract, ‘re-set the clock’ in respect of which the time limit in s 28 had expired and obtain an adjudication of the previous payment claim.

[48] The extrinsic materials referred to above do not suggest any intention to change the law as it stood after *K & J Burns v GRD*. Rather, by referring specifically to ‘rolling claims’ and to what the contract permits, they indicate an intention to confirm the law as it stood then. There was no suggestion of a legislative intention to enable a party to a contract that does not permit the making of later payment claims which subsume earlier claims

to 're-set the clock' for an adjudication application by submitting another payment claim.

[49] Initially (by its written submissions), Whatareya appeared to argue that the effect of s 7A(2) was to permit repeat claims to be adjudicated as long as they had not been adjudicated, whether or not the contract permitted such repeat claims to be made.

[50] A construction of s 7A(2) which permits a party to seek adjudication of a payment claim in respect of which the time limit prescribed by s 28 has expired would reduce the efficacy of the prescribed time limit, which is directed to the rapid resolution of payment disputes. Such a construction would be inconsistent with the emphasis in *K & J Burns v GRD* placed on the statutory language referring to a claim *under the construction contract*. The critical terms in the Act, including the new s 7A(2), continue to refer to 'a claim made under' the construction contract. If the construction contract does not permit the making of claims for payment in respect of work for which a claim for payment has already been made (such as a rolling claim), it is difficult to see how a repeat claim would be a claim made under the construction contract and thereby fall within the definition of 'payment claim'.

[51] The second example set out in s 7A(2) makes clear that a payment claim may include an amount that was included in a previous claim but that has been subsumed into a later claim, such as a rolling claim. What is meant by

the other two examples is less clear. Both refer to amounts that were ‘not dealt with’. It is unclear what that phrase is intended to refer to. In the third example, the reference is to an amount that was not ‘dealt with substantively because of procedural non-compliance’. That suggests that the phrase ‘dealt with’ is a reference to the amount being addressed, and the claim for that amount being determined, on the merits by the adjudicator. So much is confirmed by paragraph (b), being the second limb of s 7A(2), which refers to a determination under s 33(1)(b) of the Act, and is consistent with the amendment made to s 27(a). On that understanding, the first example could refer to an amount in a payment claim that had not been dealt with by the adjudicator considering the matters in s 33(1)(a). On that basis, neither of the first or third examples necessarily capture an amount included in a previous payment claim in respect of which the time limit in s 28 expired before the adjudication application for the subsequent payment claim was made.

[52] Whatareya argued that their construction promotes a simpler determination under s 33(1)(a) because the adjudicator need only be satisfied that the application was served before expiry of the time limit applied to the non-payment or dispute of the most recent payment claim. If their construction is not accepted, it was argued that the adjudicator would have to call for every previous payment claim to be satisfied that none of the matters in the payment claim the subject of the application had given rise to an earlier payment dispute. I do not accept that. I cannot see how it would not be

apparent on the application that the payment claim includes an amount included in a previous payment claim, and when the payment dispute would have arisen in respect of it.

[53] Despite altering the length of the time limit in s 28, the Amendment Act did not make any changes to ss 27 or 28 which altered or varied the operation or efficacy of the time limit in s 28(1). In particular, there is no express provision allowing for the ‘re-setting of the clock’ at the will of a party and without reference to the terms of the contract. If that was the intention, one might expect the legislature to do so overtly through s 28. Adding that the term ‘payment claim’ may include a repeat claim, if the contract permits repeat claims, only allows the ‘re-setting of the clock’ to the extent that the contract allows a party to re-enliven an obligation to pay an amount which has previously been claimed.

[54] Ultimately (in oral submissions), Whatareya made clear that it accepted that s 7A(2) would only permit adjudication of a repeat claim if the contract, expressly or impliedly, authorised repeat claims to be made.

[55] I consider that the proper construction of the Act is as follows.

[56] If the construction contract allows a repeat claim to be made, that is, a payment claim which re-enlivens an obligation to pay an amount the subject of a previous payment claim in respect of which there is already a payment dispute (that is, an unsatisfied obligation to pay), then s 7A(2) permits the repeat claim to be included in a subsequent payment claim such that a

payment dispute within s 8 arises when the subsequent payment claim is rejected or disputed or is not paid in full when it is due to be paid.

[57] The time limit in s 28 runs from the first day after a payment dispute arises. That occurs when a payment claim is made as permitted by the contract, the obligation to pay the amount in the payment claim has arisen in accordance with the contract terms, and the obligation to pay is unfulfilled as required by the contract terms.

[58] If the construction contract contemplates that another payment claim may be made, notwithstanding that a payment dispute has already arisen in relation to the obligation to pay the amount claimed for that work, and that the party's obligation to pay that amount or an amount in respect of that work is enlivened again by the making of another payment claim, the Act permits an adjudication application to be made within 65 working days of the first day after the payment dispute in relation to the subsequent payment claim.

[59] If the construction contract does not contemplate those matters, the Act will preclude an adjudication application in respect of the subsequent payment claim because the payment dispute in respect of the previous payment claim arose over 65 days before the application was made.

Construction of the contract

[60] The parties were at odds regarding whether the construction contract in this case permitted repeat claims to be made.

- [61] Costojic argued that the contract was a lump sum fixed contract with progressive payments sought by monthly invoices for work done each month, with the obligation to pay the invoices arising on the expiry of the specified period from certification by ADG (actual or deemed). Whatareya argued that the contract permitted it to submit monthly invoices that included amounts claimed in previous invoices that were already payable to it under the contract, but unpaid.
- [62] The contract provided that the contract sum is fixed (cl 6.1, IOA), and the contract lump sum is \$438,819.15, excluding GST, as adjusted in accordance with the contract (cl 2.2, IOA).
- [63] Clause 37.1 of the contract provided that:
- (a) Whatareya shall claim payment progressively in accordance with Item 28. Item 28 provided (relevantly), after the words ‘Times for progress claims’, the words ‘[works under contract] completed to date at the day of that month’.
 - (b) For the avoidance of doubt, this is a lump sum contract whereby payment of the contract sum (relevantly) becomes due and payable by Costojic to Whatareya upon completion of the works under contract to the satisfaction of ADG.
 - (c) Each progress claim shall be given in writing to ADG and shall include details of the value of the works under contract completed to date and

may include details of other moneys then due to Whatareya pursuant to the provisions of the contract.

[64] Whatareya submitted that payment claim 6 contained a new amount in relation to delay and disruption claims, and an amount for the unpaid payment claim 5, which was permissible under cl 37.1 and s 7A(2) of the Act. Emphasis was placed on the words ‘works under contract *completed to date*’ in Item 28 and cl 37.1, and the reference to ‘details of other moneys then due’ to Whatareya under the contract in cl 37.1. Whatareya submitted that the payment clauses of the contract were similar to that considered in *K & J Burns v GRD*. That clause (set out at [15]) provided that the subcontractor was to give GRD claims for payment of the contract price ‘which sets out the total value of the work completed in accordance with the [contract] to the date of the claim, the amount previously paid to the subcontractor and the amount then claimed’.

[65] Clause 37.1 required payment to be claimed by Whatareya progressively, namely monthly. It required each progress claim to include details of the value of the works under contract completed to date, which must be a reference to the date of the particular progress claim. It does not say ‘the *total* value of the works under contract completed to date’, nor does it say ‘completed to date *since the previous progress claim*’. Clause 37.1 also permitted each progress claim to include details of ‘other moneys then due’ to Whatareya pursuant to the contract. The effect of cl 37.2 is set out in paragraph [12] above. In particular, it stated that ADG is to receive a

progress claim and issue a progress certificate which sets out ADG's 'opinion of the moneys due from [Costojic] to [Whatareya] pursuant to the claim and reasons for any difference'.

[66] Reading the provisions of cll 37.1 and 37.2 together, I find that they permitted Whatareya to make repeat claims in respect of the value of the works under contract completed from the outset to the date of each claim and unpaid at that time, and required ADG to issue a progress certificate setting out its opinion of the moneys due in respect of each payment claim, including previous payment claims which were unpaid. By cl 37.2, the amount certified by ADG or, if no certificate was issued within the time set out, the amount claimed by Whatareya in each payment claim, then became payable on the dates specified in cl 37.2.

[67] Consequently, the contract permitted repeat payment claims to be made and re-enlivened the obligation to pay when they were made to the extent that ADG certified what was payable (or failed to issue a progress certificate), such that a fresh payment dispute arose in respect of each payment claim when the time for payment arose and the payment claim was unpaid.

[68] Consequently, the terms of the construction contract permitted Whatareya to submit payment claim 6, which included the amount claimed in payment claim 5. For that reason, payment claim 6 was a payment claim within the meaning of s 7A of the Act, and s 28 required that the application for adjudication be served within 65 working days of the first day after a

payment dispute arose in respect of payment claim 6, namely when it was rejected, disputed or fell due and was unpaid. There is no dispute that the application for adjudication was served within that time. The application for adjudication of payment claim 6 was brought within the time prescribed by s 28 of the Act, even though the time for an application for adjudication of payment claim 5 had expired. It follows that the adjudicator did not err in finding that s 33(1)(a)(ii) was satisfied.

[69] Ground 1 is not made out.

Ground 2 – Was Costojic denied procedural fairness because the adjudicator decided Disruption Claim 1 on the basis of a variation within cl 36.1?

[70] It was not disputed that the adjudicator's obligation to provide procedural fairness to the parties extended to notifying the parties of proposed conclusions that were not put forward by the parties and could not be easily anticipated, which turned on whether Costojic should reasonably have anticipated that the adjudicator would rely on the issue or principle concerned.¹⁰

[71] Costojic argued that neither party had submitted that there was a variation to the works under contract within cl 36.1, and it could not have reasonably anticipated the adjudicator would do so.

¹⁰ *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 41 NTLR 149 at [39]-[41] per Grant CJ, Southwood J and Mildren AJ; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* (2014) 34 NTLR 17 at [34] per Barr J.

Relevant contract T&Cs

- [72] The contract obliged: (a) Whatareya to carry out and complete the works under contract in accordance with the contract and directions authorised by the contract; and (b) Costojic to pay Whatareya the agreed lump sum, adjusted by any additions or deductions made pursuant to the contract (cl 2.1).
- [73] The contract provided for variations to be made to the works under contract, and for extensions of the time for the performance of the works under contract. Generally speaking, the contract dealt with requirements for notice in relation to variations and extensions of time and with any impacts on the contract price or other moneys payable under the contract therefrom.
- [74] Relevantly, there was a general provision dealing with variations (cl 36) and two provisions that deemed certain situations to be variations within cl 36 (cII 14 and 25). There was a separate provision dealing with extensions of time (cl 34).
- [75] Clause 36 was headed 'Variations'. Clause 36 provided that Whatareya shall not vary the works under contract except as directed in writing, and cl 36 permitted ADG, before the date of practical completion, to direct Whatareya to vary the works under contract in specified ways, including by carrying out additional work (cl 36.1). Clause 36 permitted ADG to give Whatareya written notice of a proposed variation, and required Whatareya to provide ADG notice as soon as practicable as to whether the proposed variation

could be effected, together with Whatareya's estimate of the effect on the construction program and the cost of the proposed variation (cl 36.2). It provided that, if Whatareya requested ADG to direct a variation for Whatareya's convenience, ADG could do so (cl 36.3). It provided that, if Whatareya carries out any work which it believes to be a variation, but which has not been directed pursuant to cl 40, the cost of the variation work was to be borne by Whatareya (cl 36.3).

[76] Clause 14 was headed 'Care of the work and reinstatement of damage'.

Relevantly, it provided that, except as provided by cl 14.3, Whatareya was responsible for care of the whole of the works under contract from the date of commencement of the works to the date of practical completion (cl 14.1). It provided that: (a) if loss or damage, other than that caused by an excepted risk, occurs to the works under contract during the period of Whatareya's care, Whatareya was to rectify such loss or damage at its cost; and (b) in the event of loss or damage caused by an excepted risk, Whatareya was, to the extent directed by ADG, to rectify the loss or damage, with the rectification to be a deemed variation within cl 36 (cl 14.2). 'Excepted risks' were defined (relevantly) to include defects in the design of the works under contract, other than the design provided by Whatareya (cl 14.3).

[77] Clause 25 was headed 'Latent conditions'. It defined 'latent conditions' as physical conditions on the site and its near surrounds, including artificial things, which differ materially from the physical conditions which should reasonably have been anticipated by a competent contractor at the time of

Whatareya's tender if the contractor had inspected (relevantly) all information influencing the risk allocation in Whatareya's tender and reasonably obtainable by the making of reasonable enquiries (cl 25.1). It provided that, for the avoidance of doubt, Whatareya had no claim in relation to any costs outside the agreed contract sum associated with latent conditions (cl 25.2). It provided that, on becoming aware of a latent condition while carrying out the works under contract, Whatareya shall, within two days and where possible before the latent condition is disturbed, give ADG written notice thereof, and if required by ADG, a written statement of the latent condition and the additional work, time, resources and cost estimated to deal with the latent condition (cl 25.2). It provided that the effect of the latent condition 'shall be a deemed variation' within cl 36, priced without regard to additional cost incurred more than 28 days before the date when Whatareya gave the first notice of the latent condition (cl 25.3).

[78] Clause 34 was headed 'Time and progress'. It provided that Whatareya was to ensure the works under contract reached practical completion by the date for practical completion (cl 34.1). It provided that a party becoming aware of anything which will probably cause delay to the works under contract was to promptly give ADG and the other party written notice of the cause and estimated delay (cl 34.2). It provided that Whatareya was entitled to such extension of time for carrying out the works under contract as ADG assessed if Whatareya was or would be delayed in reaching practical completion by a

qualifying cause of delay (a defined term referring to any act, default or omission of ADG or Costojic other than a breach or omission by Whatareya) and Whatareya gave ADG a written claim for an extension of time within a prescribed timeframe (cl 34.3). It provided ADG was to give the parties a written direction evidencing the extension of time assessed (cl 34.5). It also provided that, notwithstanding Whatareya was not entitled to or did not claim an extension of time, ADG could at any time and from time to time direct an extension of time (cl 34.5). It provided that Whatareya was barred absolutely from an extension of time or other entitlement if Whatareya did not comply with all of the notice provisions of cl 34.5 within a specified time (cl 34.5). It also provided for liquidated damages (at a daily rate) payable by Whatareya to Costojic if the works under contract did not reach practical completion by the date for practical completion (cl 34.7). It also provided for delay damages (at a daily rate) payable by Costojic to Whatareya for the days the subject of an extension of time (cl 34.9).

The adjudication application and submissions

[79] Whatareya's adjudication application set out a summary of the dispute, which stated that payment claim 6 related to an unpaid amount of \$172,260.61 in payment claim 5 and a claim for \$101,515.77 'for delay and disruption costs in a variation raised pursuant to the contract'.¹¹ It stated that the drawings with which it was supplied were defective and did not show the

11 Application at [4].

water main encountered during excavation, which resulted in the diversion of the water main, and ‘delayed the execution of the [works under contract] for 90 days’.¹² Various arguments were made in the application as to satisfaction of the requirements of s 33(1)(a) of the Act and as to the merits of payment claim 6. Disruption Claim 1 was for Whatareya’s costs incurred as a consequence of the discovery of the water main, which comprised ‘idle time’ and ‘down time’ costs (where Whatareya was paying for hired equipment and labour it could not use on the works under contract, or owned equipment which (presumably) it could have used to earn other income but for the contract), extra works done to permit the water main to be diverted, and a combination of the two for a period of three weeks.¹³

[80] In relation to Disruption Claim 1, the application stated that: (a) cl 14.3 of the contract lists as one of the excepted risks causing loss or damage for which Costojic was liable ‘defects in the design of [works under contract], other than designs provided by’ Whatareya;¹⁴ (b) the drawings prepared by ADG were defective as they did not include the water main;¹⁵ (c) the undocumented water main constituted a defect in the design under cl 14.3, ‘and/or may also constitute a latent defect’ under cl 25;¹⁶ (d) the defect in the design resulted in the delay in the execution of the works under contract

12 Ibid.

13 Ibid at [116].

14 Ibid at [67].

15 Ibid at [68].

16 Ibid at [69].

for 90 days;¹⁷ and (e) Costojic was notified and aware of the defect in the design and/or latent condition because it remedied it.¹⁸ The application then posed the questions the adjudicator needed to address as:¹⁹ (a) Did Whatareya have to notify Costojic the water main find would delay execution of the works under contract? (b) Did the failure of Whatareya to give formal delay notices function as a bar to the recovery of its delay and disruption costs? and (c) Did the failure of Whatareya to give delay notices give rise to the right of Costojic to claim liquidated damages for the delays suffered by the project? The application then proceeded to address those questions, referring to the information Whatareya provided to ADG about the discovery of the water main and Costojic's awareness of it and the consequences for the project. The submissions about the first question referred to cl 8.1, which dealt with defects in design. No further reference was made in the body of the application to cl 25 and latent conditions. However, attachment 3 to the adjudication application included a letter from ADG rejecting payment claim 6 for payment, which in turn included a letter from Whatareya's solicitor to Costojic which asserted, amongst other things, that the water main was a latent condition within cl 25 of the contract, and there had been variations to the works under contract which had been paid by Costojic, notwithstanding failure to give formal notifications of the

17 Ibid at [70].

18 Ibid at [71]. Attached to the application was a statutory declaration by Whatareya's project manager which referred to the encounter with the water main and stated that he emailed ADG immediately, informing them of the water main.

19 Ibid at [72].

delays as required by the contract. The submission was that the parties had dealt with the latent condition informally, without compliance with the formal notification requirements of cl 34.2.

[81] Costojic's response to the adjudication application made the primary submission that payment claim 6 was not validly made under the contract (essentially because payment claim 5 was termed the final payment claim and dealt with by ADG on that basis), and the alternative submission that ADG's certificate that no money was payable under payment claim 6 was binding on Whatareya. As regards Disruption Claim 1, Costojic's response addressed Whatareya's compliance with cl 34 and notification requirements under the contract with respect to an extension of time. Costojic's response stated that the existence of the undocumented water main 'may be regarded as a latent condition under cl 25.1, but it is certainly not a compensable cause'.

[82] Whatareya sought the opportunity to put further submissions to the adjudicator to respond to Costojic's response regarding jurisdictional issues. The adjudicator gave Whatareya that opportunity. Costojic asked the adjudicator to withdraw the opportunity to Whatareya to make further submissions. The adjudicator refused to withdraw the opportunity. Whatareya then provided further written submission.

[83] Whatareya's further written submissions stated that Whatareya did not suffer delays that required it to apply for an extension of time. It said that cl 34

required it to notify ADG of the water main, which it did, and thereafter, ADG ascertained the scope of the works required to address it, and any consequent delay, through the responsible water utility. Whatareya pressed its claim that the water main was a defect in the design falling within cl 8.1, argued that Whatareya was not obliged to seek an extension of time under cl 34.2, and denied that Costojic had a claim for liquidated damages under cl 34.7 because Whatareya was not responsible for the delays caused by the water main.

[84] Costojic put on further written submissions responding to Whatareya's further written submissions. It denied that cl 8.1 gave Whatareya an entitlement to its costs consequent upon the delay, and argued there was no evidence to support Whatareya's claim that it was entitled to recover its costs of the delay from Costojic.

[85] The adjudicator sought from Whatareya a breakdown of the costs in Disruption Claim 1, including the costs of an excavator for three weeks and the dates when those costs were incurred. Costojic argued against the adjudicator's receipt of that material. It referred to its argument that Whatareya had not followed the process for an extension of time under the contract and said the adjudicator should not, by receiving the material requested, initiate an extension of time process. The adjudicator responded that he had requested dates pertaining to Disruption Claim 1 'by way of clarification and nothing else'.

Was Costojic on notice, actually or reasonably, of a determination based on a latent defect variation?

[86] Disruption Claim 1 was founded primarily on a defect in design within cl 14 (relying also on cl 8.1) comprising a deemed variation of the works under contract, but also asserted a claim founded on a latent condition within cl 25 comprising a deemed variation of the works under contract. Whatareya's application addressed the notice requirements under cl 34, saying they did not preclude the claim. Costojic adopted the position that, while the water main may have been a latent condition, any entitlement to Whatareya's costs claimed in Disruption Claim 1 could only be founded on an extension of time under cl 34, which process had not been engaged.

[87] The adjudicator determined, on the basis of the parties' conduct, that the date for practical completion had been extended to 19 March 2022, notwithstanding the absence of formal notifications. He then recorded that it was common ground that the discovery of the water main 'caused delays and disruptions whereby the work and stoppages around' the water main amounted to a variation within cl 36.1, and proceeded to deal with Disruption Claim 1 on that basis. In light of the positions of the parties regarding latent conditions, it is apparent that the adjudicator accepted Whatareya's claim founded on a latent condition within cl 25, being a deemed variation within cl 36.

[88] Costojic had express notice of a claim founded on cll 25 and 36 and specifically addressed whether the date for practical completion had been

extended as permitted by cl 34. The email exchanges with the adjudicator regarding his request for a breakdown of Whatareya's costs and the dates on which they were incurred did not alter that position. They would not have given rise to some reasonable expectation that the adjudicator would not consider, and determine, the claim founded on cll 25 and 36, with an extension of the date for practical completion. Costojic was not denied procedural fairness.

[89] This ground is not made out.

Ground 3 – Was Costojic denied procedural fairness because the adjudicator awarded interest at 18%?

[90] The adjudicator determined that interest was payable on money owed by Costojic to Whatareya at the rate of 18% per annum.

[91] Costojic argued that the adjudicator misconstrued the contract regarding the entitlement to interest. Costojic said it was denied procedural fairness because Whatareya had claimed interest at 6.25% and it had no notice that the adjudicator would award interest at 18% and could not reasonably have anticipated he would do so.

[92] It was not disputed that the contract provided that interest as set out in Item 30 is due and payable after the date of default in payment (cl 37.5), and Item 30 provided as follows:

30 Interest rate on overdue payments (subclause 37.5)	Nil.....% per annum If nothing stated, 18% per annum
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- [93] It is clear that the adjudicator misread Item 30, failing to appreciate that Item 30 provided that no interest was payable. It was not disputed that, subject to the requirements of procedural fairness, that was an error within jurisdiction.
- [94] The Act provides that if an adjudicator determines that a party to a payment dispute is liable to make a payment, the adjudicator may also determine that interest must be paid on: (a) if the payment is overdue – the payment in accordance with the contract; or (b) otherwise – the whole or a part of the payment from the date the payment dispute arose at a rate not greater than the rate prescribed by the Regulations until and including the date of the determination (s 35(1)).
- [95] Whatareya’s adjudication application sought interest on its claim at the rate of 6.25%. It made no submissions as to the basis for that interest rate. Costojic made no submissions at all as to interest.
- [96] Costojic argued that it could not have reasonably anticipated that the adjudicator would misconstrue Item 30 and award interest at 18%.
- [97] The submission is misconceived. The question is not whether Costojic could have reasonably anticipated that the adjudicator would misconstrue the contract and award interest when none was payable. The question is whether Costojic had an opportunity to be heard in relation to an award of interest. Clearly it did. Interest is a feature of adjudication determinations prescribed by the Act, Whatareya claimed interest in its adjudication application and

Costojic had the opportunity to respond to that application by virtue of s 29 of the Act. There is no suggestion that Costojic was somehow precluded from addressing interest in its response. The Act requires that a response to an adjudication application 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 it relies in the adjudication (s 29(2)). Costojic was not denied procedural fairness.

[98] This ground is not made out.

Disposition

[99] None of the three grounds of judicial review is made out.

[100] Costojic's originating motion and summons on originating motion are dismissed.

[101] I will hear the parties as to costs.
