SUPREME COURT OF QUEENSLAND

CITATION:	*Abel Point Marina (Whitsundays) P/L v Uher and Anor* [2006] QSC 295
PARTIES:	**ABEL POINT MARINA (WHITSUNDAYS) PTY LTD (ACN 060 559 971)** (applicant) **v** **THOMAS UHER** (first respondent) **and** **SEA-SLIP MARINAS (AUST) PTY LTD (ACN 103 644 640)** (second respondent)
FILE NO:	BS7130 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application for judicial review
DELIVERED ON:	11 October 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	26, 27 September 2006
JUDGE:	Wilson J
ORDER:	**1. That the application for judicial review be dismissed.** **2. That the applicant pay the second respondent's costs of and incidental to the application, including reserved costs, if any, to be assessed on the standard basis.** **3. That the time in paragraph two in the order made by the Chief Justice on 25 August 2006 be enlarged to 9:30am 13 October 2006.** **4. That the operation of the order dismissing the application for judicial review and the order for costs be stayed to 9:30am 13 October 2006.** **5. That the matter be listed for further hearing as to the disposition of the moneys paid into Court in accordance with paragraph 3 of the said order of the Chief Justice at 9:30am 13 October 2006.**
CATCHWORDS:	JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – PROCEDURES PROVIDED BY STATUTE – where the applicant sought review of a decision by an adjudicator under the *Building and Construction Industry Payments Act 2004* (Qld) – where the adjudicator did not provide the applicant with the opportunity to provide further information – where the adjudicator was

bound to follow procedures set out in the Act – whether rules of natural justice were breached

JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – whether the adjudicator committed an error of law

JUDICIAL REVIEW – GROUNDS OF REVIEW – GENERALLY – whether there was sufficient evidence or other material to justify the adjudicator's decision – whether the adjudicator made a decision in relation to a jurisdictional fact

Administrative Decisions (Judicial Review) Act 1977 (Cth) s5
Building and Construction Industry Payments Act 2004 (Qld) s 7, s 8, s 17, s 18, s 21, s 22, s 24, s25, s 26, s30, s31, s60, s100
Judicial Review Act 1991 (Qld) s 20(2)(a), s 20(2)(f), s 20(2)(h), s 24

Australian Retailer Association v Reserve Bank of Australia (2005) 148 FCR , cited
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2003] NSWSC 1019, cited
Kioa v West (1985) 159 CLR 550, followed
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724, cited
Re Caf Grains [1994] Qd R 252, cited
Transgrid v Walter Construction Group [2004] NSWSC 21, cited
Western Television Ltd v Australian Broadcasting Tribunal (1986) 12 FCR 414, cited

COUNSEL: RA Holt SC and SA McLeod for the applicant
PG Bickford and AB Wallace for the second respondent

SOLICITORS: Allens Arthur Robinson for the applicant
McCullough Robertson Lawyers for the second respondent

[1] **WILSON J**: The applicant ("Abel Point") seeks review of the decision of the first respondent ("the adjudicator") dated 17 August 2006 in relation to an adjudication under the *Building and Construction Industry Payments Act 2004* (Qld) ("the Act") whereby it was adjudicated, inter alia, that the applicant pay an amount of $435,431.84 to the second respondent ("SSM").

[2] The decision of an adjudicator under the Act has been held to be an administrative decision to which the *Judicial Review Act 1991* (Qld) applies[1] and the hearing proceeded on the basis that that is so.

Background

[1] *JJ McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC 305; *Roadtek,Department of Main Roads v Davenport* [2006] QSC 47.

[3] By a contract made on 24 December 2004 between Abel Point as principal and the SSM as contractor, SSM was required to design and construct stages 2 and 3 berths and ancillary works at the Abel Point Marina, Airlie Beach. The agreement was varied by the December Variation Agreement made in December 2005.

[4] On 30 June 2006 SSM served a "payment claim"[2] as defined in schedule 2 of the Act on the applicant in the amount of $729,249.08 (including GST).

[5] On 14 July 2006 Abel Point served a "payment schedule"[3] as defined in schedule 2 of the Act nominating as the amount payable to SSM ("the scheduled amount") as 'Nil'.

[6] On 28 July 2006 SSM lodged an adjudication application[4] with Adjudicate Today, an authorised nominating authority, and on 31 July 2006 it served the adjudication application on Abel Point.

[7] The adjudicator was nominated as adjudicator[5] by Adjudicate Today.

[8] Abel Point served its "adjudication response"[6] as defined in schedule 2 of the Act on 7 August 2006.

[9] On 17 August 2006 the adjudicator made a decision in favour of SSM, ordering Abel Point to pay $435,431.84 (including GST) ("the adjudicated amount") to SSM together with 100% of the adjudication costs and interest.

[10] The application for judicial review challenges 2 aspects of the adjudicator's decision:

(a) The determination that Abel Point was not entitled to deduct the amount of $250,000 (plus GST) for liquidated damages from the progress payment is challenged on the grounds of -

(i) breach of the rules of natural justice;[7]

(ii) error of law;[8] and

(iii) that there was no evidence or other material to justify the determination.[9]

(b) the determination that Abel Point was not entitled to deduct $27,700 (plus GST) for the "Q-leave levy" from the progress payment is challenged on the ground of error of law.[10]

The object of the legislation

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2 the Act s 17.
3 the Act s 18.
4 the Act s 21.
5 the Act s 22.
6 the Act s 24.
7 *Judicial Review Act 1991* (Qld) s 20(2)(a).
8 *Judicial Review Act 1991* (Qld) s 20(2)(f).
9 *Judicial Review Act 1991* (Qld) s 20(2)(h).
10 *Judicial Review Act 1991* (Qld) s 20(2)(f).

[11] The Act provides for progress payments to contractors whether or not the relevant contract makes provision for progress payments and establishes a procedure for the making and recovery of such claims and their speedy adjudication where they are disputed.[11] However, an adjudication does not finally determine the rights of the parties in the sense that a party may "claw back" progress payments which it is forced to make through the adjudication process in subsequent civil proceedings.[12]

Liquidated damages

[12] In the present case there was provision for progress claims and progress payments in clause 42.1 of the contract. There was also provision for liquidated damages, capped at $250,000, for delay in reaching practical completion.[13] Under clause 42.1(b)(ii) liquidated damages could be taken into account in assessing a progress claim. Clause 35.6 provided -

> **"35.6 Liquidated Damages for Delay in Reaching Practical Completion**
>
> If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in Annexure Part A for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated pursuant to Clause 44, whichever first occurs.
>
> If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period to and including the new Date for Practical Completion."

The Date for Practical Completion and the Date of Practical Completion were questions of fact critical to the determination whether liquidated damages were payable.

[13] The December Variation Agreement provided -

> "APM[14] shall accept completion by the 31st March 2006, however earlier completion is encouraged."[15]

Abel Point contended that that set the Date for Practical Completion as 31 March 2006, but the SSM contended otherwise. The adjudicator said -

> "The 'December Variation Agreement' says in Clause 8.0, '*APM (the Respondent) shall accept completion by the 31 March 2006, however earlier completion is encouraged*'. The Claimant disputes

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11 the Act ss 7, 8.

12 the Act s 100; and see *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2003] NSWSC 1019 per Einstein J on similar NSW legislation.

13 Clause 35.6.

14 Abel Point.

15 Clause 8.0 (citation added).

> that that statement defines the Date for Practical Completion. I tend to agree with the Claimant. I would expect the 'December Variation Agreement' to be very precise on the issue of Practical Completion so that there would be no argument as to the interpretation.
>
> …
>
> Contrary to the Claimant's submission, the Respondent says that the Adjudicator is entitled to decide the Date for Practical Completion and the Date of Practical Completion. I tend to agree with the Respondent. However, I would only make a decision on such dates on condition that the parties provide me with sufficient information upon which I could make such a decision. At present the parties disagree on the Date for Practical Completion, on the amount of extensions of time granted to the Claimant and on whether or not the 'December Variation Agreement' actually provides for the Date for Practical Completion. Despite carefully examining and re-examining the submissions of the parties, I do not find the Respondent's submission compelling enough to enable me to decide the Date for Practical Completion and the Date of Practical Completion, and ultimately the Respondent's entitlement for liquidated damages, if any. I therefore decide that the Respondent is not entitled to deduct the amount of $250,000.00 (plus GST) for liquidated damages from the progress payment due.
>
> There are many other reasons raised by the Claimant in the Adjudication Application why I should reject the Respondent's deduction for liquidated damages, and there are many counter-arguments provided by the Respondent in the Adjudication Response why I should accept the Respondent's position. Since I have already decided to reject the Respondent's deduction for liquidated damages, it is not necessary for me to consider those issues any further."[16]

[14] The nub of Abel Point's submission is that having said that he could determine the Dates for Practical Completion and the Date of Practical Completion only if the parties provided him with sufficient information for that purpose, the adjudicator ought to have drawn a line in the sand, said that he could not determine these dates, and called for further written submissions.[17] It was submitted that he erred in instead proceeding to determine the liquidated damages question against Abel Point. In the context of the application for judicial review, this complaint was formulated in these ways:

(a) that the adjudicator breached the rules of natural justice by failing to afford Abel Point an opportunity to provide further information to enable him to determine the Date for Practical Completion and the Date of Practical Completion;[18]

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16 Adjudication Decision pp 7-8 (ex AJR-1 to Affidavit of Anthony James Ritchie, sworn 23 August 2006).

17 the Act s 25(4).

18 *Judicial Review Act 1991* (Qld) s 20(2)(a).

(b) that the adjudicator erred in law by deciding that the Date for Practical Completion was not 31 March 2006 as provided in the December Variation Agreement;[19]

(c) that there was no evidence or other material to justify the making of the decision that Abel Point was not entitled to deduct $250,000 (plus GST) for liquidated damages from the progress payment.[20]

Natural Justice

[15] Clearly the adjudicator was obliged to afford the parties procedural fairness. It is well established that the content of such an obligation varies according to the nature of the case. As Mason J explained in *Kioa v West*[21] –

> "Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. … What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting …
>
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, ie, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations".

[16] The Act laid down a staged process for bringing the disputed progress claim before the adjudicator in a timely fashion, and a set of procedures to be followed and matters to be considered by the adjudicator in coming to a decision.

[17] The adjudication of disputes is dealt with in division 2 of part 3 of the Act. By s 21 an adjudication application in circumstances such as these had to be made within 10 days after SSM received Abel Point's payment schedule.[22] Abel Point had to give its adjudication response within the later of 5 business days after receiving a copy of the application or 2 business days after receiving notice of the adjudicator's acceptance of the application.[23] There were limitations on the adjudication response: it could only be given if a payment schedule had been given within time[24] and it

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19 *Judicial Review Act 1991* (Qld) s 20(2)(f).
20 *Judicial Review Act 1991* (Qld) s 20(2)(h).
21 (1985) 159 CLR 550 at 584-585 (emphasis added).
22 the Act s 21(3)(c)(i), and it had to be referred by the nominating authority to an adjudicator as soon as practicable: the Act s 22(6).
23 the Act s 24(1).
24 the Act s 24(3).

could not include reasons for withholding payment not included in the payment schedule.[25]

[18] In reaching his decision the adjudicator had to follow the procedures in s 25 and consider only those matters set out in s 26 –

> "**25 Adjudication procedures**
>
> (1) An adjudicator must not decide an adjudication application until after the end of the period within which the respondent may give an adjudication response to the adjudicator.
>
> (2) An adjudicator must not consider an adjudication response unless it was made before the end of the period within which the respondent may give a response to the adjudicator.
>
> (3) Subject to subsections (1) and (2), an adjudicator must decide an adjudication application as quickly as possible and, in any case –
>
> (a) within 10 business days after the earlier of –
>
> (i) the date on which the adjudicator receives the adjudication response; or
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> (ii) the date on which the adjudicator should have received the adjudication response; or
>
> (b) within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days.
>
> (4) For a proceeding conducted to decide an adjudication application, an adjudicator –
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> (a) may ask for further written submissions from either party and must give the other party an opportunity to comment on the submissions; and
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> (b) may set deadlines for further submissions and comments by the parties; and
>
> (c) may call a conference of the parties; and
>
> (d) may carry out an inspection of any matter to which the claim relates.

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[25] the Act s 24(4).

(5) If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.

(6) The adjudicator's power to decide an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

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."[26]

[19] Those provisions set the bounds of the adjudicator's obligation to afford the parties procedural fairness.

(a) He was to make a decision on the papers (supplemented by the results of any inspection, and here there was apparently none).

(b) The decision was to be made promptly.

(c) He could call for further written submissions from either party, and if he did so, he had to give the other party an opportunity to comment on the further submissions.

(d) He could call a conference of the parties, and if he did so, it was to be conducted informally and the parties would not be entitled to legal representation.

(e) He could reach a decision even though one or both of the parties had not made a submission or comment within time or complied with his call for a conference.

The adjudicator's decision had to be in writing and to include reasons (unless the parties asked him not to include reasons).

[20] Here the adjudicator did all that was required of him to afford the parties procedural fairness. SSM claimed to be entitled to a progress claim in a certain amount. Abel Point claimed to be entitled to set-off liquidated damages. The adjudicator's primary obligation was to make a decision on the material before him. He could not determine Abel Point's right to the set-off without making findings as to the Date for Practical Completion and the Date of Practical Completion and in his view such findings could not be made on the material before him. It is not altogether clear whether the further submissions he could have called for might have included further relevant documentation, but assuming they could have, the critical point is that he was not obliged to seek further submissions.[27] If the submissions before him were such that he could not make findings as to these dates, then he could not be satisfied that Abel Point was entitled to set-off liquidated damages, and he rightly determined that issue against Abel Point. His doing so did not involve any breach of natural justice.

Error of Law

[21] As counsel for SSM conceded, it would be an error of law to misconstrue a provision of a private written agreement.[28] It is hard to see that the provision in the December Variation Agreement –

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26 Cross-reference removed.

27 *Transgrid v Walter Construction Group* [2004] NSWSC 21 at [68]-[69] per McDougall J.

28 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724; *Re Caf Grains* [1994] Qd R 252.

> "**8.0 Programme**
> [Abel Point] shall accept completion by the 31st March 2006, however earlier completion is encouraged"

could have meant other than that the Date for Practical Completion was thereby extended to 31 March 2006. But it does not follow that the adjudicator necessarily erred in law in deciding that the Date for Practical Completion was not 31 March 2006 as provided in the December Variation Agreement, since there was a dispute which he could not resolve about extensions of time. While the adjudicator said he "tended to agree" with Abel Point's submission that the Date for Practical Completion was 31 March 2006, he left the question undecided.

No Evidence

[22] The ground of review in s 20(1)(h) of the *Judicial Review Act 1991* (Qld) that "there was no evidence or other material to justify the making of the decision" must be read in conjunction with s 24. The applicant relied on s 24(a) which provides –

> "**24 Decisions without justification—establishing ground (ss 20(2)(h) and 21(2)(h))**
>
> The ground mentioned in sections 20(2)(h) and 21(2)(h) is not to be taken to be made out –
>
> (a) unless –
>
> (i) the person who made, or proposed to make, the decision was required by law to reach the decision only if a particular matter was or is established; and
>
> (ii) there was no evidence or other material (including facts of which the person was or is entitled to take notice) from which the person could or can reasonably be satisfied that the matter was or is established".

[23] Referring to the cognate provision in the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[29] Weinberg J has observed that it "seems merely to restate the doctrine of jurisdictional fact."[30] In other words, it is concerned with facts upon which the jurisdiction of a decision-maker depends as opposed to facts going to the merits.[31] As counsel for SSM submitted, the adjudicator did not make a decision in relation to any jurisdictional fact.

[24] Thus, the "no evidence" ground of review has not been made out.

Q-leave levy

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29 s 5(3)(a).

30 *Australian Retailer Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [577]. See also *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414 at 429 per Pincus J.

31 See Lawbook Co, *Federal Administrative Law*, vol 1 (at June 2006) [3155/1].

[25] Under the contract[32] SSM was required to pay all levies including WorkCover levies. It failed to pay the "Q-leave levy". Abel Point paid the levy on behalf of SSM on 2 September 2005. So much is common ground.

[26] SSM made an adjudication application dated 18 November 2005 in respect of an earlier progress claim. This resulted in an adjudication determination. There was an application for judicial review in respect of it, but the matter was resolved at mediation, and the parties entered into the December Variation Agreement on 14 December 2005.

[27] The December Variation Agreement provided (inter alia) –

> "1.0 **Purpose of Agreement**
> The purpose of this agreement is to establish terms acceptable to the parties for the completion of the Abel Point Marina.
>
> …
>
> 3.0 **Contract Value**
> Contract value including approved variations. Note SSM does not agree with all of the values approved and reserves its rights to have those variations valued in accordance with the contract.
>
> | | |
> |---|---|
> | Payment Certificate No. 10 | $ 8,228,199.99 |
> | Plus GST | $ 822,819.99 |
> | Total | $ 9,051,019.98 |
>
> 3.1 **Payments to Date**
> Amount of payments approved by M. Palmer and paid to Sea Slip Marinas
>
> | | |
> |---|---|
> | Payment Certificate No. 8 approved | $ 5,452,689.65 |
> | Less payments held | $ 397,040.55 |
> | Subtotal | $ 5,055,649.10 |
> | Plus GST | $ 505,564.91 |
> | Total | $ 5,561,214.01 |
>
> 4.0 **Balance to be Paid**
> The scope of outstanding works as at the date of this agreement, is outlined on SSM drawing 3160.34 (Colour coded) – Attachment A.
> Payment for outstanding works is to be in accordance with the Payment Schedule herewith wherein pontoon installation and electrical, plumbing and fire services will be paid as separate items.
>
> 4.1 **Payment Schedule**
> The attached schedule[33] details the agreed dollar value of each separate proportion of the work. The milestones are in the order contained in the SSM programme. That order will be adhered to unless otherwise agreed to between the parties.

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32 Item 8 of section 3.0 of the Specification.

33 It was common ground that the amended Payment Schedule dated 19 December 2005 should be substituted for that attached to the December Variation Agreement.

4.2 **The Agreed Amount**
The agreed balance of payments remaining under the contract is $3,172,550.88 plus GST $ 317,255.09 = $3,489,805.97 (subject to adjustment of variations as set out in paragraph 3.0)."

[28] The Payment Schedule had 6 columns headed as follows –

Item	Description of Work	Unit	Payable to Sea-Slip Marinas	Payable to Waterway Constructions	Total Payable excluding GST
1	Supply and Install Marina Pontoons OP	Item			Complete
2	Supply and Install Services for OP Marina Pontoons (not including commissioning	Item	$137,745.54	$132,926.00	$270,671.54
3	Supply & Install Gangway	Item	$32,223.11	$31,096.00	$63,319.11
4	Supply & Install QZ Walkway Pontoons	Item	$147,120.62	$141,974.00	$289.094.62
5	Supply and Install Link Marina Pontoons	Item	$121,445.07	$117,196.00	$238,641.07
6	Supply and Install Walkway Pontoons R/S, T/U, V/w, X/Y	Item	$167,447.08	$161,588.00	$329,035.08
7	'Supply and Install Q Finger Pontoons (16 off)	Item	$134,131.08	$129,438.00	$263,569.08
8	Supply and Install S/R & T/U Finger Pontoons	Item	$140,813.60	$135,887.00	$276,700.60
9	Supply and Install V/W & X/Y Finger Pontoons	Item	$160, 612.99	$154,994.00	$315,606.99
10	'Supply and Install Q Finger Pontoons (5 off) & T-Heads	Item	$71,998.33	$69,480.00	$141,478.33
11	Supply and Install Services for Q/Z Marina Pontoons (not including commissioning)	Item	$144,708.67	$139,646.00	$284,354.67
12	Supply and Install Services for R/S, T/U, V/W, X/Y Marina Pontoons (not including commissioning)	Item	$54,326.00	$52,425.00	$106,751.00
13	Commission Services	Item	$6,998.81		$6,998.81
14	Fuel Berth Pontoons	Item	$82,232.32	$79,357.09	$161,589.41
15	Retention to be Paid upon contract completion	Item	$198,520.27		$198,520.27

16	Retention to be Paid upon completion of defects liability period	Item	$198,520.28		$198,520.28
18	Qleave levy Paid By Pincipal [sic] Direct	Item	$27,700.00		$27,700.00
TOTAL COST EXCLUDING GST:			**$1,826,543.79**	**$1,346,007.09**	**$3,172,550.88**

[29] Abel Point contended that it was entitled to deduct the amount of the levy from the progress claim, and that properly construed the amended payments schedule acknowledged that it had been paid directly by it. The adjudicator said –

> "While under the terms of the Contract (prior to the 'December Variation Agreement'), the Claimant was responsible to pay for the 'Q-leave levy', I am of the opinion that the Respondent's right to claim a deduction for the levy from the Claimant's Payment Claim was extinguished by the 'December Variation Agreement'. I therefore decide that the Respondent is not entitled to deduct the amount of $27,700.00 (plus GST) from the Payment Claim.
>
> …
>
> What is not clear to me is why the Respondent would agree under the 'December Variation Agreement' to pay the Claimant the amount of $27,700.00, if the Respondent had previously paid that levy on behalf of the Claimant. I could be wrong but the only conclusion that I can reach is that in the 'December Variation Agreement' the Respondent had accepted the responsibility for payment of the levy and had agreed to refund to the Claimant the amount that the Respondent had withheld from the previous progress payments on account of that levy. The submissions of the Respondent in the Payment Schedule and the Adjudication Response have not convinced me that the Respondent is entitled to deduct the amount of $27,700.00 from the Payment Claim. I therefore decide that the Claimant can include the amount of $27,700.00 (plus GST) in the calculation of the progress payment due."[34]

[30] Counsel for Abel Point drew attention to the practical consequence of the adjudicator's decision that it was not entitled to deduct the amount of the levy from the progress claim – that their client would have to pay the levy twice. The adjudicator was conscious of this. The Agreed Amount in clause 4.2 was the difference between the Contract Value in clause 3.0 and the Payments to Date in clause 3.1. The Payment Schedule showed how the Agreed Amount was comprised and to whom the component parts were to be paid. Counsel for Abel Point did not explain how the adjudicator erred in his interpretation of the December Variation Agreement. If his real contention was that there was a mistake which would justify rectification, that was not a matter for determination in an adjudication under the Act, but rather for a restitutionary claim in a civil proceeding.[35]

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34 Adjudication Decision pp 8, 13-14 (ex AJR-1 to Affidavit of Anthony James Ritchie, sworn 23 August 2006).

35 See the Act s 100.

[31] The adequacy of the adjudicator's reasons has to be looked at in the context of the task assigned to him by the Act and other factors such as the qualifications for appointment as an adjudicator. He was to provide a speedy interim determination on the papers of disputes about a progress claims. His decision was enforceable by the mechanism of an adjudication certificate which might be filed as a judgment debt and enforced in a court of competent jurisdiction.[36] While there are limitations on the matters which may be raised in an application to set aside such a judgment,[37] parties' rights to raise matters in civil proceedings are not affected (subject to adjustment for any moneys found ultimately not to be due).[38] A wide range of people may qualify for appointment as adjudicators, the criteria being the holding of an adjudication qualification (a certificate of achievement of an adjudication competency standard prescribed under a regulation)[39] or another qualification that the registrar appointed under the Act considers to be equivalent to an adjudication qualification.[40]

[32] The adjudicator explained how he came to the conclusion that Abel Point was not entitled to deduct the $27,700 from the progress payment – that it had accepted responsibility for it in the December Variation Agreement and agreed to refund SSM the amount it had withheld from previous progress payments on behalf of the levy. In so doing he exposed his reasoning sufficiently to fulfil his obligation to give reasons.

Conclusion

[33] The application for judicial review should be dismissed.

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36 the Act ss 30, 31.
37 the Act s 31(4).
38 the Act s 100.
39 the Act s 60, schedule 2 - definition of "adjudication qualification".
40 the Act s 60