SUPREME COURT OF QUEENSLAND

CITATION:	*Uniting Church in Australia Property Trust (Qld) v Davenport & Anor* [2009] QSC 134
PARTIES:	**UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (QLD)** (applicant) **v** **PHILLIP DAVENPORT** (first respondent) and **HINDMARSH CONSTRUCTION QUEENSLAND PTY LTD ACN 100 120 027** (second respondent)
FILE NO:	1296/09
DIVISION:	Trial Division
PROCEEDING:	Application for injunctive relief
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2009
JUDGE:	Daubney J
ORDERS:	**1. The first respondent be permanently restrained from correcting, in the manner foreshadowed in the facsimile transmission from Adjudicate Today dated 2 February 2009, either of the adjudication decisions made by the first respondent and dated 28 January 2009 and 29 January 2009 respectively** **2. Second respondent pay the applicant's costs of and incidental to this application (including any reserved costs)**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – AMOUNT – where the applicant entered into two contracts with the second respondent builder for certain building and construction works – where the second respondent made payment claims under each contract – where adjudicator appointed under the *Building and Construction Industry Payments Act* 2004 to decide the amount of each of the progress payments under the payment claims – where the second respondent requested the adjudicator revise its decision – where adjudicator acceded to the second

respondent's request – whether adjudicator should be restrained from making a correction to his decision – whether the adjudicator's original decisions contained errors arising from an accidental slip or omission – whether the adjudicator's original decisions included material miscalculations of figures or material mistakes in the description of a person, thing or matter mentioned in the decision.

Building and Construction Industry Payments Act 2004
Judicial Review Act 1991
Justice and Other Legislation Amendment Act 2007
Uniform Civil Procedure Rules 1999 (Qld)

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] QCA 213, distinguished
Cawood v Infraworth Pty Ltd [1990] 2 Qd R 114, cited
Greenaways Australia Pty Ltd v CBC Management Pty Ltd [2004] NSWSC 1186, cited
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, applied
Musico v Davenport [2003] NSWSC 977, applied

COUNSEL:	M H Hindman for the applicant
	B Codd for the second respondent
SOLICITORS:	Deacons for the applicant
	DLA Phillips Fox for the second respondent

[1] The applicant entered into two contracts with the second respondent builder for certain building and construction works to be undertaken on a site at Ingham.

[2] This application arises out of two payment claims, one under each contract, made by the second respondent against the applicant. The second respondent invoked the adjudication mechanism for payment claims provided for under Part 3 Division 2 of the *Building and Construction Industry Payments Act* 2004 ("*BCIPA*"), and the first respondent was appointed as adjudicator by the relevant authorised nominating authority, Adjudicate Today (where appropriate, I will refer to the second respondent as "the adjudicator"). By s 26(1) of the *BCIPA*, the role of the adjudicator was to decide the amount of each of the progress payments referable to

each of the subject payment claims, the date on which any amount became payable, and the rate of interest thereon. Section 26(2) prescribed the matters to which the adjudicator could have regard when deciding the application.

[3] On 29 and 30 January 2009, and in accordance with s 26(3), the adjudicator published his written decision, and the reasons for decision, in respect of each of the payment claims.

[4] On 30 January 2009, the second respondent wrote to the adjudicator, requesting that each of his decisions be corrected pursuant to s 28 of the *BCIPA*. In that regard, s 28 provides:

> "**28 Adjudicator may correct clerical mistakes etc.**
>
> (1) Subsection (2) applies if the adjudicator's decision contains -
>
> (a) a clerical mistake; or
>
> (b) an error arising from an accidental slip or omission; or
>
> (c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter mentioned in the decision; or
>
> (d) a defect of form.
>
> (2) The adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the decision."

[5] Later that day, the applicant's solicitors wrote to the adjudicator contending that the matters raised by the second respondent were not errors contemplated by s 28, and asked the adjudicator to decline the request to revise his decisions.

[6] On 2 February 2009, the adjudicator wrote to the parties advising, in effect, that he was intending to accede to the second respondent's request, and called for any

further submissions by the parties in respect of the calculations he proposed adopting.

[7] That letter from the adjudicator prompted the present application. On its first return, the parties consented to an interim injunction to restrain the adjudicator from making the corrections which he proposed making pursuant to s 28. The applicant and the second respondent then returned later to argue the applicant's application for final injunctive relief. The adjudicator indicated his intention to abide the order of the Court, and made no submissions in respect of this matter.

The adjudicator's decisions

[8] As I have already noted, the works for the constructions of the particular project were apportioned under two separate contracts, one for building works and the other for services. These contracts were described in the material simply as "Contract 1" and "Contract 2".

[9] In respect of Contract 1, the claim which was the subject of the adjudication was Payment Claim No 26. In his reasons, the adjudicator described this claim as follows:

> "2] The claimed amount is made up of:
>
> | | | |
> |---|---|---|
> | 1. Original Contract Sum | $2,919,498 | |
> | 2. PC & Provisional Sums | 15,000 | |
> | 3. Variations | 1,282,790 | |
> | Subtotal | $4,217,288 | |
> | 4. Less paid | 3,328,399 | |
> | Subtotal | 888,889 | |
> | GST | 88,888 | |
> | Payment claim | $977,778 | [The difference rises from ignoring cents] |
>
> 3] There is no dispute over items 1, 2 and 4. The main item in issue is the claimant's claim no. 180 for $888,889 [excl GST] for

> 'Construction work associated with the superintendent's instructions to resolve discrepancies or omissions in the contract documents following RFIs'. These are requests for information. There follows a long list of numbers. However, in the adjudication application the claimant's claim for this Contract is in respect of 7 RFIs [numbers 32, 97, 105, 126, 138, 175 and 176] which at [33] of the adjudication application the claimant claims delayed Practical Completion of Contract One by 106 days."

[10] The adjudicator observed that the adjudication application in respect of Contract 1 was made at the same time as an adjudication application in respect of Contract 2, that both adjudication applications had been referred to him, that the two applications arise separately out of Contract 1 and Contract 2 between the same parties, and that the two contracts are both for work on the same project. He further noted a submission which had been made to him by the claimant builder that:

> "Whilst there are two separate contracts, in reality the Project was run as one project without differentiation between Contract 1 and 2. Only progress claims were made separately for each respective contract. The material supporting the two adjudication applications arise from the same factual circumstances."

[11] As stated in the adjudicator's summary of the claim, the principal claim in respect of Contract 1 was for some $888,889 for construction work following requests for information ("RFIs").

[12] When quantifying the actual additional costs which had been incurred and which were referable to Contract 1, the adjudicator noted that the claimant had relied in that regard on a report by a firm of forensic accountants, from which it was deduced that the actual alleged preliminaries on Contract 1 were 62.35% of the total alleged additional preliminaries on both contracts. The adjudicator said, at [14] of his reasons:

> "I calculate the amount of alleged preliminaries on Contract 1 as 62.35% of $728,057 equals $453,953. Compare paragraphs 32 to 34 of my decision in adjudication application 854 [that being the adjudication in relation to Contract 2]."

[13] The adjudicator then went on to refer to the items which he considered were not to be included in the calculation of the progress claim, and then to evidence to the effect that the date of practical completion was 196 working days after the original date for practical completion. He said, at [17]:

> "It therefore appears to me that the extra amount of $453,953 represents the additional preliminaries on Contract 1 consequent upon the extra 196 working days that it took the claimant to complete Contract 1 over and above the original time allowed in the contract."

[14] The adjudicator then noted that the claimant (the second respondent) claimed an entitlement to an extension of time of 106 working days on account of the seven RFIs which were the subject of the payment claim, with the remainder of the 196 days of delay being on account of other matters. He said:

> "22] I am satisfied that the alleged additional preliminaries should be apportioned between the delays that are said to arise from the 7 RFIs and the other delays. When I divide $453,953 by 196 and multiply by 106, I arrive at $245,505.
>
> 23] It seems to me that $245,505 is the additional cost of Contract 1 preliminaries for 106 days. That amount plus GST appears to me to be the ceiling on the claimant's entitlement if the claimant has an entitlement to additional costs for the whole 106 working days. I now turn to the question of how many days entitlement, if any, the claimant has."

[15] The adjudicator examined the evidence and material before him concerning the delays claimed under the seven RFIs which were the subject of the claim. The conclusion of his analysis was:

> "32] I calculate the delay incurred by the claimant as a consequence of RFIs 32, 97, 105, 126 and 138 as a total of 45 working days. I calculate the claimant's total additional preliminary costs on Contract 1 for 196 working days – see [para 17] by 196 and multiplying by 45. The result is $104,223."

[16] In relation to Contract 2, the adjudictor's summary of the claim referred to him for adjudication was as follows:

> "2] The claimed amount is made up of:
>
> 1. Original Contract Sum $1,402,952

2.	PC & Provisional Sums	122,500
3.	Variations	619,970
	Subtotal	$2,145,422
4.	Less paid	1,608,667
	Subtotal	536,755
	GST	53,675
	Payment claim	590,430

> 3] There is no dispute over items 1, 2 and 4. The main item in issue is the claimant's claim no. 181 for $536,755 [excl GST] for 'Construction work associated with the superintendent's instructions to resolve discrepancies or omissions in the contract documents following RFIs'. These are requests for information. There follows a long list of numbers. However, in the adjudication application the claimant's claim for this Contract is in respect of 6 RFIs which are said to have delayed Practical Completion by 64 days.
>
> 4] The payment schedule states:
>
> > Amount which the Respondent owes the Claimant $113,031.
>
> 5] However, I accept the respondent's contention at [66] of the adjudication response that this should have been the other way around and that $113,031 is the amount that the respondent contends is owed by the claimant to the respondent. The calculations in the payment schedule make this obvious. The bulk of the amount is alleged liquidated damages of $113,031. The scheduled amount is therefore $nil."

[17] In dealing with the quantification of the actual additional costs, the adjudicator observed, at [30] of his decision, that the claimant claimed that six RFIs gave rise to 64 working days delay on Contract 2. He then said:

> "32] The first item making up the calculation of the claim is the alleged excess of actual over budgeted preliminaries $728,057. The claimant arrives at this by deducting from actual preliminaries of $1,079,599 the budgeted preliminaries of $351,542.
>
> 33] These are the alleged preliminaries for the two contracts together. To arrive at the claim on Contract 2, the claimant apportions the "Project value including approved variations". The apportionment is Contract One 62.35%, Contract Two 37.65%.
>
> 34] On that basis, I calculate that the alleged extra actual preliminaries included in this progress claim is $274,113."

[18] The adjudicator then analysed further claims made under this head by the claimant for such matters as general office overheads, loss of interest, legal costs, etc., and concluded that these were not claimable, saying at [45]:

> "45] I have now arrived at the position that the only alleged extra costs that I can see could arguably be said to arise under Contract 2 from the facts upon which the claim 181 is based are the actual alleged additional preliminaries apportioned by the claimant to this progress claim namely, $274,113."

[19] The adjudicator's reasoning continued:

> "46] According to the Solid Support report of 3/11/08 at p.3 the date of practical completion [25 July 2008] was 196 working days after the original date for practical completion. It therefore appears to me that the extra amount of $274,113 represents the additional preliminaries on Contract 23 consequent upon the extra 196 working days that it took the claimant to complete Contract 2 over and above the original time allowed in the Contract.
>
> 47] The claimant claims that the claimant is entitled to an EOT of 64 working days on account of the 6 RFIs the subject of this part of the payment claim. The remainder of the 196 working days of delay had to be on account of other matters.
>
> 48] At [25] in the payment schedule the respondent says, "The Claimant claims its actual costs allegedly incurred on the project less the amount of its project estimate. It has made no allowance for any inefficiency on its own part, or under tender or its own culpable events".
>
> 49] At [60] in the adjudication response, the respondent contends that assuming that there are costs incurred by the claimant by virtue of delay, the King Planning report makes it clear that the claimant is responsible for some of the delay and the claimant should have discounted costs by the amount for which it is responsible. I agree.
>
> 50] At [61] the respondent says, "Consequently as the Claimant has failed to do so the Respondent contends that the Claimant's claim must fail." I don't agree. Portion of the claim may fail but the whole claim does not fail because the claimant has claimed too much.
>
> 51] I am satisfied that the claimant should have discounted the claim by the amount of the additional preliminaries that are not said to be caused by the 6 RFIs the subject of this adjudication. It seems therefore that the additional preliminaries must be apportioned between the delays that are said to arise from the 6 RFIs and the other delays. When I divide $274,113 by 196 and multiply by 64, I arrive at $89,506.
>
> 52] It seems to me that $89,506 is the additional cost of Contract 2 preliminaries for 64 days."

[20] The next part of the adjudication on Contract 2 was the adjudicator's analysis of the delay referable to each of the RFIs, there being competing experts' reports as to the proper extent of delay which should be ascribed to each RFI. It is sufficient for present purposes to note that the adjudicator accepted the methodology advanced by

one expert over that of the other, and, at [64], said that he was satisfied that the claimant was delayed 64 days by the RFIs which were the subject of the claim under Contract 2.

The builder's request under s 28

[21] On 30 January 2009, the second respondent requested that the decisions made by the adjudicator be corrected, saying:

> "The basis for this request is that the calculation of the apportionment of amount of preliminaries for each of Contracts One and Two are incorrect.
>
> **Findings**
>
> 1 In decision 1057877_854 at paragraph 46 and decision 1057877_853 paragraph 17 you refer to and accept the SSDA report page 3 where Hindmarsh's expert states that the Project was delayed by 196 days.
>
> 2 The Project = Contract 1 + Contract 2
>
> 3 Therefore: project Delay = Contract 1 Delay + Contract 2 Delay
>
> 4 Using this logic: 196 Days = Contract 1 Delay + Contract 2 Delay
>
> 5 Using the Adjudicators logic: 392 days = 196 Days Contract 1 delay + 196 Days Contract 2 delay
>
> 6 The Project Delay was 196 days
>
> **Adjudication Applications 1057877-854 (Contract 2)**
>
> 7 At paragraphs 32, 33, 34 and 45 of the decision, it is determined that Hindmarsh's extra costs that arise form the RFI's are the additional preliminaries. The amount of additional preliminaries for both Contracts One and Two is $728,057. The amount of additional preliminaries for Contract Two is then correctly determined as $274,113 ($728,057@37.65%).
>
> 8 However at paragraph 51 of the decision, the additional preliminaries attributable to Contract Two are reduced by the time for '*other delays*'. This is where the miscalculation has occurred. The '*other delays*' are actually delays caused to Contract One and or delays not supported by the SSDA report. As has been accepted Contracts One and Two were run as one project and there was only one date of practical completion.
>
> 9 Accordingly, there is no reason to further apportion the amount for preliminaries for Contract Two as done in paragraph 51 of the decision.

10 Contract 2 Delay = 196 days x 37.65%

11 Contract 2 Delay – 74 days

12 Using your method for Contract 2 you end up with ($274,113.00 divided by 74) multiplied by 64.

13 This equals $237,070.70

14 Plus 10% GST = $260,777.77

Adjudication Applications 1057877-853 (Contract 1)

15 A similar miscalculation has occurred in Contract One at paragraph 32. Given that it was determined that Hindmarsh was delayed by 45 days, the apportionment of the additional preliminaries for Contract One of $453,953 should have been by dividing the additional costs by 122 (196 days delay @ 63.25%) multiplied by 45.

16 Contract 1 Delay = 196 days x 62.35%

17 Contract 1 Delay = 122 days

18 Using your method for Contract 1 you end up with ($453,953.00 divided by 122) multiplied by 45

19 This equals $167,144.12

20 Plus 10% GST = $184,185.89

As discussed above, Contracts One and Two were run as one contract. The '*other delays*' are actually delays caused to Contract Two and or delays not supported by the SSDA report.

Conclusion

In the circumstances Hindmarsh requests the decisions be corrected to show the Adjudicated Amount for:

- Contract One as $167,441.72 plus GST, a total of $184,185.89.
- Contract Two as $237,070.70 plus GST, a total of $260,777.77"

The adjudicator's proposal

[22] On 2 February 2009, the relevant authorised nominating authority (Adjudicate Today) responded on behalf of the adjudicator, saying:

> "Mr Davenport is satisfied that, in apportioning the additional preliminary costs of $728,057 between Contracts 1 and 2 and between delays for which the claimant is entitled to be recompenses and other delays, he made a material miscalculation. However, he has reservations about the

> calculation contended for by the claimant is the correct calculation, Mr Davenport seeks the comments of both parties on the following calculation.
>
> 1. The delays on the two contracts attributable to causes for which the Adjudicator is satisfied the claimant is entitled to be recompensed are 64 days on Contract 2 and 45 days on Contract 1. That is a total of 109 days.
> 2. Consequently, of the $728,057 of additional preliminary costs for the total delay of 196 days, $404,888 [$728,057 divided by 196 and multiplied by 109 and ignoring cents] is the amount of additional preliminary costs attributable to the delay of 109 days.
> 3. This has to be apportioned between the two contracts. Since the two contracts were run as one, the apportionment should be based upon the number of days delay attributable to each contract.
> 4. For Contract 2 the amount is $237,732 [$404,888 divided by 109 and multiplied by 64].
> 5. For Contract 1 the amount is $167,155 [$404,888 divided by 109 and multiplied by 45.
> 6. When 10% GST is added and cents are ignored, the adjudicated amount in Adjudication 853 [Contract 1] would be $183,870."

The present application

[23] The applicant seeks to restrain the adjudicator from making the correction he has advertised in the letter of 2 February 2009, contending that what he proposes to do is manifestly beyond his power under s 28. In particular, it is argued that the correction which the adjudicator would propose to make is not one which is occasioned by "a material miscalculation of figures"[1] but is a change in the reasoning methodology adopted by the adjudicator in his reasons and from which he made his decision.

[24] For its part, the second respondent submitted:

(a) That this application for injunctive relief is premature as the adjudicator has not yet purported to make a decision under s 28, and in any event the applicant has not demonstrated why damages would not be an adequate remedy;

(b) The terms of s 28 of the *BCIPA* are analogous to the "slip rule" in *UCPR* 388, and authorities referring to the ambit of the Court's discretion under the slip rule would suggest that an adjudicator has a

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1 Section 28(1)(c).

sufficiently wide discretion under s 28 to make the correction proposed; and

(c) The error which the adjudicator is seeking to correct is one which relates to the calculation arising from the substantive findings he made, but not the substantive findings themselves, and thus can properly be described as a "miscalculation of figures" or a "mistake in the description of a person, thing or matter mentioned in the decision".

[25] It was further contended by the second respondent that this application amounts to an application for judicial review of the conduct of the adjudicator and, as decisions made under Part 3 Division 2 of the *BCIPA* are excluded from the ambit of the *Judicial Review Act* 1991, the Court should exercise its discretion against the grant of injunctive relief in the present case.

[26] It seems to me that the second respondent's attempt to draw an analogy between s 28 of the *BCIPA* and the slip rule under *UCPR* 388 is inapt. I have set out the terms of s 28 above. Rule 388 provides:

"**388 Mistakes in orders or certificates**

(1) This rule applies if -

(a) there is a clerical mistake in an order or certificate of the court or an error in a record of an order or a certificate of the court; and

(b) the mistake or error resulted from an accidental slip or omission.

(2) The court, on application by a party or on its own initiative, may at any time correct the mistake or error.

(3) The other rules in this part do not apply to a correction made under this rule."

[27] Section 28(1) prescribes, in disjunctive terms, four discrete circumstances, any one of which may found an exercise of the adjudicator's discretion under s 28(2). Rule 388(1), on the other hand, contains two subparagraphs which must be read conjunctively such that, to the extent that there is similarity in wording between

Rule 388 and s 28, the slip rule applies if "there is a clerical mistake in an order ... of the Court ... and ... the mistake ... resulted from an accidental slip or omission." In *Cawood v Infraworth Pty Ltd* [1990] 2 Qd R 114, Macrossan CJ, with whom Kelly SPJ agreed, said at 122:

> "Inadvertence, as distinguished from an error or mistake resulting from deliberate decision, is the basis of the jurisdiction to correct under the slip rule."

[28] When one looks at s 28 of the *BCIPA*, however, the only one of the discrete elements referred to in s 28(1) which imports the notion of inadvertence is that mentioned in s 28(1)(b), namely "an error arising from an accidental slip or omission".

[29] It was not suggested that the mistake which the adjudicator would seek to correct in each decision was a "clerical mistake"; on the common understanding of that term, it clearly was not, and is not sought to be painted as such. Nor were the adjudicator's mistakes suggested to be, nor could they sensibly be seen to be, defects of form. The questions, therefore, are whether:

(a) The adjudicator's original decisions contain errors arising from an accidental slip or omission, i.e. inadvertent errors; or

(b) Material miscalculations of figures or material mistakes in the description of a person, thing or matter mentioned in the decision.

[30] I observe that the adjudicator himself, by the terms of the letter of 2 February 2009, seems to consider that he "made a material miscalculation".

[31] The answers to these questions come, it seems to me, from a review of the adjudicator's process of reasoning under his original decisions and the process of reasoning which he has advertised he would now seek to adopt for the purposes of correcting his "material miscalculation".

[32] It is convenient to undertake this comparison by referring to the adjudication in respect of Contract 2.

The methodology under the original decision on Contract 2

[33] The starting point of the methodology under the original decision was that the adjudicator noted that the total of the over-budget preliminaries (that is the total for Contracts 1 and 2) was $728.057. That total of over-budget preliminaries was then apportioned on a percentage basis between Contract 1 and Contract 2 – 37.65% of that total was attributed to Contract 2, yielding $274,113 of the over-budget preliminaries attributable to Contract 2. This $274,113 represented the Contract 2 additional preliminaries incurred as a consequence of 196 extra working days. In relation to the claim before the adjudicator, however, the assessed delays under the six RFIs under Contract 2 on which the claim was based amounted to 64 days. Accordingly, the adjudicator calculated that the additional preliminary costs attributable to those six RFIs should be calculated as 64 divided by 196, then multiplied by $274,113, yielding $89,506 (being the proportion of the Contract 2 additional preliminaries referable to the 64 days allowed under the RFIs).

The adjudicator's proposed methodology on Contract 2

[34] The starting point for the adjudicator's proposed methodology is again to acknowledge that the total of the over-budget preliminaries (Contracts 1 and 2) is $728,057.

[35] He then proposes to ascribe the delays attributable to the RFIs on Contracts 1 and 2 respectively, being 45 days plus 64 days, yielding 109 days. Bearing in mind that

there were 196 extra working days, he therefore proposes to calculate the total of the over-budget preliminaries attributable across the two contracts in respect of the RFIs under both Contract 1 and Contract 2 as 109 divided by 196, then multiplied by $728,057, yielding $404,888. His next proposed step is to say this $404,888, which is attributable to the 109 days allowed under the RFIs under both contracts, needs to be apportioned between Contract 1 and Contract 2. For Contract 2, the calculation proposed to be made is 64 divided by 109, then multiplied by $404,888, yielding $237,732.37. This, it is proposed to be said by the adjudicator, represents the amount of the over-budget preliminaries recoverable in respect of the delays consequent upon the requests for information under Contract 2.

An error or miscalculation?

[36] The juxtaposition of the original methodology adopted by the adjudicator and that which he has indicated he proposes to adopt makes clear, in my view, that it cannot sensibly be said in this case either that:

(a) he made an inadvertent error in his original calculations, or

(b) his original calculations involved any sort of "miscalculation", let alone a "material miscalculation".

[37] Rather, it seems to me that the adjudicator proposes, upon further reflection, to adopt a completely different method of making the calculations of the amounts of the over-budget preliminaries which are attributable to the subject RFIs under each of Contracts 1 and 2 respectively. True it is, as the second respondent submits, that the adjudicator has not changed any of his substantive findings as to the length of delay attributable to the contracts either collectively or individually. Rather, the adjudicator proposes to apply a completely different chain of reasoning and

calculation to those substantive findings to reach results which are quite different from those calculated under his original decisions.

[38] My characterisation of what is proposed to be done by the adjudicator as a complete change of reasoning also points to a conclusion that there is no question of "miscalculation" here; rather, the adjudicator proposes to substitute new calculations for his original calculations.

Jurisdictional error

[39] My conclusion that the course proposed to be adopted by the adjudicator does not fall within any of the discrete circumstances specified in s 28(1) means that any purported exercise by the adjudicator of the power to correct under s 28(2) would be an act in excess of the discretionary power conferred on him by that subsection, and thereby constitute an act of jurisdictional error on his part.[2] Absent any statutory prohibition, it seems to me that in a case such as the present, in which the adjudicator has clearly articulated his intention to commit jurisdictional error by acting beyond power, it is clearly available to the Court to prevent the adjudicator from committing that error by granting appropriate relief, whether declaratory or, if necessary, injunctive. As McDougall J said in *Musico*,[3] "relief will lie where jurisdictional error, including jurisdictional error of law on the face of the record, is shown". *Semble*, in my view, where, as here, it is demonstrated that a jurisdictional error is about to be committed.

Judicial Review Act

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2 See, generally, *Musico v Davenport* [2003] NSWSC 977 at [28] – [31].

3 At [54].

[40] The second respondent says, however, that such relief is not available in the present case because, as a consequent of amendments made to the *Judicial Review Act* 1991 ("*JRA*") by the *Justice and Other Legislation Amendment Act* 2007, decisions made under Part 3 Division 2 of the *BCIPA* are excluded from the ambit of the *JRA*. By reason of that amending legislation, Part 2 of Schedule 1 of the *JRA* specifies Part 3 Division 2 of the *BCIPA* for the purposes of s 18(2)(b) of the *JRA*, with the consequence that the *JRA* does not apply to "decisions made, proposed to be made, or required to be made" under Part 3 Division 2 of the *BCIPA*. At it highest in respect of this argument, however, the present application is one for injunctive relief pursuant to s 43(2) of the *JRA*, which falls within Part 5 of the *JRA*, being the part dealing with prerogative orders and injunctions.[4] It is far from clear that the inclusion of the *BCIPA* in Part 2 of Schedule 1 of the *JRA* has the consequence of excluding an entitlement on the part of a contracting party to make application for injunctive relief under Part 5 of the *Judicial Review Act* 1991. On the one hand, Fraser JA in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd*[5] expressed an inclination to the view that adjudications are no longer reviewable under any part of the *Judicial Review Act*.[6] On the other hand, however, in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd*[7] Chesterman J (as he then was) said:[8]

> "[60] The application for judicial review was brought pursuant to Part 3 of the *Judicial Review Act* 1991 (Qld) ('*JR Act*'): see *The State of Queensland v Epoca Constructions Pty Ltd & Anor* [2006] QSC 324 at paras 16-35; *ACN 060 559 971 v O'Brien & Anor* [2007] QSC 91; *JJ McDonald & Sons Engineering Pty Ltd v Rics Dispute Resolution Service Qld & Anor* [2005] QSC 305; *Minimax Firefighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Anor* [2007] QSC 333 paras 39-43. With the enactment of the *Justice and Other Legislation Amendment Act* 2007 judicial

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4 See, for comparison, *Vis Constructions Ltd v Cockburn* [2006] QSC 416.
5 [2008] QCA 213.
6 See [78] and footnote 25.
7 [2008] QCA 83.
8 At [60] – [64].

> review of adjudications made pursuant to the *Building and Construction Industry Payments Act* 2004 ('the Act') will no longer be reviewable pursuant to Part 3 of the *JR Act*.
>
> [61] Adjudications will, however, continue to be reviewable pursuant to Part 5 of the *JR Act* which regulates the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. The grounds on which review might be sought are those established by the well known principles of administrative law. They are of course more circumscribed than the grounds for review given by s 20, s 23 and s 24 of the *JR Act*.
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> [62] Mr Bond SC who appeared with Mr Hindman for the applicant held out the prospect that builders dissatisfied with adjudications will continue to seek judicial review of them, utilising the provisions of Part 5 and seeking guidance, no doubt, from the New South Wales jurisprudence in which there have been numerous attempts to review adjudications pursuant to the general principles of an administrative law *dehors* a *Judicial Review Act*.
>
> [63] Section 48 of the *JR Act* (unlike s 13) applies to applications for judicial review brought under both Part 3 and Part 5. The observations of Muir JA that:
>
> > 'Judicial review of adjudicators' decisions sits uncomfortably with the Act's purpose of providing an expeditious, interim determination"
>
> and the remarks I made in Minimax that:
>
> > 'The salutary protection afforded to subcontractors by the Act will be sadly reduced if applications are routinely reviewed on any of the grounds appearing in s 20 of the *JR Act*'.
>
> are as apposite to applications brought under Part 5 as to those formerly brought under Part 3.
>
> [64] Section 48 will continue to offer an appropriate means of protecting the efficacy of the *Building and Construction Industry Payments Act* 2004 (Qld) by discouraging applications for review, subject, of course, to the individual merits of particular cases."

[41] My own preference is to adopt the approach of Chesterman J. One can well understand on policy grounds, particularly the imperative for the *BCIPA* to provide an expeditious means of decision-making for the purposes of progressing an ongoing building project, that the legislature intended that adjudicators' decisions should not be subject to statutory orders of review under the *JRA*. The underlying objective for this scheme was neatly explained, in the context of the cognate New

South Wales legislation, by Barrett J in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd*:[9]

> "15 The aim of the **Building and Construction Industry Security of Payment Act** is to ensure that progress payments are made, whether or not provided for in the contract, so that the party carrying out building work receives, on account, a summarily assessed sum as compensation for work done. That the adjudicator does or does not take into account a particular item or treats it in a particular way is irrelevant to ultimate questions of the contractual liabilities of the parties to one another. In **Multiplex Constructions Pty Ltd v Luikens** [2003] NSWSC 1140, Palmer J summarised the system embodied in the legislation as "pay now, argue later". In **Brodyn Pty Ltd v Davenport** [2004] NSWCA 394, Hodgson JA said that the Act reflects a legislative intention "to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay", the payments themselves being "only payments on account of a liability that will be finally determined otherwise."

That policy is, however, a far cry from suggesting that citizens should be precluded from having recourse to the courts to seeks orders in the nature of prerogative remedies or which otherwise lie generally within the inherent discretion of the Court without an express legislative exclusion.

Discretionary matters

[42] The second respondent contends that the discretion ought be exercised against the grant of the relief sought because the applicant has not demonstrated that damages would not be an adequate remedy. That submission, however, fails to have regard to the fact that the applicant expressly does not accept the correctness of the decisions made by the adjudicator, and in relation to which he has advertised his intention to correct, but says, quite properly in my view, that its complaints in that regard are expressly reserved by reason of s 100 of the *BCIPA* for resolution at a later stage. Section 100 provides:

> "**100 Effect of pt 3 on civil proceedings**

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9 [2004] NSWSC 1186 at [15].

> (1) Subject to section 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 aid 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."

[43] The present application ought not be determined, in my view, by reference to entitlements to claim which are preserved by the statute and which will, if necessary, be resolved by recourse to curial determination. Nor is it a question of the applicant needing to demonstrate that there is some further damage which would be suffered if the adjudicator makes the advertised corrections for which an award of damages would be inadequate. Again, any rights to make claims for damages would be expressly preserved by s 100. However, this is not an application to overturn a lawful decision. It is a case in which, on the material, the adjudicator will, unless restrained, make decisions which are beyond the powers conferred on him under s 28.

[44] In the circumstances, it is appropriate that he be so restrained.

Conclusion

[45] It will therefore be ordered that the first respondent be permanently restrained from correcting, in the manner foreshadowed in the facsimile transmission from Adjudicate Today dated 2 February 2009, either of the adjudication decisions made by the first respondent and dated 28 January 2009 and 29 January 2009 respectively.

[46] It will further be ordered that the second respondent pay the applicant's costs of and incidental to this application (including any reserved costs).