

SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v Epoca Constructions Pty Ltd & Anor*
[2006] QSC 324

PARTIES: **STATE OF QUEENSLAND**
(applicant)
v
EPOCA CONSTRUCTIONS PTY LTD
ACN 009 855 332
(first respondent)
PHILLIP DAVENPORT
(second respondent)

FILE NO/S: BS313 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court
Brisbane

DELIVERED ON: 31 October 2006

DELIVERED AT: Brisbane

HEARING DATE: 14 March 2006, 1 June 2006

JUDGE: Philippides J

ORDER: **That the adjudicator’s decision dated 29 December 2005 be set aside (a) in so far as the adjudicated amount made allowance of \$24,351.99 for Site Facilities and (b) in respect of the claims for set-off by the applicant for Reinforced Concrete Wall (\$153,747), Noise Barriers (\$87,640) and Bridge Balustrade (\$39,998), which are referred to the adjudicator for further consideration in accordance with cl 42.10 of the contract.**

The first respondent’s cross application is dismissed.

CATCHWORDS: JUDICIAL REVIEW – REVIEW DECISIONS – decisions to which Judicial Review legislation applies – where the applicant sought judicial review of a decision by an adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld) (“*BCIPA*”) – whether judicial review under the *Judicial Review Act 1991* (Qld) excluded – whether the adjudicator’s decision is of an administrative character so as to be reviewable under Part 3 of the *Judicial Review Act 1991* (Qld)

JUDICIAL REVIEW – GROUNDS OF REVIEW –

GENERALLY – whether the application for judicial review ought to be dismissed in the exercise of discretion under ss 12, 13, 30 or 48 of the *Judicial Review Act*

JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the adjudicator erred in failing to observe the provisions of the *BCIPA* – whether error made by adjudicator in consideration of *BCIPA* and application and construction of the construction contract

Acts Interpretation Act 1954 (Qld) s 14A

Building and Construction Industry Payments Act 2004 (Qld) ss 5, 7, 8, 12 -15, 18 - 33, 99, 100, Part 2, Part 3, Part 6, Schedule 2

Judicial Review Act 1991 (Qld) ss 12, 13, 18, 48, Part 3, Part 5, Schedule 1

Queensland Building Services Act 1991 (Qld) Part 4(a)

Abacus v Davenport [2003] NSWSC 1027

Attorney-General v Breckler (1999) 197 CLR 83

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321

Batemberski v Fitzsimon, [2000] QSC 185

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2003] NSWSC 1019

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421

Chiu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1

Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd [2005] NSWCA 228

Darling Casino Ltd v New South Wales Casino Control Authority (1997) 191 CLR 602

Evans v Friemann (1981) 35 ALR 428

Griffith University v Tang (2005) 221 CLR 99

Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd [2005] NSWSC 1129

JJ McDonald & Sons Engineering v Gall v Gall [2005] QSC 305

Lamb v Moss (1983) 49 ALR 533

Mbuzi v A-G (Qld) & Favell [2006] QCA 381

Mentink v Albietz, Muir J, unreported, No 630 of 1998, BC 9900070

Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140

Musico & Ors v Davenport & Ors [2003] NSWSC 977

Pacific General Securities Ltd v Soliman & Sons Pty Ltd & Ors [2006] NSWSC 13

Precision Data Holdings Ltd v Wills (1991) 173 CLR 167

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Public Service Assn (SA) v Federated Clerks' Union of Australia, South Australian Branch (1991) 173 CLR 132
R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361
Reg v Hegarty; Ex Parte City of Salisbury (1981) 147 CLR 617
Resort Management Services Limited v Noosa Shire Council [1995] 1 Qd R 311
Roadtek, Department of Main Roads v Philip Davenport & Ors [2006] QSC 047
Seymour v Attorney-General (Cth) (1984) 4 FCR 498
Stack v Commissioner of Patents (1999) 161 ALR 531
Stubberfield v Webster [1996] 2 Qd R 211
TransGrid v Walter Construction Group Ltd [2004] NSWSC 21

COUNSEL: Mr R Holt SC and Dr R Schulte for the applicant
 Mr J Bond SC and Mr M Burnett for the respondents

SOLICITORS: The Crown Solicitor for the applicant
 Ebsworth & Ebsworth for the respondents

PHILIPPIDES J:

Background facts

- [1] On 6 January 2005, the applicant, State of Queensland, acting through the Department of Main Roads (“DMR”) entered into a contract with the respondent, Epoca Constructions Pty Ltd (“Epoca”), for the construction of the western arterial bikeway from Fig Tree Pocket Road to the Brisbane River. DMR terminated the contract on 22 August 2005 pursuant to cl 44.4(b) of the General Conditions of the Contract and Epoca ceased work under the contract prior to its completion of the works. The merits of the termination by DMR are irrelevant for present purposes.
- [2] On 14 November 2005, Epoca, pursuing its rights under the *Building and Construction Industry Payments Act 2004* (Qld) (“the *BCIPA*”), delivered to DMR a payment claim for \$1,698,379.21 comprising a number of volumes of material. On 28 November 2005, DMR delivered its payment schedule under the *BCIPA*, asserting that it was not obliged to make any payment to Epoca. On 12 December 2005, an application for adjudication under the *BCIPA* was made by Epoca, with submissions in support of the application also being delivered. On 20 December 2005, DMR delivered its adjudication response. On 29 December 2005, the adjudicator Mr P Davenport delivered his decision, deciding that DMR pay a progress payment under the *BCIPA* in the amount of \$738,293.39 plus interest and the adjudication fee.
- [3] DMR did not pay the adjudicated amount as required by s 29 of the *BCIPA*, but instead filed an originating application successfully seeking interlocutory injunctive relief from Muir J restraining Epoca from taking any step (including taking any action under s 30 and s 31 of the *BCIPA*) to recover the moneys the subject of the adjudicator’s decision until the final hearing of the originating application.

- [4] DMR seeks orders, pursuant to the *Judicial Review Act* 1991 (Qld) (“the *JRA*”), quashing the decision of the adjudicator. Initially it sought orders pursuant to Part 3 of the *JRA*. Epoca raised as a preliminary issue that there is no jurisdiction to grant the relief sought under the *JRA*, submitting that the *BCIPA* by necessary implication excludes the availability of relief under the *JRA* (whether by way of statutory order of review or relief by way of prerogative order). It also raised the issue of whether the adjudicator’s decision was one to which Part 3 of the *JRA* applied.
- [5] Consequently, DMR amended its application, so as to advance three alternative claims for relief; a statutory order of review under Part 3 of the *JRA*, an order for review under Part 5 of the *JRA*, and a declaration that the decision of the adjudicator is void. Epoca filed a cross-application, upon which it sought to rely if there was jurisdiction to grant relief under the *JRA*, seeking that the Court exercise its discretion pursuant to s 48 (or alternatively s 12 or s 13) of the *JRA* to dismiss DMR’s application without considering its alleged merits. But in any event, Epoca contended that the claims for relief under the *JRA* and for declaratory relief should be dismissed on their merits.

The scheme of the *BCIPA*

- [6] The *BCIPA* commenced operation on 1 October 2004. It is in largely similar terms to the New South Wales precursor, the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (“the NSW Act”). The object of the *BCIPA* is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person undertakes to carry out construction work (or undertakes to supply related goods and services) under a construction contract: s 7. Section 8 of the *BCIPA* provides that the statutory object is achieved firstly, by granting an entitlement to progress payments whether or not the relevant contract makes provision for them (see s 8(a) and the regime set up under Part 2 of the *BCIPA*). Secondly, a statutory procedure for the recovery of progress payments is established that involves the making of a “payment claim”, the provision of a “payment schedule” in response, the referral of disputed claims to an adjudicator for decision and the payment of progress payments as decided by the adjudicator (see s 8(b) and Part 3 of the *BCIPA*).
- [7] Part 2 of the *BCIPA* thus establishes the regime by which a statutory right to progress payments is created. “Progress payment” is defined in Schedule 2 as meaning a payment to which a person is entitled under s 12 and includes final payments, one-off payments and milestone payments. By s 12, a person is entitled to a progress payment “from each reference date under a construction contract”. “Reference date” is defined in Schedule 2 as meaning the date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made. In default of provision being made in the contract, the reference date is the last day of the first month in which the work was carried out and the last day of each later month.
- [8] By s 13, the amount of a progress claim to which a person is entitled is the amount calculated under the contract or, if the contract does not provide for the matter, the amount calculated in accordance with the valuation regime specified in s 14. Section 15 provides that a progress payment becomes payable as provided for in the contract and that where no provision is made or the provision is void, the progress payment becomes payable ten days after a payment claim is made. Section 16 renders void “pay when paid” provisions.

- [9] As mentioned the statutory procedure for recovering progress payments is contained in Part 3 of the *BCIPA*. It sets up a procedure for the serving of a “payment claim”, by a person who is or who claims to be entitled to a progress payment (a claimant) on the person who is or may be liable to pay the payment claim (a respondent). Section 17 specifies formal requirements for such a claim, eg that a payment claim must identify the construction work to which the progress payment relates and specify the claimed amount. The *BCIPA* contemplates that the respondent will respond to the payment claim by specifying in a “payment schedule” the amount it proposes to pay, “the scheduled amount”, and stating why it disputes the payment claim: s 18. The procedural course under the *BCIPA* is contingent on the nature of the response by the respondent to service of the payment claim.
- [10] If the respondent does not serve a payment schedule on the claimant within the prescribed time, the respondent becomes liable to pay the claimed amount on the due date for the progress payment to which the payment claim relates: s 18(5). If that liability is not met, the claimant may choose between either suing in court to recover the unpaid amount as a debt due and owing, or pursuing an “adjudication application” under the *BCIPA*: s 19(1), (2). If the claimant proceeds in court, the respondent is not entitled in those proceedings to bring any counterclaim or raise any defence in relation to matters arising under the contract: s 19(4). If the respondent does serve a payment schedule, but does not pay the scheduled amount within the prescribed time, the claimant has, by virtue of s 20, the same choices and the respondent is subject to the same constraints where proceedings are brought to set aside judgment: s 20(4).
- [11] The manner in which adjudication applications are to proceed is provided for in s 21 to s 32. Tight time periods are set out for the making and responding to the application: s 21 and s 24. The requirements for a proper application and response are specified. A respondent may give an adjudication response only if it served a payment schedule within the prescribed timeframe: s 24(3). Furthermore, a respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule served on the claimant: s 24(4).
- [12] Tight time constraints within which the adjudicator must decide the application are also imposed; unless he obtains agreement of both claimant and respondent he must decide the adjudication within 10 business days after the earlier of receiving the adjudication response or the date on which the response should have been received: s 25. The matters which the adjudicator is to consider are the subject of prescription. They are specified as the provisions of the *BCIPA* (and to the extent relevant, Part 4A of the *Queensland Building Services Act 1991*), the provisions of the construction contract from which the application arose, the payment claim and payment schedule, together with submissions and relevant documentation in support of each and the results of any inspection carried out: s 26(2). The adjudicator’s decision must be in writing and include reasons unless the parties have asked that reasons not be included: s 26(3).
- [13] The respondent is required to pay the adjudicated amount within a prescribed period: s 29. A default in payment of all or part permits the claimant to obtain an adjudication certificate: s 30. That certificate may be filed as a judgment for a debt and may be enforced in a court of competent jurisdiction: s 31. (It was the taking of these steps which was restrained by the interlocutory injunction granted by Muir J in the present case). While a respondent may commence proceedings to have the judgment based on the adjudication certificate set aside, by s 31(4) it is precluded from challenging the

adjudicator's decision, counter-claiming or raising a defence under the contract in those proceedings. Section 31 provides:

“31 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt, and may be enforced, in a court of competent jurisdiction.
- (2) An adjudication certificate can not be filed under this action unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid at the time the certificate is filed.
- (3) If the affidavit states that part of the adjudicated amount has been paid, the judgment is for the unpaid part of the amount only.
- (4) If the respondent commences proceedings to have the judgment set aside, the respondent –
 - (a) is not, in those proceedings, entitled –
 - (i) to bring any counterclaim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge the adjudicator's decision; and
 - (b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final decision in those proceedings.”

[14] There are two remaining provisions which are contained in Part 6 of the *BCIPA* which require mention and which clarify how the *BCIPA* impacts on contractual rights and remedies. Section 99 of the *BCIPA* provides:

“99 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract, agreement or arrangement.
- (2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it -
 - (a) is contrary to this Act; or
 - (b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or
 - (c) may reasonably be construed as an attempt to deter a person from taking action under this Act.”

[15] Section 100 of the *BCIPA* provides:

“100 Effect of pt 3 on civil proceedings

- (1) Subject to s 99, nothing in part 3 affects any right that a party to a construction contract -
 - (a) may have under the contract; or

- (b) may have under part 2 in relation to the contract; or
 - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.
- (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal -
- (a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
 - (b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.”

Is judicial review under the *JRA* available in respect of an adjudication decision made under the *BCIPA*?

- [16] On behalf of Epoca it was submitted that judicial review under the *JRA* is excluded in respect of a decision of an adjudicator made under the *BCIPA*. In contending that an adjudicator’s decision is not subject to judicial review under the *JRA*, Epoca acknowledged that the Courts have repeatedly emphasised the presumption that the legislature does not intend to deprive citizens of their right to access to the courts, other than to the extent expressly stated or necessarily implied.¹
- [17] However, relying on the purposive interpretation of the *BCIPA*, required by s 14A of the *Acts Interpretation Act 1954* (Qld), Epoca argued that the purpose and scheme of the *BCIPA*, including the regime set up for ensuring swift determination and payment of progress payments and provisions such as s 31(4), s 99 and s 100 led to the conclusion that the availability of judicial review under the *JRA* is excluded by necessary implication.
- [18] In making this submission Epoca placed particular reliance on the decision of the New South Wales Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*,² contending that this court ought to follow the reasoning in that case and to conclude that the legislative intention disclosed by the *BCIPA* is so inconsistent with the availability of relief under the *JRA*, that a necessary intention to exclude it from the ambit of the *JRA* is apparent. The submission made was that the role of the court should be regarded as necessarily limited in the manner outlined in *Brodyn*, which it was said determined that relief was confined to relief by way of declaration or injunction where an adjudication did not meet the pre-conditions for a valid determination.

¹ See *Public Service Assn (SA) v Federated Clerks’ Union of Australia, South Australian Branch* (1991) 173 CLR 132 at 160; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 633.

² (2004) 61 NSWLR 421 at 440-442.

- [19] In *Brodyn*, Hodgson JA (with whom Mason P and Giles JA agreed), examined the availability of judicial review by means of relief in the nature of certiorari under the general provisions of s 69 of the *Supreme Court Act 1970 (NSW)* in respect of adjudications made under the NSW Act. The equivalent of s 31(4) of the *BCIPA* was held not to preclude the making of an order setting aside the determination or declaring it to be void, even where an adjudication certificate has already been filed as a judgment.³ However, Hodgson JA concluded that, notwithstanding the absence of a traditional privative clause, the scheme of the NSW Act appeared strongly against the availability of judicial review on the basis of non-jurisdictional error of law.⁴ In this regard, Hodgson JA agreed⁵ with the conclusion of McDougall J in *Musico v Davenport*⁶, stating:

“The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) [s 5 *BCIPA*] and s 32 [s 100 *BCIPA*]. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) [s 8 *BCIPA*] and s 25(4) [s 31(4) *BCIPA*]. The remedy provided by s 27 [s 33 *BCIPA*] can only work if a claimant can be confident of the protection given by s 27(3): if the claimant faced the prospect that an adjudicator’s determination could be set aside on any ground involving doubtful question of law, as well as fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap.”

- [20] Applying the test in *Project Blue Sky Inc v Australian Broadcasting Authority*⁷, his Honour considered that the legislative intention pointing to the exclusion of judicial review for non-jurisdictional error of law also justified the conclusion that the legislature did not intend that exact compliance with the more detailed requirements of s 22(2) of the NSW Act (the equivalent of s 26(2) of the *BCIPA*) were essential pre-conditions for a valid determination. It was sufficient to avoid invalidity if an adjudicator only considered the s 22(2) matters as the provision required or bona fide addressed them. Hodgson JA thus rejected an approach which distinguished between review for jurisdictional as opposed to non-jurisdictional error, preferring an approach based on a consideration of what were the essential pre-conditions specified by the legislation for a valid adjudication.⁸
- [21] As Brereton J observed in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*,⁹ *Brodyn* appears to hold that a remedy in the nature of certiorari is

³ *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at [40] – [42], [61].

⁴ *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at [51]; *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [38].

⁵ (2004) 61 NSWLR 421 at [51].

⁶ [2003] NSWSC 977. See also *Abacus v Davenport* [2003] NSWSC 1027; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140; *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21.

⁷ (1998) 194 CLR 355 at 390-391.

⁸ *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at [54].

⁹ [2005] NSWSC 1129 at [38]. See also *Pacific General Securites Ltd v Soliman & Sons Pty Ltd & Ors* [2006] NSWSC 13 at [84].

not available in respect of an adjudication determination, except where it is void by reason of the types of defect which the broadest privative clause would not save; that is where the adjudicator fails to comply with the basic and essential requirements prescribed by the legislation for there to be a valid determination. In *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd*¹⁰ Baston JA remarked that the approach in *Brodyn* in positing the relevant question as “whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination” reflects the concept of “jurisdictional error” under the general law.

[22] While *Brodyn* considered the extent of judicial review available, in particular in the nature of certiorari, in respect of an adjudicator’s decision under the NSW Act, it is not of assistance to the distinct issue of whether the *BCIPA* is excluded from the ambit of the *JRA*. The decision in *Brodyn* was made in the context of there being no corresponding *JRA*. I do not consider that the reasoning in *Brodyn* can be applied to the interaction of the two pieces of legislation under consideration in the present case. In this regard, Epoca’s submissions face an insurmountable obstacle.

[23] The *JRA* provides in s 18 as follows:

“(1) This Act has effect despite any law in force at its commencement.

(2) However, this Act does not -

- (a) affect the operation of an enactment mentioned in schedule 1, part 1; or
- (b) apply to decisions made, proposed to be made, or required to be made, under an enactment mentioned in schedule 1, part 2.”

[24] The *BCIPA* does not expressly exclude review under the *JRA*. The *BCIPA* does not contain, in s 31(4) or any other provision, a privative clause excluding judicial review under the *JRA*. And in any event, the *BCIPA* is not included in Part 1 of Schedule 1 to the *JRA* as an enactment that precludes review. Nor is it included in Part 2 of that Schedule as an enactment to which the *JRA* does not apply.

[25] The consequence flowing from the regime provided in s 18 was in my view correctly identified by Dutney J in *JJ McDonald & Sons Engineering v Gall*¹¹, which concerned an application for judicial review of an adjudicator’s decision made under the *BCIPA*. His Honour, having concluded that an adjudicator’s decision was both a “decision” and “made under an enactment”, held it was subject to judicial review under the *JRA*. His Honour observed:

“In so finding, I should express my view that unless decisions under this legislation are excluded from the operation of the Judicial Review Act the benefit of prompt periodic payments to contractors, which is the stated purpose of the Act, is likely to be defeated by applications for review which serve the purpose of preventing the contract to taking early advantage in a favourable determination. Despite this concern, it is not a matter which can be permitted to

¹⁰ [2005] NSWCA 228.

¹¹ [2005] QSC 305.

influence my conclusion as to the present applicability of the remedy the Judicial Review Act provides.”

- [26] Epoca contended that s 18 of the *JRA* ought not to be viewed as a code and that an intention to exclude the rights of judicial review may, notwithstanding the mechanism of s 18, be found by necessary implication in the *BCIPA*. But given that the *JRA* specifically provides a mechanism by s 18 whereby legislation may be excluded from the scope of rights of review set up by the *JRA*, one would expect a legislative intention to exclude judicial review to be indicated in accordance with that mechanism.¹² In those circumstances, I do not consider that the *JRA* is excluded by necessary implication.

Whether the adjudicator’s decision is reviewable under Part 3 of the *JRA*

- [27] Section 20 of the *JRA* provides that a person who is aggrieved by “a decision to which this Act applies” may apply for a Part 3 statutory order of review. But in addition, Part 5 of the *JRA* although abolishing recourse to the prerogative writs of mandamus, prohibition and certiorari, substitutes for those prerogative writs “relief or remedy” to the same effect, which together with declarations and injunctions, may be obtained from the Supreme Court on an “application for review”: s 41 and s 43.
- [28] Section 4 of the *JRA* defines the phrase “decision to which this Act applies” as meaning “a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion)”. While Epoca accepted that an adjudicator’s decision was a “decision” and made “under an enactment” for the purposes of the *JRA*, it contended that it was not one to which Part 3 of the *JRA* applied, because it was not a decision of “an administrative character”.
- [29] The evident purpose of the expression “of an administrative character” is the exclusion of decisions of a “legislative” or “judicial” character from review under Part 3.¹³ The statutory requirement for review under Part 3 that the decision in question be of an administrative character ought not to be given a narrow or technical construction.¹⁴ In determining whether a decision has an “administrative character” it is necessary to look at the decision in question rather than the subject matter and the legislative context in which the decision is actually made.¹⁵
- [30] The difficulties in distinguishing between decisions that are of a judicial as opposed to executive nature are well known. The line between the two is a blurred one. The making of binding determinations of right by way of adjudication of disputes about rights and obligations arising from the operation of law upon past events or conduct is a classical instance of the exercise of judicial power.¹⁶ An often cited description of judicial power was stated by Kitto J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*:¹⁷

¹² This course has been adopted in respect of decisions of the District Court: see *Mbuzi v A-G (Qld) & Favell* [2006] QCA 381 at [5] and the discussion therein of *Stubberfield v Webster* [1996] 2 Qd R 211.

¹³ *Griffith University v Tang* (2005) 221 CLR 99 at 123.

¹⁴ *Resort Management Services Limited v Noosa Shire Council* [1995] 1Qd R 311 at 317.

¹⁵ *Evans v Friemann* (1981) 35 ALR 428 at 435.

¹⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 67.

¹⁷ (1970) 123 CLR 361 at 374.

“... judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.”

- [31] A hallmark of a judicial function is whether the performance of function terminates in a determination that has conclusive effect.¹⁸ The decision of the adjudicator as to a progress payment is not a final and authoritative decision. The adjudicator does not decide questions of fact and law once and for all. As Einstein J said in *Brodyn Pty Limited t/as Time Cost and Quality v Davenport*:¹⁹

“What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution *critically* does not determine the parties’ rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That claw back route expressly includes the making of restitution orders.”

- [32] Notwithstanding that failure to pay an adjudicated amount may result in an adjudication certificate being issued, which may be filed as a judgment of the court, s 100 enshrines the interim nature of the adjudicator’s decision by preserving the parties’ rights to the processes of the courts to determine the issue of ultimate entitlement to retain the adjudicated amount. The lack of conclusiveness of an adjudicator’s decision and the fact that it is susceptible to attack in collateral curial proceedings is an important indication that the adjudicator’s decision is not of a judicial character.
- [33] A further indication as to the character of the decision may be gleaned from the way in which the adjudicator exercises his powers.²⁰ A function may be characterised as judicial where it is exercised in accordance with the judicial process.²¹ The following are significant in that regard. The adjudication proceeds on the basis of the material put before the adjudicator in accordance with Part 3 of the *BCIPA* and there is no provision for the calling and cross examining of witnesses. While an adjudicator may call a conference of the parties and may carry out an inspection, it must be conducted informally and parties are not entitled to any legal representation: s 25(4). There is

¹⁸ Evans, J.M., *De Smith’s Judicial Review of Administrative Action*, 4th ed, Stevens & Son Limited, 1980 at pp 81-82.

¹⁹ [2003] NSW SC 1019 at [14].

²⁰ *Reg v Hegarty; Ex Parte City of Salisbury* (1981) 147 CLR 617 at 628.

²¹ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

thus little scope for factual inquiry and a consequent finding of fact in a judicial sense by the adjudicator. Further, while there is some echo in the procedures set out in the *BCIPA* (for a payment claim, payment schedule, submissions and adjudication response) of the procedure for pleadings in a court, it is somewhat faint. And there is little by way of the judicial trappings or other indicia associated with exercise of a judicial power.

- [34] Moreover, legal qualifications are not a prerequisite for appointment as an adjudicator. Section 60 prescribes the criteria for appointment as the holding of an adjudication qualification (defined in Schedule 2 as a certificate of achievement of an adjudication competency standard prescribed under a regulation) or equivalent qualification.
- [35] A consideration of the factors mentioned points to the conclusion that an adjudicator's decision is a decision of an administrative character and thus one to which Part 3 applies.

Discretionary dismissal under the *JRA*

- [36] By its cross application, Epoca contended that the present case was one where the court in the exercise of its discretion ought to refuse to grant judicial review under the *JRA* without a consideration of the merits. In passing I note that Epoca did not strongly press its submissions that the discretion under s 12 and s 13 of the *JRA* was enlivened. On that issue, I accept DMR's submissions that although the subsequent civil proceedings open to a disappointed respondent may entail a revisiting of the adjudicator's decision, they cannot be said to amount to a "review" of that decision for the purposes of s 12 and s 13. Rather Epoca placed primary reliance on the discretion in s 30 and s 48 of the *JRA*.
- [37] On behalf of Epoca, it was submitted that guidance as to the construction of the broad discretion conferred by s 30 and s 48(1)(a) may be had from s 16(1) of the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*,²² and a series of decisions,²³ which have construed that provision as conferring a wide discretion as to whether or not to grant relief, even where a basis of relief is established. Section 48(1)(a) of the *JRA* provides that an application under Part 3 or Part 5 may be dismissed if the court considers that it would be inappropriate for proceedings in relation to the application or claim to be continued or to grant the application or claim.
- [38] In submitting that the court ought to exercise its discretion to dismiss the DMR's application without a consideration of the merits, Epoca reiterated the matters previously relied upon in respect of its submission that relief under the *JRA* was impliedly excluded by the *BCIPA*. Epoca contended in particular that the availability of the usual processes of the Court (or an arbitration pursuant to dispute resolution procedures in the contract) to determine the question of ultimate entitlement to retain moneys paid under the *BCIPA* should be regarded as an adequate remedy for a respondent disappointed in the outcome of the adjudication process.

²² Section 16 of the *JRA* indicates that the ideas embodied in the *JRA* are to be interpreted in the same way as the ideas embodied in the Commonwealth Act.

²³ *Lamb v Moss* (1983) 49 ALR 533 at 549, *Seymour v Attorney-General (Cth)* (1984) 4 FCR 498, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 338, *Stack v Commissioner of Patents* (1999) 161 ALR 531 at 536. See also as to s 30 of the *JRA*: *Batemberski v Fitzsimon* [2000] QSC 185 and *Mentink v Albietz*, Muir J, unreported, No 630 of 1998, BC 9900070.

[39] However, in my view those considerations do not result in the conclusion that DMR's application is "inappropriate" in the s 48 *JRA* sense, with the result that the Court should dismiss the application without a consideration of the merits of DMR's claims. Nor do I consider that it is appropriate to dismiss DMR's application in the exercise of the discretion under s 30 without a consideration of the merits.

[40] I therefore turn to deal with the errors alleged to have been made by the adjudicator.

Grounds of review

(a) The alleged failure by the adjudicator in breach of s 26 (2)(b) of the *BCIPA* to consider provisions of the Act.

(i) Reference Date

[41] It is said that the adjudicator failed to determine the question of entitlement to a progress claim by reference to the "reference date" as required by s 12 of the *BCIPA*. That was not an issue in dispute before the adjudicator and it was not articulated how the failure to refer to a reference date impacted on the quantification of Epoca's claim or why there would have been a different outcome if the issue had been specifically addressed. I can see no basis for the contention that there was reviewable error in the circumstances.

(ii) Noise Barriers (Item 6213.01) - \$59,615.97

[42] The payment claim identified this claim as a claim for partial completion of works included within the agreed schedule of rates (as part of the portion 1 claim). The DMR's payment schedule identified the reason for withholding payment simply as "no work done". The adjudicator stated at p14:

"In the adjudication application ... the claimant says that this is incorrect. In the adjudication response, the respondent acknowledges that this is so and provides a different explanation for withholding payment. The respondent is not entitled to rely upon these additional reasons for withholding payment [s 24(4) of the Act]. Since the respondent's reason (in the payment schedule) for withholding payment is not valid, I am satisfied that the respondent has no valid reason for withholding payment for the claimed amount."

[43] The adjudicator correctly identified that DMR was precluded by s 24(4) of the *BCIPA* from relying on additional matters in its adjudication response that were not raised in the payment schedule. DMR's complaint is essentially that, having rejected its contentions, the adjudicator was required to assess the construction work carried out independently and value it but failed to do so. Epoca argues that the adjudicator was entitled to accept the uncontested valuation material which Epoca had put before him and, in the circumstances, detailed reasons were not required in the circumstances. I accept Epoca's submissions that the adjudicator interpreted the DMR's adjudication response as conceding that it was incorrect to say that no work had been done and correctly refused to allow the additional and different rationale for withholding payment. The adjudicator was entitled to accept the valuation put forward by Epoca and adequately revealed his reasons for the decision reached in this regard. I do not

consider that in the circumstances there was any reviewable error in the adjudicator's approach.

(iii) *Portion 3 – Post termination contract- Reinforced Concrete Wall, Noise Barriers and Bridge Balustrade etc - \$31,224.07*

- [44] Epoca's payment claim included claims for items under "Portion 3" which referred to amounts said to be payable in accordance with agreements reached, following DMR's termination of the contract, for materials, equipment and pre-existing traffic management arrangements which were transferred by Epoca to DMR to allow it to complete the works. The adjudicator allowed either totally or in part five of the 10 items claimed under this head. Except in one minor respect, the adjudicator in allowing the five claims, acted on the valuations specified by DMR in its payment schedule. In respect of two of the items, DMR's payment schedule admitted liability.
- [45] DMR's complaint is that the adjudicator erred in valuing these separate items with the claims under the construction contract. However, there was no submission in the payment schedule by DMR that the adjudicator could not determine the payment claim in respect of these items because they were referable to separate agreements. It is apparent that the adjudicator and the parties proceeded on the basis that the claims were made under separate agreements post termination. Epoca was entitled to present its claims for these items as payment claims because it claimed to be entitled to "progress payments" in respect of works which were "construction work" (as defined) under contracts which were each a "construction contract" (as defined). I do not consider that there is any substance in this ground of review.

(b) The alleged failure by the adjudicator to have regard to the contract

(i) The Method of Calculation

- [46] DMR submitted that the adjudicator failed to consider the terms of cl 42.1 as required by s 13 of the Act. In his reasons (pp 5-6), the adjudicator stated:

"The Contract provides in clause 42.1 for the making of progress claims, the issue of progress certificates and the amounts of the progress payments. ... Neither party relies upon clause 42.1. ... Since neither party relies on an express provision of the Contract for the calculation of the amount of the progress payment, section 13[b] provides that the amount is to be calculated 'on the basis of the value of construction work carried out or undertaken to be carried out'."

- [47] DMR complained that the adjudicator erred in the approach he took to cl 42.1 and did not give any reasons to support the view that he was entitled to act in accordance with s 13(b) of the *BCIPA*, that is, on the basis that the contract did not provide for the matter. It maintained that an absence of reliance by DMR on cl 42.1 did not absolve the adjudicator from the duty to consider the terms of the contract so as to ascertain whether it contained provisions relevant to calculation. DMR sought to argue that compliance was a condition precedent to payment under cl 42.1 of the contract. It was contended that the adjudicator failed to consider whether there was evidence of conformance as required by cl 42.1 and whether Epoca had discharged the onus on it in that regard.

[48] Epoca argued the provisions of the *BCIPA* operated to permit Epoca to advance a payment claim and eventually have it valued under the adjudication provisions, notwithstanding that by the time the payment claim was submitted the contract had already been terminated and that cl 42.1 did not in its terms regulate the valuation of such work.

[49] It is apparent that the adjudicator had regard to the schedule of rates in calculating the value of the claims and DMR did not advance in its payment schedule the contention based on cl 42.1 now sought to be made, that is, that the relevant claims by Epoca were to be disallowed in their entirety because conformity was a contractual condition precedent to any payment entitlement. The statement of Mackenzie J in *Roadtek, Department of Main Roads v Philip Davenport*²⁴ with which I respectfully agree is relevant here, that is that “it should it be permissible to raise in judicial review proceedings, an issue of law affecting the value of the claim which could have been raised in the way contemplated by the Act, but was not, even if the adjudicator is arguably wrong”. The issue of non-conformity was raised by DMR in its payment schedule in the context of the calculation of the actual valuation to be given to the work in question.

[50] This is apparent from the manner in which the following claims were dealt with.

(ii) *Bikeway Pavement (Item A9001.01) - \$51,376*

[51] The claim for \$51,376 related to a bikeway pavement of 988 square metres and was calculated in allowance with the schedule of rates which provided for \$52.00 per square metre for “concrete bikeway path – 125mm thick”. In the payment schedule DMR accepted that 966 square metres of the path had been constructed but allowed nothing because it was said to be non-conforming. In this regard the payment schedule stated: “No approved concrete and quality issues – substantial breach of contract – value? Refer sheet and photo attached.”

[52] The adjudicator referred to the supporting information to the payment schedule in critical terms as “a hand written unsigned calculation which is meaningless to me and some very poor photographs which have no explanation attached and convey nothing to me” (p 12). DMR relied on further material in its adjudication response, including a technical report, to support its contentions including the claim that the concrete mix was non-conforming. The adjudicator in his reasons noted the dispute as to whether the work was conforming or not and the additional material provided in the adjudication response. The adjudicator stated (p 12):

“The respondent has apparently not yet determined whether the concrete laid will have to be removed. The respondent’s reason for withholding payment is essentially that in the absence of certain test information, the respondent does not know whether the concrete is defective. ... On the information provided by the respondent I am not prepared to accept that the concrete laid is worthless or that the area of path laid is less than claimed by the claimant and I have nothing from which I can arrive at a valuation less than claimed by the claimant. Consequently for the purpose of an interim payment, I am prepared to accept the claimant’s valuation.”

²⁴ [2006] QSC 047 at [15].

- [53] It is apparent that the adjudicator was not prepared to conclude that the work was non-conforming nor that it was worthless. The adjudicator was entitled to reach a view on the evidence before him as to whether there was merit in the argument concerning non-conformity and resolved that issue against DMR and valued the claim accordingly explaining his reasons for doing so. I do not consider that that approach was not open to him or that the decision concerning the claim for the bikeway pavement revealed error.

(iii) Electrical Conduits (Item D6511.01P) - \$6,222

- [54] DMR's complaint concerning the electrical conduits claim is similar to the complaint concerning the bikeway pavement claim. In respect of this item Epoca made a claim for additional works by way of variation of the original tender scope requirements. It claimed it engaged a licensed electrical subcontractor to carry out the installation of the varied works and claimed an entitlement to the "properly measured and substantiated completed scope with minor addition from previously agreed quantum of completed work".
- [55] Epoca claimed \$12,444 (based on a rate of \$17 per metre for 732 metres). DMR allowed the amount of \$6,222 in its payment schedule (based on the same manner of quantification but for half the claim, ie 366 metres). The payment schedule for this item stated: "No certification by registered electrical supervisor. Refer documentation attached. Allow 50% rework to make conforming and obtain certificate."
- [56] In his reasons (p 11), the adjudicator stated:

"The respondent attaches section MRS 11.91 of the Specification. Clause 2.2 provides that the quantity of the item will be measured according to the conduit length. I accept the claimant's contention [Appendix 01 Part 03 of the adjudication application] that the claimant should not be expected to obtain certification before the work was complete.

There is nothing to justify adopting an estimate of 50% as the respondent has done. The respondent has not provided any estimate of the cost of obtaining certification and has not provided details of any rework or how the estimate of 50% is calculated. The respondent has not disputed that the claimant has installed the length for which the claimant claims payment. In absence of evidence to enable me to verify the reasonableness of the respondent's deduction of 50% of the scheduled rate, I accept the claimant's assessment and allow the claimant an additional \$6,222."

- [57] The adjudicator was clearly not prepared on the basis of the material to determine the issues as to conformity against Epoca and to reduce the claim in the manner contended for by DMR. It was open to the adjudicator to take that view.

(iv) The Retention

- [58] DMR submitted that the adjudicator erred in law by failing to consider the operation of cls 5 and 42.3 of the contract providing for retention moneys to be withheld and that,

as a result, he has determined the amounts to be payable to Epoca without any consideration of or calculation of the deduction of retention pursuant to those clauses.

- [59] There is nothing in the adjudicator's decision to suggest that he gave consideration to either cls 5 or 42.3. It was apparent from the documentation provided with the payment schedule that retention moneys had been deducted under the contract and it was contended by DMR that the failure to consider cls 5 and 42.3 of the contract constituted a failure to consider relevant provisions of the contract. In making that submission DMR relied on *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*,²⁵ although it is to be observed that the payment schedule in that case, unlike the present case, raise the issue of retention moneys.
- [60] It was clear from the calculations set out in Epoca's payment claim and submissions that no allowance had been made by Epoca for the retention moneys. Yet neither the DMR's payment schedule, nor its adjudication response, included as a reason for withholding payment any submission in relation to retention and neither identified the retention moneys. The issue concerning the deduction of retention moneys was raised for the first time in the present application. In those circumstances I do not consider that the adjudicator erred in failing to have regard to clauses in the contract relating to retention, when that was not a matter raised by the parties.

(v) *Site Facilities (Item A1101.01S) - \$24,351.99*

- [61] Epoca claimed the lump sum of \$62,441 in the schedule of rates for contractor's site facilities in its payment schedule. Clause 5 of the Standard Specifications MRS 11.28 to the Contract provided for payment in three stages. DMR reduced the allowance for this item from 100 per cent to 61 per cent, being \$38,089.01. It allowed 40 per cent under cl 5.2 for establishment in respect of the first three payment certificates (the first stage), 21 per cent under cl 5.3 for operation and maintenance and nothing of the possible 10 per cent under cl 5.4 for disestablishment. The adjudicator rejected DMR's calculations limiting the claim to 61 per cent and allowed the difference of \$24,351.99.
- [62] The error complained of concerning this item is that the adjudicator failed to have regard to or alternatively to properly construe cls 5.3 and 5.4 so that there was error in his decision in respect of both the progressive entitlement and the disestablishment entitlement.
- [63] The adjudicator's reasons (pp 9-10) for allowing Epoca's claim are as follows:

“The respondent provides in the payment schedule details of how the respondent calculates the respondent's allowance. Clauses 5.2 and 5.4 of part MRS11.28 provides how the lump sum is to be paid by instalments in progress payments. In the respondent's calculation the respondent allows the 40% payable with the first three payment certificates but fails to allow the 10% payable on disestablishment. The claimant has disestablished from site and is entitled to this 10%.

Clause 5.2 deals with payment of the 40%. Clause 5.4 deals with payment of the 10%. Clause 5.3 appears to be intended to deal with payment of the remaining 50%. It would have been simple for the

²⁵ [2005] NSWSC 1129 at [59], [60]

clause to provide that payment of the remaining 50% is to be paid by equal instalments with Payment Certificates numbers 4 to 10. Instead clause 5.3 provides a formula which does not make sense.

Clause 5.3 provides:

Provided that the Contractor is fulfilling all its obligations under the Contract, each Payment Certificate after the third Payment Certificate shall include a percentage of the lump sum amount for the item until a total of 90% of the lump sum amount has been paid. The aggregate percentage entitlement shall be calculated as follows:

$$E = \frac{(C-3) \times 50}{N-3}$$

Where

E = aggregate percentage entitlement;

C = Payment Certificate number; and

N = anticipated number of Payment Certificates as determined from the Date of Acceptance of Tender to the date for Practical Completion

The term “aggregating percentage” is not defined. It is not clear what it means. The definition of ‘N’ is ambiguous. The respondent (in the calculation in payment schedule) allows 10 as the anticipated number of Payment periods. The calculation which the respondent makes is:

$$\frac{(6-3) \times 50}{10-3} = 21\%$$

The respondent adds 21% to 40% to get 61%. However, this is not what clause 5.3 provides. Moreover, the respondent says that the Contract was terminated prior to Payment Certificate No. 7. Therefore, if there was a Payment Certificate for the present payment claim, it would have to be at least Payment Certificate No. 7. The clause does not deal with the situation where the Contract is terminated and where a Payment Certificate is not issued.

I am not satisfied that the respondent has correctly calculated the claimant’s entitlement. The claimant is not now required to provide anymore site establishment and has left the site. It seems to me that the claimant’s site establishment is complete and the claimant is entitled to the amount claimed.”

[64] Contrary to the adjudicator’s view, cl 5.3 was not ambiguous. In that clause, “N” was defined as “the anticipated number of Payment Certificates as determined from the Date of Acceptance of Tender to the date for Practical Completion”. The Letter of Acceptance which was in the material before the adjudicator specified the date of acceptance of the tender as 8 October 2004 and the date for practical completion as 4 August 2005. The material also indicated that payment claims were monthly with the first payment claim being due one month after the date of acceptance of the tender. The anticipated number of payment certificates was therefore 10. The adjudicator’s

reasoning therefore reveals error in the construction of cl 5.3 and a failure to have regard to the fact that payment under cl 5.3 was qualified by the words “provided that the contractor is fulfilling all its obligations under the contract”. Likewise, cl 5.4 allowed 10% for disestablishment provided the contractor fulfilled all its obligations under the contract for disestablishment.

- [65] I do not accept Epoca’s contention that any error in construction of cls 5.3 and 5.4 was irrelevant because the provisions did not apply to a valuation exercise carried out after the contract was terminated. Accordingly, the decision to allow the additional \$24,351.99 claimed by Epoca is set aside.

(c) The alleged errors in the construction of the contract

(i) DMR’s Damages Claim – Clause 42.10

- [66] DMR submitted that the adjudicator made an error of law in the construction of cl 42.10. DMR sought to set-off a claim for damages as a result of the termination of the contract under cl 44.4(b). Clause 44.10 provides that if the contract is terminated under cl 44.4(b) the rights and liabilities of the parties were the same as they would have been at common law had the defaulting party repudiated the contract and the other party elected to treat the contract as at an end and recover damages.

- [67] Clause 42.10 permits the deduction from moneys due to Epoca of any debts owing to DMR and also “any claim which the Principal may have against the Contractor –
- (a) whether or not the debt or claim arises by way of damages, debt, restitution or otherwise; and
 - (b) whether or not the factual basis giving rise to the debt or claim arises out of this Contract or any other contract or is independent of any contract”

- [68] In its payment schedule (para 43), DMR asserted an entitlement to damages and asserted that the quantum of the damages would be “far in excess of the sums payable under Epoca’s contract”.

- [69] The adjudicator in his reasons stated:

“Clause 42.10 says that both a debt and a claim can be deducted from monies due to the contractor. This is careless drafting. A claim is an assertion or a contention. An assertion or a contention cannot be deducted from moneys. A claimed amount can be deducted. However, clause 42.10 does not refer to a claimed amount. It refers to ‘any claim which the Principal may have against the Contractor.’ Clause 42.10 does not presently provide the respondent with any right to withhold payment. Clause 42.10 does not say that if the respondent has a claim against the claimant, the respondent can withhold payment of progress payments or withhold payment until the amount of the respondent’s entitlement in respect of the claim is determined.

If the respondent did validly terminate the Contract on 22 August 2005 and the respondent has an entitlement to damages, as contended by the respondent, then that entitlement arose on 22 August 2005 and

could have been pursued there and then. The fact that the respondent has had difficulty in quantifying damages is irrelevant. There is nothing in the Contract or elsewhere in law that would permit the respondent to avoid liability to make a progress payment under the Act while the respondent determines the amount of the entitlement which, if it exists at all, existed on 22 August 2005.”

[70] The adjudicator’s reasons reflected an erroneous construction of that cl 42.10. Under cl 42.10 DMR was entitled to have deducted from any moneys due to Epoca any claim by way of damages whether or not the factual basis giving rise to the claim arose out of the contract or any other contract or was independent of any contract. Furthermore, it was specified that that clause survived the termination of the contract. In those circumstances, there was an error of law in relation to the adjudicator’s construction of cl 42.10.

[71] Accepting the submissions made by DMR that on its proper construction, the clause permitted the deduction of claims for damages of the nature put forward by DMR, there was another aspect to the adjudicator’s reasoning to be considered. The adjudicator referred to DMR’s concession in its adjudication response that it was “unable to quantify the damages it claimed from Epoca at this point as the works have not been completed”, that it had “only an estimate of the cost to complete the work”. The adjudicator concluded in those circumstances:

“I cannot assess any amount as a set-off (under clause 44.10 or otherwise) when the Respondent is unable to determine the amount of the Respondent’s damages.”

[72] Notwithstanding any error in the construction of the contractual provisions, the adjudicator was not placed in a position to resolve whether the DMR damages claim exceeded Epoca’s payment claim and was entitled to decline to act on DMR’s unsubstantiated assertions as to the quantum of its damages claim equalling or exceeding Epoca’s claim. Accordingly, I do not consider that there is a basis for setting aside the adjudicator’s decision with respect to DMR’s claim for a set-off in respect of the entirety of any amount payable to Epoca.

(ii) *DMR’s claims for Reinforced Concrete Wall (\$153,747), Noise Barriers (\$87,640) and Bridge Balustrade (\$39,998)*

[73] DMR’s payment schedule asserted “credits” for additional costs which it claimed had been incurred for a reinforced concrete retaining wall (\$153,747), a noise barrier (\$87,640), and the fabrication of the bridge balustrade (\$39,998) over and above the Epoca claimed amount. DMR sought to set off these amounts against Epoca’s payment claim.

[74] In his reasons relating to Portion 3 claim, the adjudicator states (pp 16-17):

“In the payment claim, the respondent has provided a spreadsheet providing the respondent’s assessment of each item and the respondent’s reasons for withholding payment. In that spreadsheet the respondent includes ‘credits’ for additional costs allegedly incurred by the respondent to construct concrete retaining wall, noise barriers and fabrication of bridge balustrade.

The respondent has not explained how an adjudicator can take into account these “credits” in calculating the amount of the progress payment. It seems to me that these alleged costs must be included in the respondent’s claim for damages following the alleged termination by the respondent of the Contract. I cannot see how these alleged additional costs can be isolated from the general claim for damages and be set-off against the amount that the claimant claims in Portion 3.”

[75] Epoca contended that the adjudicator approached the Portion 3 claims for damages as falling within the general damages claim and that it was open to the adjudicator to take into account the concession concerning the general damages claim. However, the adjudicator failed to appreciate that the contractual basis for DMR’s claim to set-off, and the concessions made by DMR as to the inability to quantify its general damages claim, did not apply to these specific claims for set-off by DMR.

[76] Accordingly, I consider that the adjudicator decision as to these claims for set-off by DMR involved an error of law and ought to be set aside.

Conclusion

[77] The result is that DMR is in part successful in its application. The adjudicator’s decision is set aside insofar as it concerns the allowance of \$24,351.99 for Site Facilities, and the claims for set-off by DMR for Reinforced Concrete Wall (\$153,747), Noise Barriers (\$87,640) and Bridge Balustrade (\$39,998). Those claims for set-off are referred to the adjudicator for further consideration in accordance with cl 42.10 of the contract.

[78] Epoca’s cross application is dismissed.

[79] I shall hear submissions as to costs.