

# SUPREME COURT OF QUEENSLAND

CITATION: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors* [2010] QSC 95

PARTIES: **NORTHBUILD CONSTRUCTION PTY LTD**  
(applicant)

v

**CENTRAL INTERIOR LININGS PTY LTD**  
(first respondent)

AND

**ADJUDICATE TODAY PTY LTD**

(second respondent)

AND

**PHILIP DAVENPORT**

(third respondent)

FILE NO/S: 12131 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 9 April 2010

DELIVERED AT: Brisbane

HEARING DATE: 30 November 2009

JUDGE: Martin J

ORDER: **APPLICATION DISMISSED**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – NATURAL JUSTICE – where there was a construction contract between the applicant and the first respondent – where the matter went to adjudication – where there were discrepancies in the materials before the adjudicator – whether the adjudicator made a bona fide attempt to understand and apply the contract

ADMINISTRATIVE LAW – JUDICIAL REVIEW – NATURAL JUSTICE – where there was a construction contract between the applicant and the first respondent – where variation work was completed by the first respondent – where the matter went to adjudication – where the payment claim included 73 variation claims – where the first

respondent provided a quantity surveyor report with respect to 33 of the variation claims – where the adjudicator did not deal with each variation claim individually – whether the adjudicator correctly considered the contractual requirements with respect to the valuation of variation work – whether the adjudicator made a fair and reasonable valuation of the variation work

*Building and Construction Industry Payments Act 2004*, s 17, s 18, s 26

*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

*Coordinated Construction Co Pty Ltd v J M Hargraves (NSW) Pty Ltd* (2005) 63 NSWLR 385

*Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* (2007) 69 NSWLR 72

*John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19

*Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142

*Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279

*Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7

*Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* [2009] QSC 165

*Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152

*Transgrid v Siemens Ltd* (2004) 61 NSWLR 521

COUNSEL: P J Dunning SC and G Beacham for the applicant  
R A Holt SC and M D Ambrose for the respondent

SOLICITORS: Holding Redlich Lawyers for the applicant  
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- [1] The applicant, Northbuild Construction Pty Ltd (“Northbuild”), seeks a declaration that an adjudication decision made by the Second Respondent under the *Building and Construction Industry Payments Act 2004* (“the Payments Act”) is void.

### **Background**

- [2] Northbuild was the head contractor for the construction of an apartment complex at Runaway Bay, Queensland. On 26 September 2008 it entered into a sub-contract with the first respondent, Central Interior Linings Pty Ltd (“CIL”), to provide carpentry and plastering works. The contract was terminated on 3 August 2009 at which point Northbuild had paid \$2,909,670 to CIL under the contract.

- [3] On 1 September 2009 CIL served a payment claim on Northbuild under the Act in the sum of \$1,398,031.56, though this was later reduced to \$1,227,804. Northbuild served a payment schedule on 14 September 2009 and asserted that no money was owed under the contract.
- [4] The matter was referred for adjudication under the Payments Act on 28 September 2009 and accepted by the adjudicator on 1 October 2009. He gave his decision (dated 12 October) to the parties on 15 October 2009.
- [5] The adjudicator awarded CIL the sum of \$856,594 together with interest and costs.

#### **Building and Construction Industry Payments Act 2004**

- [6] Section 7 of the Payments Act relevantly provides that “The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments ...”.
- [7] Section 17 deals with payment claims and provides that a claimant may serve a payment claim under the Payments Act on a person who is liable to make payment to them under a construction contract. Section 18 permits a party so served with a payment claim to serve a payment schedule on the claimant, along with reasons as to why, if it is the case, the respondent’s proposed payment is less than the amount claimed.
- [8] In *Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019 Einstein J, in a passage which has been frequently referred to, described one of the legislative purposes of the Act in the following way:

“[14] What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. **That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing.** It is also because of the constraints imposed upon the adjudicator by s 21, and in particular by s 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. **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 clawback route expressly includes the making of restitution orders.” (emphasis added)

[9] Of course, an arbitrator is not immune from criticism.

[10] In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, Hodgson JA (with whom Mason P and Giles JA agreed) said:

“[51] I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. 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) and s 32. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) and s 25(4). The remedy provided by s 27 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 questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap.

[52] However, it is plain in my opinion that for a document purporting to be an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

[53] What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8).
2. The service by the claimant on the respondent of a payment claim (s 13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
4. The reference of the application to an eligible adjudicator, who accepts the application (s 18 and s 19).
5. The determination by the adjudicator of this application (s 19(2) and s 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).

[54] The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

[55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that **the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–391. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), 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 (cf *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598), 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 legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.**

[56] It was said in the passage in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, quoted by McDougall J, that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in *Craig v South Australia* (at 177)

the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s 22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s 22(2), especially in pars (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is “duly made” by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (s 20(1) and s 22(2)). **In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered.** To that extent, I disagree with the views expressed by Palmer J in *Multiplex Constructions Pty Ltd v Luikens*.

[57] The circumstance that the legislation requires notice to the respondent and an opportunity to the respondent to make submissions (ss 17(1) and (2), 20, 21(1), 22(2)(d)) **confirms that natural justice is to be afforded to the extent contemplated by these provisions; and in my opinion, such is the importance generally of natural justice that one can infer a legislative intention that this is essential to validity, so that if there is a failure by the adjudicator to receive and consider submissions, occasioned by breach of these provisions, the determination will be a nullity.** On this basis, I agree with the result reached in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903. I note there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see, for example, *Ridge v Baldwin* [1964] AC 40; *Durayappah v Fernando* [1967] 2 AC 337; *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 233; *Calvin v Carr* [1980] AC 574 at 589–590; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 630–634); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void.” (Emphasis added.)

- [11] In summary, what is required of an adjudicator is that he or she make a genuine attempt to understand and apply the relevant contract and to exercise the power in accordance with the Act. *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7.
- [12] It is important to establish, before proceeding further, the basis upon which the decision of an adjudicator should be assessed, especially when claims are made that there has not been a bona fide attempt by the adjudicator to deal with the matter. It

does not assist in the determination of such a question to simply cherry pick particular paragraphs from a lengthy decision and, by pointing at them alone, attempt to show an absence of bona fides. The correct approach is that which was described in the following two decisions. In *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, Barrett J said at [20]:

“... the whole of the content and tenor of an adjudication may be called in aid in deciding whether particular submissions were considered in the way the Act requires. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions.”

- [13] To similar effect is the statement by Hodgson JA (with whom Beazley and Basten JJA agreed on this point) in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19:

“[55] The relevant requirement of s.22(2) is that the adjudicator consider the provisions of the Act, the provisions of the contract and submissions duly made. If an adjudicator does consider the provisions of the Act and the contract which he or she believes to be relevant, and considers those of the submissions that he or she believes to have been duly made, I do not think an accidental or erroneous omission to consider a particular provision of the Act or a particular provision of the contract, or a particular submission, could either wholly invalidate a determination, or invalidate it as regards any part affected by the omission. One could express this by saying that such an accidental or erroneous omission does not amount to a failure to comply with s.22(2), so long as the specified classes of considerations are addressed; or alternatively, if one takes the view that s.22(2) does require consideration of each and every relevant provision of the Act and the contract and each and every submission duly made, the intention of the legislature cannot have been that this kind of mistake should invalidate the determination. In a case where there were 1,000 submissions duly made, an accidental failure to consider one of them could not reasonably be considered as invalidating a whole determination; and there is no basis for partial invalidation of a determination, that is, invalidation only of that part affected by the omitted submission.”

### **The Applicant’s Case**

- [14] Northbuild argues that the adjudicator failed to consider, or did not make a bona fide attempt to consider, the issues raised in its payment schedule or the evidence contained in the adjudication response. CIL argues that the adjudicator’s assessment was fair and reasonable and that he did not fail to consider the material put to him by Northbuild.
- [15] In *Coordinated Construction Co Pty Ltd v J M Hargraves (NSW) Pty Ltd* (2005) 63 NSWLR 385, Hodgson JA held at [52] that:

“The adjudicator’s duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim.”

- [16] This requires the adjudicator to consider, at a minimum, the complete submissions of the claimant and respondent. Justice Hodgson continued at [53]:

“... my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent’s material, this could be such a failure to address the task set by the Act as to render the determination void.”

- [17] In determining a dispute, the adjudicator must comply with s 26 of the Payments Act:

**“26 Adjudicator's decision**

- (1) An adjudicator is to decide--
- (a) the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount); and
  - (b) the date on which any amount became or becomes payable; and
  - (c) the rate of interest payable on any amount.
- (2) In deciding an adjudication application, the adjudicator is to consider the following matters only--
- (a) the provisions of this Act and, to the extent they are relevant, the provisions of the Queensland Building Services Authority Act 1991, part 4A;
  - (b) the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the claimant in support of the claim;
  - (d) the payment schedule, if any, to which the application relates, together with all submissions, including relevant documentation, that have been properly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (3) The adjudicator's decision must--
- (a) be in writing; and
  - (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.”

- [18] In particular, s 26(2)(d) requires the adjudicator to consider “all submissions” of the respondent. Northbuild submitted that the adjudicator did not make a determination to the best of his ability on all of the material available, and thus did not make a bona fide attempt to determine the dispute.

[19] It was submitted by CIL that the relevant question to be considered by the Court is whether the adjudicator has complied with s 26, and not whether there has been an error of fact or law by the adjudicator. There is ample authority supporting this proposition: *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, [52]-[57] per Hodgson JA, Mason P and Giles JA agreeing; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521, [29]-[30] per Hodgson JA, Mason P and Giles JA agreeing; *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142, [49] per Hodgson JA, Bryson JA and Brownie AJA agreeing; and *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* [2008] NSWCA 279, [27] per Allsop P, Giles and Hodgson JJA agreeing.

[20] In this Court, Peter Lyons J considered s 26 of the Payments Act and concluded:

“The *Payments Act* seeks to provide a mechanism for obtaining a decision which will be quick, but in a sense, provisional. It does not seem to me, consistent with the general object and tenor of the Act, to impose a requirement of ‘reasonableness’.”<sup>1</sup>

[21] Northbuild relied upon the statement of Hodgson JA in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, [55] that:

“...if a purported determination is not ... 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 requirement that the legislature has indicated as essential to the existence of a determination.”

[22] The applicant submitted that this approach has found support in Queensland: *Hitachi Limited v O'Donnell Griffin Pty Ltd* [2008] QSC 135; *Walton Constructions (Qld) Pty Ltd v Salce* [2008] QSC 235; *J Hutchinson Pty Ltd v Galform Pty Ltd* [2008] QSC 205; *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2009] QSC 205.

[23] In any case, the respondent relied upon the decision of Giles JA (with whom Santow and Tobias JJA agreed) in *Downer Construction (Australia) Pty Ltd v Energy Australia & Ors* (2007) 69 NSWLR 72 where it was held that the proper determinant of the question of bona fides will not be whether the court reaches a different conclusion than the adjudicator as to fact or law.

[24] In its general submissions, the applicant referred to statements made by the adjudicator in certain parts of his reasons in which he clearly expresses his dissatisfaction with the extent of the material before him. For example, he said:

“[30] It is unrealistic for the respondent to expect an adjudicator to sort through 73 variation claims (the majority of which are each for less than \$5,000) and the volumes of material provided by the parties with respect thereto and work out the extent, if any, to which the alleged additional work is work included in the scope of the original contract.”

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<sup>1</sup> *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd & Anor* [2009] QSC 165, [32], affirmed on appeal in *Queensland Bulk Water Supply Authority t/as Seqwater v McDonald Keen Group Pty Ltd (in liq)* [2010] QCA 7.

[25] One of the major complaints made by the applicant is that the adjudicator did not descend to particularity in the manner in which he approached his task. His view on his role appears in the following extract:

“[60] Attached to the payment claim is a spreadsheet with 73 variation claims. The total claimed is \$985,586. The total allowed by the respondent is \$102,903. The parties have made voluminous submissions with respect to each of the variations, supported by volumes of supporting documents. However, for the purposes of a progress payment, I don’t consider it necessary for me to value every variation individually and decide every issue over each variation.”

[26] The adjudicator made it clear that he was not satisfied with parts of the material relied upon by Northbuild. At paragraphs [44]-[50] he sets out why he was unprepared to make an assumption about an agreement alleged to have been entered into on 19 March 2009. With respect, his views appear to be both reasoned and reasonable. He also criticises evidence relied upon by Northbuild set out in some spreadsheets. At [55]-[59] he outlines some of the discrepancies and inconsistencies. He does that in order, as I apprehend his reasons, to demonstrate by way of example what he later refers to as “numerous discrepancies and inconsistencies”. It was sufficient for him to form the view that the attachments which he was then considering did not confirm the agreement alleged to have been made on 19 March.

[27] The adjudicator refers to the question of the valuation of variations and the use of expert evidence. In particular, he made reference to a report provided by Northbuild which he found to be of little if any assistance. His reasoning for that is clear. The report did not provide a total of the values arrived at by the author of the report and they appeared, individually, to differ from some of the amounts provided for in Northbuild’s payment schedule.

[28] The adjudication dealt with the claim under four broad headings:

- (a) The value of the work required under the contract,
- (b) The liability to pay for, and the value of, variation work,
- (c) Northbuild’s claim for liquidated damages for failure to complete the works by the date for practical completion, and
- (d) Northbuild’s claim for damages based on the termination of the construction contract and the cost to complete the work required under the contract.

### **Work under contract**

[29] Before the adjudicator, CIL claimed that various aspects of the work were between 85% and 99% complete and that, on an overall basis, the work was 95% complete. Northbuild did not accept that and contended that the work was 89% complete overall.

[30] Northbuild submits that an example of the adjudicator’s failure to act bona fide is his omission to justify comments made with respect to the material provided to him by Northbuild on this topic. In his reasons the adjudicator referred to the supporting material provided by Northbuild in the following way:

“[119] The assessment sheets are spreadsheets that list buildings, units within the buildings and six categories of work for each unit. Each category of work within each unit is then ascribed a value. Then the percentage complete of that item is assessed and an amount is determined based upon the value which has been ascribed to the items. The many hundreds of individual amounts are then added and the total compared to the Contract Sum is taken to be the percentage complete. This seems a very cumbersome, time consuming and not very accurate method of assessing the value of the work. I am not satisfied that that method can actually value the whole of the Contract works to within a percentage or two or even five percent. It still involves subjective assessments.”

- [31] I do not accept that this is a permissible criticism of the reasons at that point. The arbitrator is a person who is selected for his particular skills and abilities with respect to the assessment of disputes under building contracts and this type of view is one which a person in the arbitrator’s position should be able to form if it is appropriate.
- [32] Northbuild complains that the assessment put forward by CIL was of a limited value and analysis. Northbuild’s assessment, on the other hand, was, so it was submitted, of much greater detail. The complaint by Northbuild on this point is that: “On no objective view could the CIL approach have been considered more accurate, nor could a rational basis for so concluding be identified”.
- [33] I do not accept that that submission is justified. At paragraphs [120] and [121] the adjudicator deals with various parts of the evidence which was provided to him and his conclusion was one which, on the material, was open to him. An application of this sort is not an appeal from a decision of an arbitrator but a much more limited examination of what has been done. That examination has to take place within the confines of the Payments Act and its purposes and, in making that examination, it is essential that the context of the legislative provisions and the particular case itself be taken into account.
- [34] I do not accept that the adjudicator has not made a genuine attempt to exercise the power given to him under the Payments Act.

### **Variation work**

- [35] The payment claim included 73 variation claims. Northbuild contested its liability to pay many of the variations and also contested, if it was found to be liable, the amount properly payable. The amount which it said it should pay, if otherwise liable, was set out in a schedule identifying Northbuild’s assessment of the value of each variation and the reason for the different assessment.
- [36] In response to that, CIL provided the adjudicator with a report from a quantity surveyor which valued 33 of the 73 variations.
- [37] The complaint made with respect to these matters is that the adjudicator did not deal with each variation individually and decide every issue with respect to each variation. The adjudicator made that clear in [60]. He also said:

“[71] It is not just a matter whether I disagree with the claimant’s valuation of the variation claims or that I accept the respondent’s valuation of variations, it is that in an adjudication what has to be determined is a value for the purpose of a payment on account. The final determination of a value of each variation is a different matter. It is for expert determination, litigation or arbitration. It does not appear to me that the Act contemplates that the adjudicator will separately value 73 variation claims. The Act contemplates an expedited process not the process that would be involved in separately valuing every single variation. That could take many weeks and would necessitate seeking countless further submissions from the parties. It seems to me that for the purpose of a progress payment on account, the pragmatic approach of Mr Roberts to valuing variations is just what the contract and the Act contemplate.”

- [38] CIL submits, correctly in my opinion, that the requirements of the contract with respect to the valuation of variations is of singular importance. Clause 6(d) of the Contract provided for the valuation of variation work as follows:

“The price of a Variation shall be determined by agreement between the Builder and Subcontractor, or in the absence of such agreement, the Builder must make a fair and reasonable valuation of the Variation.”

- [39] As was submitted by CIL there are no objective parameters provided in the contract to allow for the valuation of variations such as might occur if there were provisions setting forth how the process of valuation was to occur or the insertion of a bill of quantities or a schedule of rates. It follows, then, that the adjudicator’s task must be of a similar nature, that is, to make a fair and reasonable valuation of the variation work.
- [40] It should also be remembered, as has been pointed out above, that the adjudicator rejected the assertion by Northbuild of an agreement having been reached on 19 March 2009 as to the value of some of the variations. In doing so, that removed the foundation for much of Northbuild’s submissions on this point.
- [41] Northbuild also submitted that the adjudicator was wrong to adopt the valuation of the variations contained in a report by Currie & Brown. In that report three different methods of valuation were adopted for the three different groups of variations. Northbuild provided a report from Turner & Townsend. The adjudicator did not accept the Turner & Townsend report and identified at least one reason for that being that the report referred to those variations which were alleged to have been the subject of the alleged agreement. The adjudicator considers this at [66] and points out the difficulties in attempting to establish precisely which variations were alleged to have been agreed and at what value.
- [42] One of the major complaints of Northbuild on this area is that the adjudicator took a broad brush approach to the assessment of these variations. The adjudicator had, at [71], set out his opinion that, should he be required to consider and determine each variation, that the task would take many weeks and require further submissions. Obviously, if that course was undertaken then the adjudication would not be

provided within the time limited by the Act. Rather than pursue that lengthy task, the adjudicator used an abbreviated method of valuation but only with respect to those variations where the claim was less than \$5,000. Given the intention of the Act and the purposes of the adjudication this does not demonstrate to me a lack of bona fides.

- [43] The adjudicator also clearly gave consideration to all the material supplied by Northbuild but, in the end, preferred the submissions of CIL on this point.

#### **The delay claim**

- [44] Under this heading the adjudicator considered the competing opinions from the experts whose reports were before him and adopted that of Currie & Brown. This, in the circumstances to which I have already alluded, appears to have been unremarkable.

#### **Natural justice**

- [45] Northbuild argues that because of the approach taken by the adjudicator he essentially disregarded the material relied upon by Northbuild. I do not accept that. The adjudicator is not required to set out every detail of every part of every report or other document provided by a party to the adjudication. An adjudicator must, in compliance with the provisions of the Act, consider all the material and, in setting out the reasons, should either explicitly or implicitly state that regard has been had to them.
- [46] The written submissions of Northbuild refer to the “pejorative manner of the adjudicator” as being something which supports the finding that natural justice was not afforded. The adjudicator did, in some of his remarks, express a level of disappointment with the material provided and the approach taken by Northbuild. He was entitled to do that. The pressure which is on adjudicators to deal with matters of this complexity in a short time is considerable. Sometimes that pressure is relieved through the making of comments which might, on more mature reflection, not be made. But an adjudicator is not alone in the making of such comments.
- [47] As I have said above, this is not an appeal from the adjudicator’s decision. To establish that there has been a lack of bona fides or a denial of natural justice is not an easy task. This was a complicated matter in which there was a substantial amount of material all of which needed to be considered and resolved within a limited period of time. The arbitrator did not accept much of what Northbuild said but I do not accept that in doing so he exhibited any lack of bona fides or failed to afford natural justice to Northbuild.
- [48] The application is dismissed. I will hear the parties on costs.