CITATION:	*James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor* [2019] NTCA 7
PARTIES:	JAMES ENGINEERING PTY LTD v ABB AUSTRALIA PTY LTD AND: TUHTAN, JOHN
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 1 of 2019 (21822765)
DELIVERED:	19 August 2019
HEARING DATE:	3 June 2019
JUDGMENT OF:	Blokland and Hiley JJ and Graham AJ

CATCHWORDS:

ADMINISTRATIVE LAW – JUDICIAL REVIEW – CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) – Adjudicator failed to consider the respondent's claim to set off liquidated damages in response to the appellant's payment claim – Adjudicator misconstrued the nature of his functions under the *Construction Contracts (Security of Payments) Act* (NT) – Adjudicator failed to exercise a core function under s 33(1)(b) of the *Construction Contracts (Security of Payments) Act* (NT) – Adjudicator's error amounted to jurisdictional error which could be judicially reviewed –

primary judge's decision that the Determination made by the Adjudicator was a nullity upheld on appeal.

Building and Construction Industry Security of Payment Act 1999 (NSW)
Building and Construction Industry Security of Payment Act 2002 (Vic)
Building Industry Fairness (Security of Payment) Act 2017 (Qld) ss 69, 76, 77, 82
Construction Contracts (Security of Payments) Act 2004 (NT) ss 4, 8, 27, 28, 29, 33, 34, 48
Construction Contracts Act 2004 (WA) s 27, 31, 32
Supreme Court Rules 1987 (NT) r 56

Alliance Contracting Pty Ltd v James [2014] WASC 212; *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386; *Multiplex Constructions v Luikens* [2003] NSWSC 1140, followed.

Brodyn Pty Ltd v Davenport [2004] NSWCA 394; 61 NSWLR 421; *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 92 ALJR 780; *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323; *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* [2018] NTCA 6; 334 FLR 314, applied.

ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor [2018] NTSC 91; *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] NTCA 4; 25 NTLR 14; *Annie Street JV Pty Ltd v MCC Pty Ltd & Ors* [2016] QSC 268; *Axis Plumbing NT Pty Ltd v Option Group (NT) Pty Ltd* [2014] NTSC 22; 34 NTLR 35; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; *CH2M Hill Australia Pty Ltd and Another v ABB Australia Pty Ltd and Another* [2016] NTSC 42; 311 FLR 227; *Coordinated Construction Company Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229; *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Another* [2012] NTSC 22; 31 NTLR 139; *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247; 313 FLR 163; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* [2014] NTSC 20; 34 NTLR 17; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* [2008] NTSC 46; 24 NTLR 15; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd*

[2011] NTCA 1; 29 NTLR 1; *Martincevic v Commonwealth* [2007] FCAFC 164; 164 FCR 45; *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 93 ALJR 252; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409; 64 NSWLR 462; *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791; *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294; *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* [2008] NTSC 42; 23 NTLR 123; *United States v L A Tucker Truck Lines Inc* 344 US 33 (1952), referred to.

REPRESENTATION:

Counsel:

Appellant:	D Savage QC with C Coulsen
First Respondent:	A Wyvill SC with D Baldry
Second Respondent:	No appearance

Solicitors:

Appellant:	QBM Lawyer
First Respondent:	Ward Keller
Second Respondent:	No appearance

Judgment category classification:	B
Number of pages:	30

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

James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor [2019] NTCA 7
No. AP 1 of 2019 (21822765)

BETWEEN:

JAMES ENGINEERING PTY LTD
Appellant

AND:

ABB AUSTRALIA PTY LTD
First Respondent

AND:

JOHN TUHTAN
Second Respondent

CORAM: BLOKLAND and HILEY JJ and GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 19 August 2019)

Introduction

[1] The appellant (**James Engineering**) and the respondent (**ABB**) were parties to a contract for the design, manufacture, transport and delivery of switch rooms in the form of modular buildings to the site of the Combined Cycle

Power Plant of the Ichthys Onshore LNG Facilities project in Darwin (**the Contract**).[1]

[2] On 22 December 2017 James Engineering served a payment claim[2] under the Contract on ABB claiming $2,129,234.80 for variations and associated costs (**the Payment Claim**).[3]

[3] On 11 January 2018, ABB served a notice disputing the Payment Claim, entitled "Payment Schedule" (**the Payment Schedule**).[4] The Payment Schedule stated that "the respondent proposes to pay … $0.00 (nil)" and that the reasons why that amount is less than the amount claimed and for withholding payment are set out in the attachments. The first attachment provided five reasons "why ABB proposes to pay James $0.00 (nil) against the total amount of the Payment Claim."[5] The fifth reason was that:

> James are ignoring their contractual obligation to pay ABB Liquidated Damages in accordance with the Contract and, are acting beyond the parameters of the Contract and claiming beyond their contractual entitlement.

[4] On 28 March 2018, James Engineering applied for adjudication of the Payment Claim under the *Construction Contracts (Security of Payments) Act*

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1 Appeal Book (**AB**) at 521-607. It is common ground that the Contract was a "construction contract" within the meaning of the *Construction Contracts (Security of Payments) Act 2004* (NT) (**the Act** or **the NT Act**).

2 Defined in s 4 of the Act.

3 AB at 1402-1421.

4 AB at 1422-1436.

5 AB at 1423.

2004 (NT) (**the Act** or **the NT Act**) (**the Adjudication Application**).[6] The Adjudication Application referred to the fact that ABB had not made payment when it was due to be paid and disputed 100 per cent of the Payment Claim.[7] The Adjudication Application included submissions which summarised "JE's Response to [ABB's] Payment Schedule" and an affidavit by Mr Brian Scott.[8] At paragraph 17 of the submissions, James Engineering stated:

> In item 5 of its payment schedule ABB has purported to offset against the amount claimed in the payment claim a sum of $1,746,160 for liquidated damages.[9]

Mr Scott's affidavit included a detailed response to each of the five reasons stated by ABB in Attachment A to its Payment Schedule, including the fifth reason, concerning liquidated damages.[10]

[5] The second respondent, Mr John Tuhtan (**the Adjudicator**) was appointed as adjudicator on 4 April 2018.

[6] On 18 April 2018, ABB submitted its response to the Adjudication Application to the Adjudicator (**the Adjudication Response**).[11] This

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6 AB at 1308-1854. Sections 27 and 28 of the Act refer to the making of such an application.

7 AB at 1311. These circumstances amounted to a "payment dispute" of the kind referred to in s 8(a) of the Act, which then formed the basis of the Adjudication Application.

8 Mr Scott was a project manager of and oversaw the Contract at every stage of the project until he retired in March 2016.

9 AB at 1493.

10 AB at 1564.

11 AB at 85-1306. Section 29 of the Act refer to the provision of such a response. Amongst other things the response was required to "state the details of, or have attached to it, any rejection or dispute of the Payment Claim that has given rise to the dispute" - s 29(2)(b).

included a detailed seven page submission entitled "Part D: ABB's claim for liquidated damages".[12] That submission ended with a conclusion requesting the Adjudicator to reject James Engineering's contentions concerning its liquidated damages liability and submitting that "ABB's set-off should be allowed by the Adjudicator."

[7] On 15 May 2018, the Adjudicator made his determination in which he determined that the amount to be paid to James Engineering by ABB was $1,516,310.40 (**the Determination**).[13] There was no allowance for the set-off claimed by ABB.

[8] ABB sought a writ of certiorari in the Supreme Court under order 56 of the *Supreme Court Rules*. James Engineering initially contended that the Supreme Court did not have jurisdiction because of s 48 of the Act but that contention was later abandoned. The Supreme Court (Kelly J) heard the application on 30 November 2018. On 21 December 2018 Kelly J declared that the Determination was a nullity and made an order in the nature of certiorari setting aside the Determination.

[9] James Engineering has appealed to this Court against that declaration.

Kelly J's reasons

[10] In short, Kelly J concluded that the Adjudicator misconstrued the nature of his functions under the Act and failed to deal with the merits of ABB's

12 AB at 137-146.

13 AB at 15-83.

claimed set-off, it having been raised as a defence to the Payment Claim. This amounted to a jurisdictional error.[14]

[11] Her Honour referred to and compared the circumstances of this matter with those in the Western Australian case of *Cooper & Oxley Builders Pty Ltd v Steensma*.[15] In that case an adjudicator had miscategorised a respondent's claim to a set-off as a separate payment dispute and determined the applicant's payment claim without reference to the claimed set-off. Le Miere J held that the adjudicator's failure to assess the merits of the respondent's claim to set off liquidated damages against amounts claimed by the applicant amounted to jurisdictional error.[16]

[12] Kelly J observed that the adjudicator's finding in *Cooper & Oxley* that he was precluded by the relevant section of the *Construction Contracts Act* (WA) (**the WA Act**) from considering Cooper & Oxley's set-off claim was an erroneous construction of that Act.[17] She noted that Le Miere J analysed the error made by the adjudicator in the following terms:

> A determination made pursuant to s 31(2)(b)[18] of the Act can be challenged by judicial review: *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217 [11] (Martin CJ), [7] [8] (McLure P), [92], [95] (Murphy JA). The adjudicator made a jurisdictional error. The adjudicator found that he was precluded by s 32(3)(b)[19] from

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14 *ABB Australia Pty Ltd v James Engineering Pty Ltd & Anor* [2018] NTSC 91 (**Reasons**) at [43], per Kelly J.

15 [2016] WASC 386 (***Cooper & Oxley***).

16 *Cooper & Oxley* at [20].

17 *Cooper & Oxley* at [13].

18 This is s 33(1)(b) in the NT Act.

19 This is s 34(3)(b) in the NT Act.

> considering Cooper & Oxley's set-off defence to AM Land's claim. That was an erroneous construction of the Act. An adjudicator may not adjudicate simultaneously two or more payment disputes without the consent of the parties but that does not preclude him from considering the respondent's counterclaim or set-off raised by way of defence to the applicant's claim. Sections 27, 31(2)(b) and 32(1)(a)(ii) of the Act require the adjudicator to take into account the respondent's response, including the merits of any counterclaim or set-off, in reaching a determination.[20] The adjudicator did not take into account Cooper & Oxley's set-off defence raised in its response. The adjudicator thereby failed to take into account a matter which the Act requires he take into account in determining the payment dispute. The adjudicator misconceived the function which he was performing and the extent of his powers.[21] *[emphasis added by Kelly J]*

[13] Her Honour agreed with that reasoning and said that it accords with the reasoning in *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd*[22] that a purported determination in which an adjudicator makes an error in construing the provisions of the Act which give him his power, is reviewable by this Court for jurisdictional error.[23] Her Honour noted the similarities of the relevant statutory provisions, including the requirement for a respondent to provide its response within 10 days giving details of any rejection or dispute of the payment claim together with other prescribed information,[24] the requirement that an adjudicator take into account any response so provided[25] and determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment and, if so,

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20 Le Miere J cited *Alliance Contracting Pty Ltd v James* [2014] WASC 212 at [50] and [76] for the proposition that an adjudicator is required to take into account the respondent's response, including the merits of any counterclaim or set-off, in reaching his determination.

21 *Cooper & Oxley* at [23].

22 [2009] 25 NTLR 14.

23 *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* [2009] 25 NTLR 14 at [14].

24 Section 27 of the WA Act, which is the same as s 29 of the NT Act.

25 Section 32(1)(a)(ii) of the WA Act which is the same as s 34(1)(a)(ii) of the NT Act.

determine the amount to be paid, and the date on or before which the amount must be paid.[26]

[14] Though the error in the present matter was of a different kind to that in *Cooper & Oxley* her Honour considered that both adjudicators misunderstood the nature of the contention being made by their respective respondents. That led both to fail to take into account a claimed defence by way of set-off to the claims of the respective applicants.[27] In each case the respondent was seeking to raise its set-off claim as a shield and not a sword.[28]

[15] However, her Honour said it was possible that the cause of the error in each case may make a material difference. She said that in *Cooper & Oxley* Le Miere J found that the adjudicator had misconstrued the WA Act, in particular the section defining a payment dispute. This led the adjudicator in that matter to misapply s 32(3)(b) of the WA Act which precluded him from adjudicating more than one payment dispute at the same time except by consent.[29] Her Honour said that:

> It seems to me that the Adjudicator's misconstruction of ABB's claimed set-off in this case arises from a different cause. I can see no evidence that the Adjudicator misconstrued the Act.[30]

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26 Section 31(2)(b) of the WA Act which is the same as s 33(1)(a) of the NT Act.

27 Reasons at [28].

28 Reasons at [27] quoting from *Cooper & Oxley* at [21].

29 Reasons at [29].

30 Reasons at [30].

[16] Her Honour proceeded to consider the nature of the Adjudicator's error in the context of the requirements of the Act. At [32] – [34]:

> [32] ABB was contending that it had a right to liquidated damages under the Contract and that it was entitled to set that off against any amount owing to James Engineering under the Contract. What the Adjudicator should have done was to look at the arguments of ABB and James Engineering and decide whether ABB was entitled to liquidated damages and, if so, how much, and whether the Contract allowed ABB to set these off against amounts otherwise owing to James Engineering. He should then have reduced the amount which he determined to be owing to James Engineering by the amount of liquidated damages (if any) he assessed was owing and able to be set off. If he had made a factual or legal error in that process, then that error would not have been reviewable by this Court.
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> [33] The Adjudicator did not embark on that process at all. Nevertheless, looking at what occurred through the very broadest lens, one might say that it doesn't matter what kind of error led to his failure to embark on the process: he was making a *bona fide* attempt to do what was required under s 33(1)(b), namely to determine on the balance of probabilities whether ABB was liable to make a payment to James Engineering and, if so, determine how much was owing. From that view point, any errors he made in the process were errors within jurisdiction.
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> [34] However, examined at a somewhat finer level of detail, one might say that the Act requires the Adjudicator to determine whether ABB was liable to make a payment to James Engineering and, if so, how much [s 33(1)(b)], on the basis of the Adjudication Application and its attachments and the Adjudication Response and its attachments [s 34(1)(a)]. This is the core function conferred on the Adjudicator by the scheme of the legislation. In deciding that he would not enquire into whether or not ABB was entitled to liquidated damages, and whether it was entitled to set these off against any amounts otherwise owing to James Engineering, the Adjudicator failed to take into account a matter which the Act requires he take into account in determining the payment dispute. That was a failure to perform that core function, and the purported Determination is therefore not a determination protected from review by s 48(3).

[17] Her Honour then considered the possible reasons why the Adjudicator failed to consider whether ABB was entitled to set off liquidated damages against the Payment Claim. She found that the Adjudicator was wrong to conclude that in the Payment Schedule, ABB had not relied on its right to set off liquidated damages against any amount otherwise owing to James Engineering as a reason for saying that no money was owing to James Engineering. However, her Honour said, that was arguably a factual error which would not by itself render the Determination a nullity reviewable by the Court.[31] Her Honour considered that although the Payment Schedule delivered by ABB suffered from some lack of clarity it was clear that James Engineering understood that the schedule relied on a set-off of liquidated damages.[32] This was also apparent from those parts of the Adjudication Application referred to in [4] above and Part D of the Adjudication Response referred to in [6] above.

[18] Her Honour then referred to the Adjudicator's conclusion that even if the Payment Schedule had set off liquidated damages against the Payment Claim, he would not have dealt with the set-off. This was because the only way a decision could be made about whether ABB was entitled to set off liquidated damages against James Engineering's claim was by lodging a separate payment dispute. Her Honour said this was not correct. ABB was

31 Reasons at [36].

32 Reasons at [37].

entitled to rely on its claim that James Engineering was indebted to it for liquidated damages as a defence to James Engineering's payment claim.[33]

[19] Her Honour said that the Adjudicator appears to have not understood the nature of the set-off as a defence to a payment claim and that was an error of law. She concluded that this caused the Adjudicator to misconstrue the nature of his functions under the Act. This was because it

> led the Adjudicator to fail entirely to deal with the merits of ABB's claimed set-off which constituted a substantial part of ABB's Adjudication Response and which, had it been successful, would have been a complete answer to James Engineering's claim. This it seems to me cannot be said to constitute a *bona fide* attempt to carry out the Adjudicator's core function under s 33(1)(b) … namely to determine on the balance of probabilities whether there was actually an amount owing by ABB to James Engineering and, if so, how much [s 33(1)(b)] on the basis of the Adjudication Application and the Adjudication Response [s 34(1)].[34]

[20] A number of other issues were dealt with by the trial judge but they have not been pursued in this appeal. We note however that in the course of dealing with one of those other issues her Honour expressed the view that "it is at least strongly arguable that it was a substantial breach of procedural fairness for the Adjudicator not to give advance notice to the parties that he was intending not to determine the merits of ABB's claimed set-off and to invite submissions on whether it would be correct for him to proceed that way."[35]

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33 Reasons at [42].

34 Reasons at [43]. See too [67] - [70] and footnote 34.

35 Reasons at [68].

The appeal

[21] Although the notice of appeal[36] identified nine grounds of appeal the submissions advanced by the appellant before this Court relied on three grounds:

1. That the trial judge concluded the case on a basis not put.

2. Alternatively, the trial judge incorrectly found relevant error on the part of the Adjudicator by not considering ABB's claim to a set-off and not making a *bona fide* attempt to perform his statutory function.[37]

3. Alternatively, if Ground 2 is not made out and the Adjudicator was wrong to decline to determine ABB's claim to set off its liquidated damages, such an error was an error within jurisdiction.[38]

Ground 1

[22] This ground is not made out. We have already referred to references in the documents before the Adjudicator to ABB's liquidated damages claim and to ABB's assertion of its right to set off that claim against James Engineering's

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36 AB at 2102-5.

37 Transcript of proceedings, 3 June 2019 at p 3.2. See too Appellant's Written Submissions filed 21 May 2019 at [84], [85] and [89] – [91] and Respondent's Written Submissions filed 28 May 2019 at [4.2] and [34].

38 Transcript of proceedings, 3 June 2019 at p 3.6. See too Appellant's Written Submissions filed 21 May 2019 at [84], [86] and [92] – [94] and Respondent's Written Submissions filed 28 May 2019 at [4.3] and [34].

payment claim. See [3], [4], [6] and [18] above. The issue was also argued before the trial judge.[39]

[23] A primary focus of James Engineering's submissions to this Court about this topic was that the words "set off" were only used twice in the material provided to the Adjudicator, at [36.5(b)] and [36.58] of the Adjudication Response, and that setting off the liquidated damages claimed by ABB was identified in [36.58] of the Adjudication Response as one of three ways by which ABB was entitled to recover the liquidated damages from James Engineering.[40] These references were contained in the detailed seven page submission entitled "Part D: ABB's claim for liquidated damages".[41] These submissions have no merit. James Engineering, and the Adjudicator, could never have been in any doubt, from the moment they received the Payment Schedule dated 11 January 2018, that ABB was claiming that it owed no money to James Engineering as it had alleged in the Payment Claim because James Engineering had a liability to pay liquidated damages to ABB. Whether that claim made in ABB's Payment Schedule was or was not described as a set-off, counterclaim, defence or something else, was not to the point. Naturally, the parties, or at least their lawyers, have found it convenient to use the term "set-off" as a convenient way to describe ABB's

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39 See Second Amended Originating Motion Between Parties [3(a)(iv)] at AB 2036; Plaintiff's List of Authorities and Summary of Submissions filed 26 October 2018, "C. Set-off Ground" at AB at 2044-6 and oral submissions at AB at 2129-2144.

40 See Appellant's Written Submissions filed 21 May 2019 at [20] – [26] and [41(e)].

41 AB at 137-146.

liquidated damages claim in response to James Engineering's Payment Claim.[42]

Ground 2

[24] Nor is this ground made out. We have already quoted and summarised what the trial judge said about this topic at [16] to [19] above. Her Honour's analysis and conclusions are entirely consistent with various things that the Adjudicator said in the Determination, particularly at [295] to [309] under the heading "Respondent's Liquidated Damages".

[25] The Adjudicator commenced that discussion by saying, at [295]:

> The respondent has made submissions regarding liquidated damages it considers it is entitled to set off against money otherwise payable to the applicant (if any).

[26] After referring to the Payment Claim and the Payment Schedule the Adjudicator said, at [299]:

> There is no mention of liquidated damages in the amount of $1,746,160 being applied in the payment schedule.[43]

[27] He then referred to a letter of demand dated 4 August 2017 which ABB had sent to James Engineering. It demanded payment of liquidated damages in the amount of $1,746,160 and included a reservation of ABB's rights under

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42 See for example paragraph 17 of James Engineering's submissions at AB 1493 – quoted in [4] above - where the author said that "ABB has purported to offset against amounts claimed …". These submissions predated ABB's Adjudication Response.

43 This must be a reference to the front page headed "Payment Schedule" at AB 1422. As we have noted there were a number of references to ABB's claim to set off the liquidated damages, including the precise amount claimed, in the attachments to that single page document.

the Contract and the law in relation to any failure by James Engineering to pay the liquidated damages by 4 September 2017. He then said, at [301]:

> The respondent [ABB] never set off the liquidated damages in relation to which on 4 August 2017 it had notified the applicant [James Engineering] were owing and accordingly, there can be no liquidated damages in dispute for the purposes of this application for adjudication.

[28] The Adjudicator then said, at [302]:

> In order for a dispute relating to liquidated damages to be adjudicated, the respondent was required to make its claim for liquidated damages by way of the payment schedule and then, if the applicant rejected the respondent's claim for liquidated damages, either party was entitled to make an application for adjudication in relation to the payment dispute.

[29] He then referred to ss 4 and 8 of the Act and said, at [306] – [308]:

> 306. In this case if the respondent had applied liquidated damages, then that would be a payment claim for the purposes of the [Act] and the respondent would have accrued a right to have the payment disputed [sic] adjudicated when the applicant rejected the respondent's claim.
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> 307. If the respondent did not accept the applicant's rejection of its claim for liquidated damages, under s 28 of the [Act], the respondent had 90 days from the date that the dispute had arisen to make an adjudication application.
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> 308. Alternatively, the respondent could have applied the liquidated damages by way of the payment schedule and if the applicant had considered that to give rise to a payment dispute, then the applicant was entitled to make an application for adjudication in relation to the liquidated damages.
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> 309. For the above stated reasons, there is no claim for liquidated damages in relation to this application for adjudication and, therefore, there can be no payment dispute in relation [to] liquidated damages for me to determine.

[30] As her Honour pointed out, what the Adjudicator said, particularly at [302] and [306] - [308], was not correct as a matter of law in the Northern

Territory.[44] We note in passing that although other legislation, such as the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**the Queensland Act**), uses the term and refers to a "payment schedule" and imposes certain requirements upon the respondent to a payment claim including to provide certain information in the "payment schedule",[45] there is no such reference in the NT Act. Nor does the Contract refer to such a document or impose such requirements. We also note that clause 10.2 of the Contract specifically relates to the recovery of liquidated damages including by deducting the relevant amount from any amount due to the Vendors Contract.[46]

[31] The Adjudicator's conclusion in [309] was clearly wrong. As we have said in relation to Ground 1, ABB's claim to set off liquidated damages against the Payment Claim was clearly a live claim before the Adjudicator.

[32] Counsel for James Engineering stressed the fact that the Adjudicator "adverted to" the set off claim. Counsel referred to the Adjudicator's discussion under the heading "Respondent's Liquidated Damages" and also to [101] of the Determination where he said: "I have considered the claim for variations and the respondent's claim for liquidated damages separately – there is nothing objectionable or unorthodox about this."[47] His reference to "consider[ing] the respondent's claim for liquidated damages separately"

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44 Reasons at [42].

45 See for example ss 69, 76, 77 and 82(4).

46 AB at 533.

47 See Appellant's Written Submissions filed 21 May 2019 at [45] - [47] and [51].

is a reference to that later discussion under the heading "Respondent's Liquidated Damages", referred to in [24] to [31] above.

[33] In our opinion the fact that the Adjudicator "adverted to" and said that he "considered" the set-off claim mischaracterises what he actually did, and whether or not he complied with his statutory obligations, namely those under s 33(1)(b) of the Act. It is clear that he gave no more "consideration" to the claim than looking at its form and misconstruing ABB's statutory right to make such a claim as part of the current payment dispute. [48] Even to the extent that he may have perused relevant documents and submissions his purpose of such perusal was to enable him to decide that they were not part of the payment dispute, not to consider the set off claim on its merits. He did not consider the set off claim on its merits.

[34] The Adjudicator "misconceived the function which he was performing and the extent of his powers"[49] and obligations under s 33(1)(b) of the Act. Consequently, he wrongly concluded that he did not have jurisdiction to consider and determine ABB's set-off claim on its merits. He failed to carry out his core function under s 33(1)(b) of the Act.

[35] As Le Miere J said, in *Cooper &Oxley* at [22]:

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48 Indeed in their written submissions counsel for James Engineering stated that: "The adjudicator … resolved the matter by determining that whatever the amount of the set off and whatever the entitlement to set off (which the adjudicator did not deal with …) it was unnecessary because of a conclusion about the form of the adjudicative response and material." See Appellant's Written Submissions filed 21 May 2019 at [89].

49 *Cooper & Oxley* at [23]. See too [33] – [34].

> A respondent to an application may use its counterclaim or set-off as a defence to the claim made against it. The adjudicator is required to take into account the respondent's response, including the merits of any counterclaim or set-off, in reaching his determination.

Ground 3

[36] As her Honour said at [11] of her Reasons:

> It is well settled law that in order for there to be a valid determination within the meaning of the Act which is immune from review by reason of s 48(3), the adjudicator must make a *bona fide* attempt to comply with the essential requirements of the Act, and there must be no substantial denial of procedural fairness. In a long line of cases this Court (and the Court of Appeal) has applied the principles enunciated by the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*.[50]

[37] In *Brodyn* the New South Wales Court of Appeal identified that there had to be a *bona fide* attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation which governs him. A decision will be void if the basic requirements are not complied with. Per Hodgson JA (Mason P and Giles JA agreeing):

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

50 Reasons at [11] referring to *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 (***Brodyn***).

> legislature has indicated as essential to the existence of a determination.[51] *[citations and references omitted]*

[38] There have been numerous authorities in this jurisdiction where those principles have been accepted and applied.[52] Many of those recognised that an error of law in construing the provisions of the Act which give the Adjudicator his jurisdiction to make a determination will render a determination a nullity reviewable by this Court.[53] In the most recent of those decisions, *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd*, this Court said, at [18]:

> If an adjudicator has not made a *bona fide* attempt to comply with the essential requirements of the Act, or if there has been a substantial denial of procedural fairness, an adjudication will be reviewable.

[39] An adjudicator's jurisdiction is invoked upon appointment following a duly made application for adjudication of a "payment dispute" (defined in s 8 of the Act).[54] Unless the Adjudicator determines under s 33(1)(a) to dismiss

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51 *Brodyn* at 441-442 [55].

52 *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at 138-139 [42] and [43]; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at [39] – [49], per Mildren J; *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 1 at [13]-[14] per Mildren J; [33], [35] per Southwood J; and [36] per Riley J; *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 29 NTLR 1 at [107] and at [126] (including footnote 97), per Kelly J; and at [249] per Olsson AJ; *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Another* (2012) 31 NTLR 139 at [33]-[34], per Barr J; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* (2014) 34 NTLR 17 at [34], per Barr J; *Axis Plumbing NT Pty Ltd v Option Group (NT) Pty Ltd* (2014) 34 NTLR 35 per Hiley J at [37]-[39]; *CH2M Hill Australia Pty Ltd and Another v ABB Australia Pty Ltd and Another* (2016) 311 FLR 227 at [43], per Kelly J; *JKC Australia LNG Pty Ltd v INPEX Operations Australia Pty Ltd* (2018) 334 FLR 314 at [18]-[19] per Grant CJ, Southwood J and Mildren AJ.

53 *AJ Lucas Operations Pty Ltd v Mac-Attack Equipment Hire Pty Ltd* (2009) 25 NTLR 14 at [29]; *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* (2008) 23 NTLR 123 at 138 [43]; *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd* (2008) 24 NTLR 15 at 25 [49]; *Hall Contracting Pty Ltd v MacMahon Contractors Pty Ltd* (2014) 34 NTLR 17 at 31 [34].

54 Sections 27 and 28 of the Act.

the application without making a determination of its merits s 33(1)(b) requires the Adjudicator to:

> determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment or return any security and, if so, determine:
>
> (i) the amount to be paid …; and
>
> (ii) the date on or before which the amount must be paid ...

[40] Section 34 imposes certain obligations and confers various powers upon the adjudicator. In particular, the adjudicator must if possible make the determination on the basis of the application and its attachments made under s 28 and a response and its attachments made under s 29 of the Act.

[41] It is well established that the discharge of the duty to determine a payment dispute requires the adjudicator to determine not just the merits of the payment claim which gave rise to the payment dispute, but also any claim to a set-off by the responding party against its asserted liability under the subject payment claim. See for example *Alliance Contracting Pty Ltd v James*[55] at [65] - [66] and *Cooper & Oxley* at [16] - [22]. That determination must be made by reference to the terms of the construction contract including any implied terms (if applicable) and the general law (if applicable) as at the date of the Determination.

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55 [2014] WASC 212 (***Alliance Contracting***).

[42] James Engineering contends that if the Adjudicator failed to take into account ABB's liquidated damages claim and resulting set-off this is merely a mistake of fact and not a jurisdictional error.

[43] ABB contends that the Adjudicator wrongly decided that ABB's claim to set off liquidated damages fell outside the payment dispute he was obliged to determine. It was for that reason that the Adjudicator did not bring the set-off claim to account when purporting to determine "on the balance of probabilities whether any party to the payment dispute is liable to make a payment." He did not assume jurisdiction in relation to the set-off claim and assess James Engineering's liability as at the date of the Determination. He refused to accept it.

[44] We agree with those submissions made on behalf of ABB. That the Adjudicator failed to consider the merits of the set-off claim and wrongly decided that it fell outside the payment dispute that he was required to consider and determine under s 33(1)(b) is clear from the various passages from the Determination that we have quoted and referred to above in relation to Ground 2.

[45] The question for determination now is whether the Adjudicator's failure to exercise this part of his core function required under s 33(1)(b) of the Act amounted to jurisdictional error, and if so whether the Determination was a nullity.

[46] Counsel for James Engineering relied heavily upon a number of decisions in other jurisdictions which also relate to adjudications of disputes of the kind involved in the present matter. However caution needs to be exercised before too readily applying those decisions as many of them concerned statutory provisions that are quite different in material respects to those in the NT Act (and in the WA Act which is very similar to the NT Act).

[47] The High Court has considered the question of jurisdictional error in the context of privative clauses on numerous occasions, more recently in the context of immigration matters and issues of procedural fairness that arise in many of those matters.

[48] In the context of a breach of an obligation by a tribunal to afford procedural fairness there is presently some disagreement between some justices of the High Court as to whether such a breach would only constitute jurisdictional error if the breach of the obligation to afford procedural fairness gives rise to a "practical injustice", namely a denial of an opportunity to make submissions where that denial is "material" to the tribunal's decision.[56]

[49] The broader question as to what constitutes jurisdictional error and whether or not a particular jurisdictional error necessarily results in the quashing of a tribunal's decision was also a point of some discussion in *Hossain v Minister for Immigration and Border Protection*.[57] At [17] Kiefel CJ,

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56 See *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252 (***SZMTA***) per Bell, Gageler and Keane JJ at [38] and [45] - [49] cf Nettle and Gordon JJ at [84] - [95].

57 (2018) 92 ALJR 780 (***Hossain***) primarily by Nettle J at [40] - [43] and Edelman J at [66] - [72].

Gageler and Keane JJ quoted Frankfurter J's description of the term "jurisdiction" as "a verbal coat of too many colours".[58] After referring to other views expressed by Frankfurter J and others, and some earlier decisions of the High Court, their Honours said, at [23] and [24]:

> [23] Jurisdiction, in the most generic sense in which it has come to be used in this field of discourse, refers to the scope of the authority that is conferred on a repository. In its application to judicial review of administrative action the taking of which is authorised by statute, it refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have "such force and effect as is given to it by the law pursuant to which it was made".[59]
>
> [24] Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction.[60] A decision made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law.[61] But a decision made outside jurisdiction is a decision in fact which is properly to be regarded

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58 *Hossain* at [17] quoting *United States v L A Tucker Truck Lines Inc* 344 US 33 at 39 (1952), per Frankfurter J.

59 *Hossain* at [23] quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46].

60 Ibid at 606 [17].

61 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 613 [46]; *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1 at 16 [42].

for the purposes of the law pursuant to which it was purported to be made as "no decision at all".[62] To that extent, in traditional parlance, the decision is "invalid" or "void".[63]

[50] Their Honours then referred to discussion and cases concerning degrees of non-compliance with statutory obligations and materiality, before concluding with the following, at [29] - [31]:

> [29] That a decision-maker "must proceed by reference to correct legal principles, correctly applied"[64] is an ordinarily (although not universally)[65] implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance.
>
> [30] Whilst a statute on its proper construction might set a higher or lower threshold of materiality,[66] the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome",[67] or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was "so insignificant

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62 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 615 [51].

63 *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 157; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 264 [63].

64 *Plaintiff M61/2010E v The Commonwealth of Australia and Others* (*Offshore Processing Case*) (2010) 243 CLR 319 at 354 [78].

65 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248.

66 Cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

67 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 341 [56], quoting *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147. E.g. *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 637-638 [78].

that the failure to take it into account could not have materially affected" the decision that was made.[68]

[31] Thus, as it was put in *Wei v Minister for Immigration and Border Protection*,[69] "[j]urisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act". Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision.

[51] In *SZMTA*, at the start of their discussion about jurisdictional error and in support of their views that jurisdictional error was not limited to those cases where a breach of procedural fairness would lead to "practical injustice" or be "material", their Honours Nettle and Gordon JJ said the following, at [81] – [84]:

[81] The categories of jurisdictional error are not closed.[70] Jurisdictional error by a statutory decision-maker includes identifying a wrong issue; asking the wrong question; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; and failing to observe some applicable requirement of procedural fairness.[71] As McHugh, Gummow and Hayne JJ said in *Minister for Immigration and Multicultural Affairs v Yusuf*:[72]

> "What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material *in a way that affects the exercise of power* is to make an error of law. Further, doing so results in the decision-maker *exceeding the authority or*

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68 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. Cf *Martincevic v Commonwealth* (2007) 164 FCR 45 at 64-65 [67]-[68].

69 (2015) 257 CLR 22 at 32 [23].

70 *SZMTA* at [81] referring to *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (***Yusuf***) at 351 [82]. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [71] and 574 [73].

71 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67]; *Hossain* at 795-796 [70]-[72].

72 (2001) 206 CLR 323 at 351 [82].

powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it." (emphasis added)

[82] In the context of the exercise of statutory powers, the question is whether the decision-maker has exercised, or not exceeded, the jurisdiction conferred by the *statute*. This is because the central premise of jurisdictional error is as articulated by Brennan J in *Attorney-General (NSW) v Quin*:[73]

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise." (emphasis added)

[83] The question, and the answer, as to whether jurisdictional error is made out is thus to be found in the statute.[74] It is by construing the statute that conferred the power, so as to understand the limits of the power, that it is possible to determine whether a decision-maker has made an error, and whether any error is jurisdictional.[75] … A finding of jurisdictional error is a conclusion that the decision-maker has failed to comply with an essential pre-condition to, or limit on, the valid exercise of the particular

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73 (1990) 170 CLR 1 at 35-36.

74 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 372-375 [34]-[41] and 389-391 [92]-[93]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152-154 [43]-[44]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 140 [160]. See also Gageler, "The Legitimate Scope of Judicial Review" (2001) 21 *Australian Bar Review* 279 at 287; Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *Federal Law Review* 217 at 227.

75 See *Project Blue Sky* (1998) 194 CLR 355 at 372-373 [34], quoting *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410; *Hossain* at 794-795 [66]-[67]. See also *Kioa v West* (1985) 159 CLR 550 at 609 and 614.

statutory power. It reflects a distinction between acts unauthorised by law, and acts that are authorised.[76]

[84] What then are the consequences of a finding that a decision is affected by jurisdictional error? The decision is properly to be regarded as no decision at all.[77]

[52] With those general principles regarding jurisdictional error in mind we turn to consider the application of those principles in the context of other authorities concerning adjudications under analogous legislation.

[53] As we have mentioned counsel for James Engineering relied heavily upon a number of authorities in other jurisdictions.[78] Many of those decisions relate to inadequacies in the pleading or particularisation of payment claims or "payment schedules".[79] In some of those cases and other cases referred to by the respondent[80] the errors made by the adjudicators were not jurisdictional errors because they were made by the adjudicator in the course of making a genuine attempt to consider the matters required to be considered under the relevant legislation. Those matters involved the adjudicator doing much more than merely "adverting" to the respondent's

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76 See Selway, "The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues" (2002) 30 *Federal Law Review* 217 at 234.

77 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51] and 616 [53]. See also *Craig v South Australia* (1995) 184 CLR 163 at 179, quoted in *Kirk Industrial Court (NSW)* (2010) 239 CLR 531 at 572 [67].

78 Appellant's Written Submissions filed 21 May 2019 at [98] – [118].

79 See for example *Multiplex Constructions v Luikens* [2003] NSWSC 1140 (***Luikens***) at [62] – [80]; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd* (in liq) (2005) 64 NSWLR 462; *Coordinated Construction Company Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [36]; *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at 44-45; *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 per Finkelstein J at [12]; and *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 313 FLR 163.

80 See for example *Pittwater Council v Keystone Projects Group Pty Ltd* [2014] NSWSC 1791 and *Annie Street JV Pty Ltd v MCC Pty Ltd & Ors* [2016] QSC 268.

response and deciding not to deal with it on its merits as part of the payment dispute, as was the case here.

[54] It is important to note, as we have already observed in relation to the Queensland Act, that there are significant differences between the legislation in other jurisdictions and the NT Act. In short, the NT Act does not include the kind of more proscriptive provisions found in other legislation such as the necessity for a respondent to provide a "payment schedule" and for it to contain assertions and materials in the nature of pleadings.

[55] For example, counsel for James Engineering relied heavily upon the decision of the New South Wales Supreme Court in *Luikens* (Palmer J), primarily in support of their contentions in Grounds 1 and 2 to the effect that ABB's claim to the set-off was not sufficiently raised in the Payment Schedule. The lengthy passages from Palmer J's judgment which they quoted included the following passage in [68]:

> If the respondent had any reason whatsoever for withholding payment of all or any part of the payment claim s 14(3) requires that the reason be indicated in the payment schedule and s 20(2B) prevents the respondent from relying in its adjudication response upon any reason not indicated in the payment schedule. Correspondingly, s 22(d) requires the adjudicator to have regard only to those submissions, which have been 'duly made' by the respondent in support of the payment schedule, that is, made in support of a reason for withholding payment which has been indicated in the payment schedule in accordance with s 14(3).

[56] Like the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the NSW Act**) contains provisions quite different to the NT Act and the WA Act. As appears from the passage from *Luikens* quoted above the legislation in NSW – as does that in Queensland and Victoria[81] - imposes stricter requirements in relation to the making of and responding to a payment claim. For example, those provisions require certain particulars to be effectively pleaded in the initial payment claim and "payment schedule" stages and they preclude the respondent from relying in its adjudication response upon any reason not previously identified in its "payment schedule". On the other hand, the NT Act does not refer to or require a "payment schedule" and expressly requires the adjudicator to take into account the adjudication response served under s 29 of the Act.[82]

[57] However, Palmer J's consideration of and conclusions about another error found in that case appear directly apposite to the situation in the present matter regarding jurisdictional error. Like the present matter, the adjudicator wrongly concluded that he was required to exclude from his considerations submissions and evidence advanced by a respondent to a payment claim.[83] Palmer J concluded, at [81]:

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81 *Building and Construction Industry Security of Payment Act (2002) Act* (Vic) the subject of *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 313 FLR 163.

82 Section 34(1)(a) of the Act.

83 Section 22(2)(d) of the NSW Act is an analogous to s 34(1)(a)(ii) of the NT Act.

> Accordingly, [the adjudicator] failed to take into account matters which s 22(2)(d) required him to take into account and he thereby fell into jurisdictional error.

Following this conclusion, his Honour proceeded to exercise his discretion and to quash the Determination.

[58] In the present matter the Adjudicator failed to appreciate that the set-off claim brought by ABB in response to James Engineering's payment claim could and did fall within the "payment dispute" that he was required to determine under s 33(1)(b) of the Act. This was not a mere omission on his part. He "adverted" to the claim and erroneously decided that it did not form part of the payment dispute that he was required to adjudicate. He misconstrued his statutory obligations. Consequently, he failed to discharge his duty under ss 33(1)(b) and 34(1)(a) of the Act in relation to the payment dispute brought by ABB.

[59] By refusing to consider the set-off claim as part of the payment dispute that he was required to determine under s 33(1)(b), the Adjudicator failed to comply with an essential condition which was required of him in order for him to perform the decision-making process required of him by the Act.[84] This failure materially affected his purported exercise of his power.[85] The non-compliance was "material" as it resulted in the Adjudicator failing to take the set off-into account when performing its core function under

84 Cf *Hossain* at [23] – [24].

85 Cf *Yusuf* at [82].

s 33(1)(b). Had he taken the set-off into account the Adjudicator could have made a different decision.[86]

[60] Those errors were jurisdictional in the same way as were the errors in *Cooper & Oxley* and *Luikens*. They are such that the Determination is a nullity.

Conclusion

[61] The appeal is dismissed. We will hear counsel on costs.

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86 Cf *Hossain* at [30] – [31]. See too *Yusuf* at [82].