Supreme Court
New South Wales

Medium Neutral Citation:	**Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd (No 2) [2024] NSWSC 1223**
Hearing dates:	4, 5, 6, 26 September 2024
Date of orders:	26 September 2024
Decision date:	30 September 2024
Jurisdiction:	Equity - Commercial List
Before:	Parker J
Decision:	See [359-361]
Catchwords:	BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (‘SOPA’) — adjudication of payment claims — adjudicator’s obligation to give reasons — adjudicator’s obligation to consider respondent's submissions — “legal unreasonableness” — jurisdictional error BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (‘SOPA’) — adjudication of payment claims — scope of adjudication proceedings — respondent calls bank guarantees and allows credit against set-off claims in payment schedule — claim for restitution in adjudication application — jurisdiction BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) (‘SOPA’) — adjudication determination — application for stay of enforcement proceedings pending arbitration — alleged risk of non-repayment — whether stay available

	where judgment creditor not in liquidation — SOPA, s 32B — whether expert evidence required as to risk of non-repayment –— degree of risk — stay refused
Legislation Cited:	*Building and Construction Industry Security of Payment Act 1999* *Commercial Arbitration Act 2010* *Corporations Act 2001* (Cth)
Cases Cited:	*Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd* [2023] NSWSC 1565 *A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144 *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56 *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578 *Binah Constructions Pty Ltd v PTMG Pty Ltd* [2024] NSWSC 872 *Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering* [2017] NSWSC 1665 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 *CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd* [2019] NSWSC 1251 *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225 *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 *City of Ryde v AMFM Constructions Pty Ltd & Anor* [2011] NSWSC 1469 *Demex Pty Ltd v McNab Building Services Pty Ltd* [2023] NSWCA 261 *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72 *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162 *Fulton Hogan v Cockram Constructions* (2018) 97 NSWLR 773 *Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico* [2004] NSWSC 344 *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 *Joye Group Pty Ltd v Cemco Projects Pty Ltd* [2021] NSWSCA 211

LPTD v Minister for Immigration [2024] HCA 12; 98 ALJR 610
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894
Prime Constructions (Qld) Pty Ltd v HPS (Qld) Pty Ltd [2019] QSC 301
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1
Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd [2009] QSC 165
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 216 CLR 212
Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2018] NSWCA 33
TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 118
Veolia Water Solutions v Kruger Engineering [No 3] [2007] NSWSC 459

Texts Cited: Nil

Category: Principal judgment

Parties:

Proceedings 2024/278963
Martinus Rail Pty Limited (Plaintiff)
Qube RE Services (No 2) Pty Limited (Defendant)

Notice of Motion filed 1 August 2024
Qube RE Services (No 2) Pty Limited (Applicant)
Martinus Rail Pty Limited (Respondent)

Proceedings 2024/278984
Martinus Rail Pty Limited (Plaintiff)
Qube RE Services (No 2) Pty Limited (Defendant)

Notice of Motion filed 1 August 2024
Qube RE Services (No 2) Pty Limited (Applicant)
Martinus Rail Pty Limited (Respondent)

Proceedings 2024/286961
Qube RE Services (No 2) Pty Limited (Plaintiff)
Martinus Rail Pty Limited (First Defendant)

	John Tuhtan (Second Defendant)
Representation:	Counsel: Proceedings 2024/278963 J C Giles SC/ T J Boyle/ J Bridgett (Defendant/Applicant) S Robertson SC/ A Langshaw (Plaintiff/Respondent) Proceedings 2024/278984 J C Giles SC/ T J Boyle/ J Bridgett (Defendant/Applicant) S Robertson SC/ A Langshaw (Respondent/Applicant) Proceedings 2024/286961 J C Giles SC/ T J Boyle/ J Bridgett (Plaintiff) S Robertson SC/ A Langshaw (Defendant) Solicitors: Proceedings 2024/278963 Maddocks Lawyers (Plaintiff/Respondent) King & Wood Mallesons (Defendant/Applicant) Proceedings 2024/278984 Maddocks Lawyers (Plaintiff/Respondent) King & Wood Mallesons (Defendant/Applicant) Proceedings 2024/286961 King & Wood Mallesons (Plaintiff) Maddocks Lawyers (First Defendant)
File Number(s):	2024/278963; 2024/278984; 2024/286962
Publication restriction:	Nil

JUDGMENT

1 These proceedings arise out of two adjudications under the *Building and Construction Industry Security of Payment Act 1999* ("SOPA" or "the Act"). The adjudications took place under two separate contracts between a head contractor and a sub-contractor. They obliged the head contractor to pay $71 million in total to the sub-contractor. In the present proceedings, the sub-contractor seeks to enforce the payment of the adjudicated amounts. The head contractor seeks to set the adjudications aside or alternatively to stay their enforcement until the parties' rights are determined by arbitration.

2

The dispute between the parties has already been the subject of proceedings in this Court, which resulted in a judgment of Rees J last December: *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2023] NSWSC 1550 (“J1”). At J1 [11]-[28] her Honour summarised the background and some of the contractual provisions. The background for the purposes of the present dispute may be further summarised as follows.

3 The contracts in question were for works forming part of a large infrastructure development being undertaken at Moorebank in Western Sydney, known as the Moorebank Intermodal Terminal Project. The development is being carried out by a Commonwealth government business enterprise named National Intermodal. The head contractor is Qube RE Services (No 2) Pty Ltd (“Qube”). The sub-contractor is Martinus Rail Pty Ltd (“Martinus”).

4 The contract between National Intermodal and Qube is known as the “Development and Operation Deed” (“DOD”). The two sub-contacts between Qube and Martinus, which are the subject of these proceedings, were both dated July 2022. They are styled “Interstate Terminal Works Contract” dated 8 July 2022 (“INTS Contract”) and “Interstate Rail Access Works Contract” of the same date (“ISRA Contract”). I will refer to them collectively as “the Contracts”. The Contracts were on “construct only” terms; that is, Martinus was to undertake the specified construction work in accordance with designs provided by Qube.

5 As is conventional, the administration of the Contracts took place under the direction of a superintendent appointed by Qube (“the Superintendent”). The Superintendent was obliged by the terms of the Contracts to “act independently”. Qube appointed Mr Peter Marshall of Rail Planning Services Pty Limited (“RPS”).

6 In February last year, Martinus was estimating that the date for practical completion under the Contracts was ten months away, in December. Over the following months that date blew out. By August it had reached June this year (still ten months away). According to Qube, at that point the adjusted date for practical completion under the Contracts, taking into account approved extension of time claims, was 30 November. The “sunset date” by which completion of Qube’s works was required under the DOD was 24 January this year.

7 For its part, Martinus blamed Qube for the delay. According to Martinus, the necessary designs to undertake the work had been delivered late, and were in some cases inadequate. Furthermore, Qube had failed to give access to the site to allow Martinus to undertake the works. According to Martinus, access had been delayed in some cases

by more than a hundred days after the originally scheduled date. Martinus claimed not only that it was not responsible for the delays, but also that Qube was liable for additional costs attributable to them.

8 It seems that these arguments were not accepted by the Superintendent. Martinus' payment claims for the period up to 31 May went to adjudication. In early August, the adjudicator (Mr Alan Stapleton, not the adjudicator whose adjudications are in issue in these proceedings) handed down determinations in favour of Martinus totalling $11.1 million. These amounts were paid by Qube.

9 Matters came to a head at the end of August. Qube issued formal notices invoking the show cause procedure required for termination of the Contracts. Martinus responded, but Qube took the position that the response was unsatisfactory. On 25 September, Qube issued formal notices of termination for cause. On the same date, it issued formal notices of termination for convenience to take effect if the terminations for cause proved to be invalid.

10 Martinus disputes the validity of the termination for cause, but it is common ground that the Contracts were terminated on 25 September; the question is whether the termination was for cause or for convenience.

11 Martinus' payment claims under the Contracts for the period up to 31 August 2023 also went to adjudication before Mr Stapleton. Early in November, he delivered determinations in favour of Martinus, totalling $4.6 million. These amounts were also paid by Qube.

12 By this point Qube had paid a total of $113 million (or perhaps $117 million) to Martinus under the Contracts, including adjudicated amounts.

13 In early December, Qube issued formal notices of dispute under the dispute resolution clauses of the Contracts. Qube alleged that it was entitled to substantial damages from Martinus for breach of contract, and to reimbursement of monies which should not have been allowed in the adjudications before Mr Stapleton.

14 The dispute resolution clause in the INTS Contracts (which I understand to have been the same in the ISRA Contract) provided for an elaborate multi-stage process. The first step involved negotiations between appointed representatives of the parties. If these negotiations were unsuccessful, there was to be what the Contracts described as an "Escalation of Dispute" involving further negotiations between the parties at senior executive level. Provision was made for the executive negotiators, if unable to agree on a resolution of the dispute, to refer it to mediation, expert determination or arbitration. If

the matter was not resolved through mediation or expert determination (including if any party was dissatisfied by the expert's determination), the dispute would be determined by formal arbitration.

15 Following the issue of the notices of dispute, the earlier proceedings in this Court to which I have referred were commenced. Martinus applied under the *Commercial Arbitration Act 2010* for an injunction restraining Qube from calling on the bank guarantees provided as security for Martinus' obligations under the Contracts. The application was heard by Rees J on 11 December and her Honour delivered judgment on 20 December. She dismissed the application.

16 Although the injunction was refused, Qube did not immediately call on the bank guarantees. That did not happen until 8 February this year.

17 The payment claims which resulted in these proceedings were also issued on 8 February (shortly after, but in ignorance of, the call on the bank guarantees). The amounts claimed were $104.1 million for the INTS Contract and $33.3 million for the ISRA Contract. Qube responded on 22 February. Qube alleged that under each Contract it was owed money by Martinus. The scheduled amounts were credits of $1.4 million for the INTS Contract and $1.4 million for the ISRA Contract. The difference between the parties was therefore almost $140 million.

18 On 7 March, Martinus issued its adjudication applications. Qube was served later that day. The applications claimed payment of $104.1 million under the INTS Contract and $33.3 million under the ISRA Contract. They were referred to Mr John Tuhtan ("the Adjudicator"). On 15 March, Qube duly provided its responses to the applications.

19 The adjudication proceedings before the Adjudicator were complex and proved to be protracted. The payment claims, payment schedules, applications and responses involved scores of disputed items, hundreds of pages of submissions and thousands of pages of supporting material.

20 Under the timetable laid down by the Act, the adjudications were to be completed by 2 April. On 22 March, the Adjudicator requested an extension of 21 business days, noting the volume of documents and the complexity of the issues . The parties consented. In the end, four further extensions of time were sought and granted, taking the date for delivery of the determinations to the second half of July. According to counsel for Qube, the Adjudicator's fees were calculated on the basis that he spent more than 9 hours a day, on average, on the adjudication over the 132 calendar days (that is, including weekends and public holidays) between the beginning of the adjudications and the delivery of the determinations. I did not understand these figures to be in dispute.

21

The Adjudicator delivered his determinations on 22 July. Including the reasons, they consisted of 560 pages for the INTS adjudication and 287 pages for the ISRA adjudication, although there was a degree of repetition. The Adjudicator determined that progress payments of $63.1 million should be made under the INTS Contract and $7.1 million under the ISRA Contract. He also decided that Qube should pay the whole of the costs of the adjudications. The Adjudicator's fees totalled $543,000 which was split $209,000 for the ISRA adjudication and $334,000 for the INTS adjudication).

22 On 2 February, Qube had given notices pursuant the dispute resolution procedure under the Contracts escalating the dispute to executive level. A mediation took place unsuccessfully and it seems there were no further attempts at executive resolution. On 27 March, while the adjudication proceedings were pending, Qube issued formal notices of referral to arbitration under the Contracts. On 26 July, four days after delivery of the Adjudicator's determinations, Qube served notices of arbitration under the rules of the Resolution Institute, the body under whose auspices arbitrations of disputes are to occur under the Contracts. Counsel for the parties told me that the identity of the arbitrator has not yet been agreed.

23 Under the Act the time for payment of the adjudicated amounts was 29 July. Qube failed to pay and the commencement of the present proceedings followed soon after.

Issues for determination

24 There are three proceedings before the Court. The first two proceedings (2024/278693 and 2024/278984) were commenced by Martinus to enforce payment of the adjudicated amounts under the Act. I will refer to them as the "enforcement proceedings".

25 Adjudication certificates were filed on 30 July, commending the enforcement proceedings. Judgments were entered, pursuant to s 25 of the Act, on the following day. For the INTS Contract the judgment was $66.087 million. For the ISRA Contract it was $7.595 million.

26 On 5 August, Qube filed its own proceedings (2024/286961), to which I will refer as the "judicial review proceedings". In these proceedings Qube seeks to set aside the determinations on the grounds of alleged jurisdictional error on the part of the Adjudicator.

27 Qube's primary case is that the errors made by the Adjudicator are so extensive that the whole of the adjudications should be set aside, along with the judgments based on them. An interim order has been made staying execution on the judgments entered in the enforcement proceedings until after I deliver my judgment, as a condition of which Qube has paid $4 million to Martinus and lodged bank guarantees to secure the remaining amounts outstanding under the judgments.

28 Alternatively, if the judicial review proceedings fail or only result in the adjudications being partially set aside, Qube applies for stays of any remaining obligation to pay. These applications have been made by way of notices of motion filed in the enforcement proceedings (for convenience I will refer to them as a single application).

29 In these circumstances, I will deal first with the judicial review proceedings. I will then consider the stay applications in the enforcement proceedings in the light of my conclusions in the judicial review proceedings.

Judicial review proceedings

30 In their written submissions, counsel for Qube advanced 37 challenges to different components of the adjudications. Counsel also challenged the Adjudicator's determinations on costs.

31 Counsel for Qube did not challenge every single component of the Adjudicator's determinations. But their primary position was that the determinations were so riddled with jurisdictional errors that the determinations should be set aside as a whole. Alternatively, counsel asked me to set aside the determinations to the extent that Qube's challenges were sustained, pursuant to s 32A of the Act.

Jurisdictional error: general principles

32 Authoritative guidance on jurisdictional error has recently been provided by the judgment of six members of the High Court in *LPTD v Minister for Immigration* [2024] HCA 12; 98 ALJR 610. At [2]-[3], the Court identified the relevant context (citations omitted):

> Jurisdictional error can refer to breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force attributed to exercise of that authority by statute. Though a decision affected by jurisdictional error is a decision in fact, it is "in law … no decision at all" and is in that sense "void".
>
> ... Jurisdictional error can result from breach by a third party of a condition of a statutory process preceding a decision, but more often results from breach by a statutory decision-maker of a condition of the making of a decision. Jurisdictional error on the part of a statutory decision-maker in making a decision can include: misunderstanding the applicable law; asking the wrong question; exceeding the bounds of reasonableness; identifying a wrong issue; ignoring relevant material; relying on irrelevant material; in some cases, making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.

33 The Court continued at [4] (citations omitted):

> A statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition. Only by construing the statute so as to understand the limits of the statutory conferral of decision-making authority is it possible to determine, first, whether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory

> conferral of decision-making authority) and, second, whether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force).

34 At [6]-[7], the Court addressed the requirement of "materiality" (citations omitted):

> In some cases, where an error is established, the error will be jurisdictional irrespective of any effect that the error might or might not have had on the decision that was made in fact. In other cases, the potential for an effect on the decision will be inherent in the nature of the error. An example of the former is apprehended or actual bias. An example of the latter is unreasonableness in the final result. In such cases, the error necessarily satisfies the requirement of materiality.
>
> In most cases, however, an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred. That is because it is now accepted that a statute which contains an express or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating such a "threshold of materiality" in the event of non-compliance.

35 At [9]-[13], the Court discussed how these principles operate in practice. There are two requirements, namely that an error has occurred, and if so, that that error was material (if materiality must be demonstrated to establish jurisdictional error). The onus lies on the applicant to satisfy the court on the balance of probabilities that the alleged error in fact occurred. If that is established, then whether the error is, or is not, material is determined by inference from the evidence adduced on the application.

36 The Court went on to give specific guidance on the test of materiality (citations omitted):

> The question … is whether the decision that was in fact made *could*, not *would*, "realistically" have been different had there been no error. "Realistic" is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous.
>
> What must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error. In some cases, it will be sufficient to show that there has been an error and that the outcome is consistent with the error having affected the decision. Where the error is a denial of procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision-maker would have approached the applicant's further evidence or submissions with an open mind. In those cases, it is "no easy task" for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome. Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained. This case affords an example.
>
> In sum, unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met (and curial relief will be justified subject to any issue of utility or discretion).

Jurisdictional error under the Act

37

Counsel for both parties addressed me in some detail on the principles which have emerged from the case law on the identification of jurisdictional error in the particular context of the Act. I will address those submissions at this point.

38 **Nature and scope of adjudication proceedings**: The requirements of an adjudication determination are set out in s 22(1), which provides:

> **22 Adjudicator's determination**
>
> (1) An adjudicator is to determine—
>
> (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 such amount became or becomes payable, and
>
> (c) the rate of interest payable on any such amount.
>
> …

39 An adjudication application is an application for adjudication "of a payment claim" (s 17(1)). A payment claim is a claim "to be entitled to a progress payment" (s 13(1)). Relevantly for present purposes, the entitlements claimed by Martinus were entitlements "calculated in accordance with the terms of" the Contracts (s 8(1) and s 9(a)).

40 Formal requirements for a payment claim are set out in s 13(2). Relevantly they include:

> A payment claim—
>
> (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
>
> (b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and
>
> …

41 Formal requirements of a payment schedule are set out in 14(2) and (3). Of particular significance is subsection (3), which provides:

> If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

42 As the Court of Appeal (Basten JA, with whom Macfarlan JA and Emmett AJA agreed) explained in *Joye Group Pty Ltd v Cemco Projects Pty Ltd* [2021] NSWSCA 211 at [12]:

> The provision of a payment schedule indicating that part or all of the claim is disputed, engages the entitlement of the claimant to apply for an adjudication pursuant to s 17 of the Security of Payment Act. Importantly, if an adjudication application is made, the party against whom the claim is made is entitled to file an adjudication response, but "cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant": s 20(2B). The reasons given in the payment schedule therefore impose a critical constraint upon the scope of the adjudication.

43

It had previously been suggested by Hodgson JA in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 that where an item in a payment claim was disputed in the payment schedule, but no reasons were articulated, the Adjudicator was still required to consider what was properly payable having regard to the "true construction of the Contract and the Act" and the "true merits of the claim". In *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225 the suggestion was examined in detail and rejected. Payne JA, with whom the other members of the Court agreed, stated (emphasis added):

> **It is the dispute between the maker of the payment claim and the recipient of that claim which is referred for adjudication**. In the light of [s 20(2B)] an adjudicator is not required to go beyond the terms of the payment schedule, repeated in an adjudication response, in accepting all or part of the payment claim. **The requirement in s 22(1), that the adjudicator is to determine "the amount of the progress payment (if any) to be paid" by the respondent to the claimant, in context, is a requirement to determine the amount of the progress payment arising from the dispute submitted by the parties for adjudication**. The notion that it is jurisdictional error for an adjudicator to fail to address what the adjudicator considers to be the "true construction of the contract" and the "true merits of the claim" outside the limited issues presented by the parties for determination is an invitation for the reviewing court to embark on an impermissible merits review.

44 The decision of the Court of Appeal (Spigelman CJ, Basten JA and McDougall J) in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 confirms that judicial review may be obtained in at least some cases where the adjudicator makes a (purported) determination of a dispute which falls outside the scope of the Act. In that case, there was an issue about whether the adjudication application had been served on the respondent within the time limit prescribed by s 17(2)(a). The adjudicator considered that it had been. The Court of Appeal held, however, that the Court was not bound by that determination, which was plainly incorrect. The result was that there had never been valid adjudication proceedings at all.

45 The scope for review is however limited as a result of Court of Appeal decisions which accept that adjudicators may in some respects determine the scope of the adjudication for themselves: see *Australia Avenue Developments Pty Ltd v Icon Co (NSW) Pty Ltd* [2018] NSWSC 1578 at [74]-[86]. In *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72, the Court of Appeal (Giles JA, speaking for the Court) stated (at [87]):

> In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination. In the present case, in determining the amount of the progress payment (if any) to be made it was for the adjudicator to decide whether the water ingress fell within latent conditions for the purpose of the contract, and the parameters of the payment claim in that respect. He did so. As to both, it could not be said that the adjudicator's decision was without foundation, and if the adjudicator addressed the matters and came to his decisions, even if other decisions could have been come to, he did what the Act required – he determined the adjudicated amount. …

46

In *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 an adjudicator made a determination in favour of a contractor which included the reversal of "backcharges" previously levied by the principal, the reversal of which had not been claimed in the contractor's payment claim. The Court of Appeal (Basten JA, with whom Meagher and Leeming JJA agreed) rejected the principal's challenge to the adjudicator's jurisdiction.

47 At [23]-[25], Basten JA described how the issue arose:

> The references to "backcharge items" requires some explanation: the term is obscure. Indeed, it is not entirely clear that it is used consistently by the parties. Thus, in its written submissions in this Court, the appellant stated:
>
> > "The 'backcharges' were introduced into the dispute by Australia Avenue in its payment schedule…. The 'backcharges' reflected amounts which Australia Avenue asserted should be taken off the contract sum for various items of work because there had been variations reducing the scope (or price) of the relevant works. Variations of that kind can properly be described as 'negative variations'. In the documents before the adjudicator, the parties called those items 'backcharges' because they reflected amounts which Australia Avenue had already paid to Icon, but which Australia Avenue was asserting should not have been paid by reason of the negative variations."
>
> The submissions further stated:
>
> > "In its adjudication application, Icon contended that there should be no deduction for the 'backcharge' amounts …. The Adjudicator agreed with Icon's contentions and did not allow the deductions referred to by Australia Avenue …. His Honour held that the Adjudicator erred in doing so."
>
> It was part of the respondent's case that the adjudicator allowed an amount on account of "backcharges" which was not to be found in the payment claim. If a backcharge were an amount which reduced the claim, it would not properly be described as an amount for which a claim was made. It would only be part of a payment claim if the claim included amounts which had previously been made and allowed, or perhaps disallowed and were now sought to be reinstated. It is not clear that either party used the language in that sense.

48 His Honour had earlier quoted the passage from *Downer* reproduced above and commented (at [19]):

> It follows that it was no part of the primary judge's function to examine the payment claim to determine whether he considered that the approach adopted by the adjudicator was erroneous. Even if it were erroneous, it would not constitute jurisdictional error to act upon such an erroneous view…

49 Having described at [23]-[25] how the issue in the instant case arose, his Honour continued (at [26]-[27]):

> In substance this case involved a dispute as to how the payment claim and the payment schedule should be understood.
>
> It was not, and is not, appropriate for the Court to engage in an analysis of the manner in which the adjudicator dealt with the payment claim in her determination. …

50 After reviewing what had occurred in the adjudication, his Honour concluded, at [32]-[33]:

> This was not a case in which it could be said that the adjudicator awarded more than the amount claimed; she self-evidently did not. Rather, it was a dispute as to the proper construction of the payment claim having regard to the contractual provisions. The statute requires that the adjudicator "is to consider" the provisions of the construction

> contract and the payment claim.27 However, an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form a basis upon which the adjudication can be quashed.
>
> In any event, it is tolerably clear that there was no error. There was a dispute between the parties in relation to what were described as "backcharges". Once it was accepted that there was a dispute to be resolved, the respondent identified no error in the reasoning of the adjudicator, except to say that the backcharges were not part of the payment claim as served. The respondent accepted that the payment claim as served and adjudicated upon identified the construction work, as required by s 13(2)(a). It was not deficient in that respect. The dispute was as to the calculation of the value of that work, which was the very task vested in the adjudicator.

51 **Consideration of parties' submissions**: This topic is addressed in s 22(2)(b) of the Act. For context, I set out the whole of s 22(2):

> In determining an adjudication application, the adjudicator is to consider the following matters only—
>
> (a) the provisions of this Act,
>
> (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 duly 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 duly 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.

52 The express terms of s 22(2) are negative in form: all they do is restrict the material to which the Adjudicator may have regard (it has in fact been held that there may be circumstances in which the Adjudicator can have regard to other matters, but that is not material for the purpose of the present case). The section does not say, in terms, that the Adjudicator must consider the material specified. But it seems that the obligation is read as meaning "the adjudicator is to consider, and to consider only" the specified material. For instance, in the passage just quoted from *Icon,* at [32], Basten JA said that s 22(2) of the Act "requires" that the adjudicator "is to consider" the provisions of the construction contract and the payment claim.

53 In *Ceerose*, Payne JA (with whom Ward ACJ and Basten AJA agreed) addressed the practical question of how breach of the obligation to "consider" material in s 22(2) is to be established. His Honour stated, at [62]-[69]:

> The attempt to articulate, using other language, what is required by the verb "consider" will usually be misconceived. Certainly, it is misconceived in the present statutory circumstance. In a practical sense, the problem for a party challenging a determination is not to identify whether the mental process undertaken by the adjudicator was "active", "intellectual" or "genuine", but rather to identify a basis on which it could be said that consideration did not occur. The mental processes of the adjudicator will be entirely opaque, except to the extent that they are revealed in his or her reasons. However … the failure to identify a particular claim or response in reasons will not of itself demonstrate that the adjudicator failed to consider it. That is so for a number of reasons.

> First, reasons are not necessarily, or even usually, a comprehensive statement of all aspects of a decision-maker's thinking. Even judicial reasons, which are expected to be more comprehensive and detailed than those of an administrative decision-maker, are not required to deal with all the evidence or all the submissions. A process of selection is undertaken: that is a necessary part of the process and not merely a concession to judicial frailty.
>
> Secondly, the scope of the reasons will inevitably reflect the practical circumstances under which the adjudicator is operating. … unless time is extended by the parties, the adjudicator may have as few as eight business days to determine the application by reference to the adjudication response.
>
> Thirdly, it is not unusual for the material supplied to an adjudicator to run into hundreds and even thousands of pages (as it did in this case). It is inevitable that, in accordance with this statutory scheme, an adjudicator will spend more time on some items within a claim than on others. The reasons may reflect such choices or they may not. It would, however, be entirely rational for an adjudicator to spend little time on an item of, say, $3,000 in a total claim of over $1 million, both in considering submissions and in preparing reasons.
>
> Fourthly, there is a question as to what specific inference is to be drawn from the absence of reference to a particular submission or contention in a set of reasons. There are a range of possible explanations, only one of which is that the material was not considered. Another is that the claim was readily seen to be well-founded and the submissions to the contrary as lacking in substance. However, the latter would be a good reason to omit reference to the issue in the reasons. If the submission had been misunderstood, the facts mistaken or the law wrongly identified, that might explain absence from the reasons of something expected to be addressed, but not lack of consideration. Of course, the duty to consider a submission is separate from the absence of any duty to deal with it correctly, whether in law or in fact. The point is rather that an unreviewable error may explain why the reasons do not advert to a particular matter.
>
> This is a situation in which the reasoning of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360; [1949] HCA 26 may be turned on its head. In explaining why a decision may be reviewable even though the decision-maker has not given reasons, Dixon J stated:
>
>> "If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition."
>
> Often it will be equally likely that an adjudicator who does not refer in reasons to a particular matter mistook the facts or misunderstood the contractual provision or the legal principle to be applied, as that he or she did not consider the factor at all. In those circumstances, a complaint of failure to consider will not be proven.
>
> For all of these reasons, there are likely to be few cases in which an applicant for judicial review can establish a breach of the duty to consider the matters set out in s 22(2). That is not to say that there may not be circumstances in which the inference of omission to consider is demonstrated. Thus, failure to refer to a submission on a centrally important matter, clearly articulated and based on uncontested facts, may demonstrate a failure to consider at all. Such is likely to be a rare case.

54 The High Court in *LPTD* expressly identified "ignoring relevant material" as conduct of a decision-maker which may amount to jurisdictional error. But as I understood counsel for Martinus, they did not accept that an adjudicator's failure to consider a submission, even if it involved a contravention of s 22(2), would be a jurisdictional error for the purposes of the Act.

55 It is true that not every contravention of s 22(2) has been so treated. The key decision of the Court of Appeal in this regard is *Brodyn*. The leading judgment was given by Hodgson JA.

56 His Honour began by referring to the “basic and essential requirements” specified, expressly or impliedly, in the Act, which, if not satisfied, could give rise to jurisdictional error. His Honour stated, at [53], that there were at least five such requirements, including:

> 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)).

57 After referring to some of the more detailed procedural requirements of the Act, including: s 13(2) as to the content of payment claims; s 17 as to the contents of an adjudication application; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons, his Honour continued at [55]-[56] (emphasis added):

> 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.
>
> 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**. ...

58 These observations must, of course, be read in the light of the more recent decision of the Court of Appeal in *Chase Oyster Bar*: see, in particular, Spigelman CJ at [20]-[32].

59 In isolation, the first emphasised sentence in [56] of *Brodyn* appears to support the conclusion for which counsel contend. But I do not think that, when his Honour's remarks are read in context, they actually do support it. In the second emphasised sentence, his Honour spoke of addressing the requirements of s 22(2) "as to what is to be considered". Forming a view, bona fide but incorrect, that a submission has not been "duly made" and then not addressing it further (if not itself sufficient "consideration" for the purposes of s 22(2)) is not a jurisdictional error.

60 But I think it is implicit in what his Honour was saying that a failure to address a submission which is not attributable to having formed such a view, for example because of inadvertence, would be. And, at [57], his Honour went on to say explicitly that if there was "a failure by the Adjudicator to receive and consider submissions" occasioned by breach of s 22(2), the determination would be a nullity. I will proceed on this basis, subject, of course, to the requirement of materiality.

61 **Natural justice**: As we have seen, Hodgson JA stated in *Brodyn* that "substantial denial of the measure of natural justice that the Act requires to be given" is a jurisdictional error. That has never been disputed in later cases.

62 Counsel for Martinus, however, referred me to *Demex Pty Ltd v McNab Building Services Pty Ltd* [2023] NSWCA 261, where the Court of Appeal observed that the requirements of procedural fairness are somewhat attenuated in the context of the Act. Kirk JA, speaking for the Court at [9]-[24], identified various reasons for that. These reasons included: that the decision did not finally determine the parties' rights (albeit that for practical purposes an obligation to pay a sum of money could put the principal at risk of not being able to recover it in practice); the tight deadlines provided by the Act; and the fact that adjudicators are not required to be lawyers but may instead be persons from the building industry experienced in the administration of building contracts.

63 His Honour concluded, at [32]:

> Consistently with the effect of what was said in *Brodyn*, … it should be understood that only if there has been a substantial denial of procedural fairness by an adjudicator in determining an adjudication application will there be jurisdictional error under the Act. Put another way, the content of the requisite procedural fairness is reduced [citation omitted]. What this means in practice will turn on the particular circumstances of cases. But generally a conclusion of invalidity would only be reached if there was a significant departure from what would ordinarily be the requirements of procedural fairness for a person exercising a statutory power, and where that departure could be characterised

> as leading to substantial practical injustice in all the circumstances. This approach reflects the fact that the Act provides for a "rough and ready" process [citation omitted], not intended readily to be held invalid on judicial review.

64 The "rules" of natural justice, as they apply to statutory proceedings, are generally regarded as including an obligation to entertain, and take account of, submissions by the parties. In the case of adjudications under the Act, that obligation is expressly stated in s 22(2). Clearly, in limiting natural justice under the Act to "substantial" or "significant" departures from the rules involving "substantial practical injustice", Kirk JA was drawing attention to the requirement of materiality now laid down by the High Court in *LPTD*. But I have already accepted that a breach of s 22(2) can only amount to a jurisdictional error if it is material in the relevant sense. I do not read his Honour as saying that the obligation in s 22(2) should be further "reduced" beyond that (if that is what counsel intended).

65 Other procedural rules of natural justice, such as the obligation not to decide a matter on a point which occurs to the decision-maker without giving notice to the parties, are not expressly stated in the Act. They may be spelled out of the express provisions, or arise separately by implication (although the factors mentioned in the Act may limit the extent to which this can happen). If so, breach of them will, to amount to jurisdictional error, have to satisfy the requirement of materiality. But as with the obligation under s 22(2), I do not understand *Demex* to require some further attenuation of their effect.

66 **Reasons for determination**: Reasons are addressed in s 22(3), which relevantly provides:

> The adjudicator's determination must—
>
> (a) be in writing, and
>
> (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination),
>
> ...

67 It is common in administrative law to speak of an obligation to give "reasons" for a decision. But that is not quite the way in which s 22(3)(b) is worded. It speaks of an obligation to give "the reasons" for the determination and goes on later to refer to "those reasons".

68 The natural grammatical meaning of this language is to oblige adjudicators to record in their adjudication determinations the reasons which they actually had for making the determination. This was the construction of s 22(3)(b) advanced by the appellant in *Fulton Hogan v Cockram Constructions* (2018) 97 NSWLR 773, a case to which I was referred by counsel for Martinus.

69

The Court of Appeal (Meagher JA, with whom Barrett AJA agreed) was prepared to accept that construction, at least for the sake of argument. On that construction, s 22(3)(b) arguably presupposes that “reasons” within the meaning of the Act existed for the determination, and those reasons were conceptually independent of what had been recorded: see the concurring judgment of Basten JA at [4]-[8]. Thus, it may be said that, implicitly, s 22(3(b)) requires that adjudicators have such “reasons” for their determinations.

70 It would follow that two types of error could arise under s 22(3)(b). One would arise if the reasons which the adjudicator actually had for determining the application were not recorded, or wholly recorded, in the determination. That would be a clear breach of the express terms of s 22(3). The other would arise if the adjudicator had not actually had “reasons” within the meaning of the Act for the determination, in breach of the possible implicit requirement of the enactment.

71 The next question is what “reasons” mean for the purposes of the Act. On one view, the term means no more than the thought process followed by the adjudicator, no matter how bizarre or irrelevant that process might be. On that view, if an adjudicator were to decide to resolve an adjudication by flipping a coin, and then record that he had done so in his published reasons, he would comply with s 22(3)(b).

72 The alternative view is that the term implicitly requires that there be some element of rationality to the thought process, or relevance to the determination made. Clearly, it cannot have been intended that “reasons” in s 22(3)(b) means “correct reasons”. But in the coin-toss example, it may be possible to argue that the adjudicator’s thought processes were so irrelevant to the task at hand that it did not to amount to “reasons” under the Act.

73 I have gone into this in some detail because it seemed to me in the course of the oral argument that it might provide a statutory foundation for a requirement of “legal unreasonableness”, which is one of the grounds on which counsel for Qube challenged components of the Adjudicator’s determinations. But neither counsel seemed particularly interested in developing that thought further. Having regard to the conclusions I have reached on “legal unreasonableness”, it is not necessary to do so and I will proceed on the basis that s 22(3)(b) creates an obligation to give reasons without analysing that obligation in more detail.

74 Counsel for Martinus of course accepted the existence of such an obligation. But counsel submitted that breach of it did not constitute jurisdictional error.

75

Counsel, in the end, accepted that in *Fulton Hogan* the Court had left this question open. But counsel submitted that it had been determined in the negative by Brereton J in *City of Ryde v AMFM Constructions Pty Ltd & Anor* [2011] NSWSC 1469, and that I should follow that decision.

76 In *City of Ryde*, Brereton J referred to the previous decision of the High Court in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 where four of the five members of the Court held that failure of a decision maker to comply with a statutory obligation to give reasons under the *Migration Act 1958* (Cth) for cancelling a visa was not a jurisdictional error. In a joint judgment, three members of the Court said (at 226):

> The visa cancellation decision may be reviewed in this Court for jurisdictional error. Such error may be found from what is disclosed by reasons provided under s 501G(1)(e). Failure to provide reasons may also be reviewed in this Court and compliance by the Minister with the statutory duty may be ordered. The reasons then provided may furnish grounds for prohibition under s 75(v) in respect of the visa cancellation decision. But what is not provided for is for a prosecutor, as in this case, to bypass that earlier step utilising mandamus, and to impeach the visa cancellation decision itself for want of discharge of the duty to provide reasons. There is, as was pointed out in argument, a critical distinction between failure to comply with s 501G(1)(e) [the obligation to give the reasons] and using that failure to conclude that the visa cancellation decision is flawed by jurisdictional error.

77 In his concurring judgment, McHugh J said (at 227-228):

> The prosecutor contends that the Minister’s failure to give reasons constitutes jurisdictional error with the result that the Minister has no jurisdiction or power to cancel the visa. Jurisdiction is the authority to decide. It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision. Nevertheless, it is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision. If it has, a decision that does not give reasons will be made without authority... In this case, it is beyond argument that the Act did not intend failure to comply with s 501G should invalidate the decision to cancel a visa...
>
> ...
>
> The Minister's failure to give reasons did not leave the prosecutor without remedy. It was open to the prosecutor to seek a writ of mandamus to compel the Minister to provide reasons for the decision. If reasons were provided as the result of the issue of the mandamus, they might demonstrate an error of the kind that would attract prohibition under s 75(v) of the Constitution. But the prosecutor has not sought a writ of mandamus.

78 At [9], Brereton J said:

> As to the first of these, the inadequacy, insufficiency, inconsistency or illogicality of reasons for a decision, even when the governing statute requires a decision-maker to give reasons in conjunction with and contemporaneously with the decision, does not of itself amount to jurisdictional error. The significance of the reasons, or their inadequacy, is that in the context of the surrounding material they may reveal jurisdictional error, or that the adjudicator has not performed the task of determining an adjudicated amount by reference to the specified relevant factors in accordance with s 22 of the Act. This distinction was adverted to in the context of the (CTH) *Migration Act*, 1958, [sic] by the High Court of Australia in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212…

79

As McHugh J said in the passage just quoted, whether the act of giving reasons is a condition of validity of the decision in question is always a matter of construction of the governing statute. Counsel for Martinus' submission comes down to saying that adjudicators could hand down determinations which simply set out the amount allowed, without including any reasons at all, or without including reasons for specified components of the determination, and such determinations would be valid and enforceable as if they contained a full set of reasons. Can that intention be attributed to Parliament?

80 In my opinion, what Brereton J said in *City of Ryde* does not sustain counsel's submission. It is one thing to say that, where mandamus is available to compel the giving of reasons, a plaintiff should not be allowed to "bypass" that step by challenging the decision itself on the ground that the failure to give reasons invalidated it. But that is not realistic in the context of the Act. The Act requires that the reasons be given in the very same document which records the adjudicator's determination. If the determination is given without reasons, it is hard to see how the statutory obligation could be enforced by mandamus, particularly when the very tight timetables prescribed by the Act for proceeding to judgment and enforcement are taken into account.

81 Apart from the practical availability of mandamus, I think that there are other considerations relating to presumed Parliamentary intention which make this conclusion untenable. One must ask why it was that Parliament required the giving of reasons in the first place.

82 The self-discipline involved in writing reasons is, in general, a benefit to the decision-making process, in that it is apt to improve the quality of the decision quite independently of the later publication of those reasons. But even if this is part of the explanation, it is not the whole of it.

83 Parliament has, by the enactment of s 32A of the Act, confirmed the availability of judicial review of adjudicator's determinations for jurisdictional error. It must therefore have been intended that adjudicators' reasons would at least be sufficient to allow that right of judicial review to be exercised.

84 But it does not end there. Section 22(5) confers on the adjudicator a wide power to vary determinations including a power to correct any error "arising from an accidental slip or omission". This power may be invoked not only by the adjudicator of his or her own motion, but by the parties. The power is wide. Any error or omission, whether of fact or law, or whether jurisdictional or non-jurisdictional, can be so corrected. Clearly, the parties could not meaningfully exercise their right to seek review of a determination on that ground unless reasons for the determination are given in the first place.

85

In any event, the utility of providing reasons to parties is not necessarily limited to allowing decisions to be challenged, any more than a duty to give judicial reasons only applies to decisions, or aspects of decisions, which are subject to appeal. Parliament must have intended, in my view, that, as with judicial proceedings, reasons, as a matter of principle, must be provided so that parties who are unsuccessful in adjudications can see why they lost.

86 The extent of the reasons required is, of course, another matter. It no doubt depends on what can reasonably be expected having regard to the tight timetables prescribed by the Act and the relative importance of the different components of the determination being made: a point made by Brereton J in *City of Ryde* at [13]; see also *Ceerose* at [64] quoted at [53] above. And, to be jurisdictional, any such breach would have to satisfy the requirement of materiality. But within these confines, it seems to me, an absence of reasons for a determination may give rise to a jurisdictional error.

87 **"Legal unreasonableness"**: The starting point for the submissions of counsel for Qube was the discussion concerning unreasonableness as a ground for judicial review by three of the five members of the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362-367 ([63]-[76]). The case concerned the exercise of a statutory discretion. At 367 ([76]), the Court stated:

> As to the inferences that may be drawn by an appellate court, it was said in *House v The King* (1963) 55 CLR 499 at 505 that an appellate court may infer that in some way there has been a failure properly to exercise the discretion "if upon the facts [the result] is unreasonable or plainly unjust". The same reasoning might apply to the review of the exercise of a statutory discretion, where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power. Even where some reasons have been provided, as is the case here, it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.

88 The Court's judgment in *Li* makes it clear that the identification of "legal unreasonableness" is not confined to inferring jurisdictional errors of other types in cases where no reasons, or no adequate reasons, are given for a decision. A vitiating error may be identified in a reasoned decision: see in particular at 350-351 (at [26] and [28)].

89 In *LPTD,* the High Court identified potential jurisdictional errors as including "exceeding the bounds of reasonableness" and "in some cases, making an erroneous finding or reaching a mistaken conclusion". One or other of both of these would appear to encompass "legal unreasonableness". In practice, other potential errors identified by the Court, such as "identifying a wrong issue" and "asking the wrong question" may also result in a decision which can be described as lacking an "evident and intelligible justification".

90

Turning to jurisdictional error under the Act, counsel referred me to various subsequent decisions at first instance, both in this Court and in the Supreme Court of Queensland, which have accepted that a decision which "lacks an evident and intelligible justification" or some similar formulation, may involve jurisdictional error: *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd* [2009] QSC 165 at [32]; *Bouygues Construction Australia Pty Ltd v Southern Cross Electrical Engineering* [2017] NSWSC 1665 at [21]; *CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd* [2019] NSWSC 1251 at [29]; *Prime Constructions (Qld) Pty Ltd v HPS (Qld) Pty Ltd* [2019] QSC 301 at [39].

91 One of the judgments was the decision of Stevenson J in *Bougyes*. That decision, however, was an interlocutory decision concerning the arguability of a jurisdictional challenge to a determination, rather than a final decision. In the following year, his Honour stated in *Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd* [2018] NSWSC 894 that:

> … it would require a most extraordinary case for a court to find an adjudicator's decision to be unlawful because it is irrational or fails to disclose a logical connection between the findings made and the evidence.

92 Counsel for Martinus scathingly described "legal unreasonableness" as "the traditional refuge of the damned in administrative law cases". They emphasised that in his concurring judgment in *Li*, Gageler J (as his Honour then was) stated that the concept of "legal unreasonableness" should not be used as an invitation to merits review; it can only apply where a condition, arising expressly or impliedly, of the validity of the administrative decision in question has not been satisfied.

93 Counsel however did not go so far as to submit that the first instance decisions to which counsel for Qube referred were incorrect in accepting that, at least in some circumstances, the lack of an evident and intelligible justification for a determination could amount to jurisdictional error. As I understood their position, this was possible in theory, but "extraordinary" in practice.

94 I would add, however, that an important practical limitation arises from the decision of the High Court in *Li* that no judicial review is available for error of law on the face of the record: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1. Rarely, if ever, could a decision, even if it involved a patent error of construction of the relevant building contract, be challenged for "irrationality" if a direct challenge based on error of law would not be available.

95 In *City of Ryde*, at [12], Brereton J explained some previous judicial review decisions on the footing that the adjudications in question involved decisions having been made on an "essentially capricious basis". One characteristic of reasoned decision making is that

the decision-maker acts consistently and in accordance with an external body of rules, so that, if the same circumstances recur, the decision-maker will make the same decision. A determination which is reached capriciously would arguably be a determination otherwise than in accordance with the process of decision-making assumed by the Act. This might be an indication of the sort of determination which could be challenged as “legally unreasonable”.

Material before Adjudicator

96 The payment claims were in conventional form. Each consisted of a summary page, containing figures for the various components of the claim and, showing, for each category, amounts previously allowed and additional amounts claimed in the current claim. Attached was a spreadsheet which contained a line-by-line breakdown for the figures in the summary. Accompanying the claim were various supplementary documents referred to in the spreadsheet.

97 Qube’s payment schedules appear to have been prepared for Qube by the Superintendent. Each schedule took broadly the same, conventional, form as the payment claims. That is, the schedule consisted of a summary dealing with categories of claim, setting out the amount scheduled for each category, supported by a lengthy spreadsheet annexed breaking the categories down into individual items. The spreadsheet contained, for each item, a comment field which set out in summary terms the grounds on which the claim for that item was rejected or accepted only in part. The schedule was accompanied by supplementary documents incorporated by reference into the spreadsheet.

98 In order to understand the issues presented in the adjudication, it is necessary describe the payment claims and payment schedules in more detail.

99 The summary page for Martinus’ INTS payment claim identified two groups of categories. Martinus’ ISRA payment claim summary followed the same format.

100 Group 1 consisted of Preliminaries (category 1A) and Contract Works (Category 1B)). Preliminaries were allowances under the Contracts for costs associated with the preparation of, and otherwise preliminary to, the execution of the Contract Works, which were the works specified in the Contracts.

101 Group 2 consisted of: a group of Variations associated with changes to the design of the works, and referred to collectively as “CN-521” (item 2A.1); other Variations (Category 2A.2); a claim based on “Termination for Convenience”, being additional entitlements Martinus had if that was the true basis for termination (item 2A.3); and a claim for delay costs consequent upon contested claims for extensions of time (“EOTs”; Category 2B.1).

102 The summary page for Qube's INTS payment schedule contained the same elements as Martinus' payment claim, but organised differently. Preliminaries and Contract works were combined (item 1). That item also included Variation claim CN-521. The other Variation claims, EOTs and Termination for Convenience were shown separately (items 2, 3 and 4B). Qube also raised a credit for off-sets (item 4A) claimed consequential on termination (which, on Qube's case, had been a termination for cause).

103 The mismatch between the parties' categories made it difficult, in some cases, to marry up Martinus' claims with Qube's scheduled amounts and supporting grounds, although the parties were apparently able to navigate their way through the problem and the totals all reconciled. The mismatch became an issue in the adjudication and I will return to it below.

104 The disputes concerning the Variations and EOT claims involved questions of contractual entitlement as well as quantification. So too did the Termination for Convenience claim. The Contract Works and Preliminaries claims were largely matters of quantification (although potentially affected by the outcome of the disputed variations).

105 Martinus' adjudication applications were prepared on its behalf by its solicitors. Each application took the form of a lengthy written submission with attached witness statements and other supporting documents. The principal supporting document was a statutory declaration of Mr Mitchell Corrigan. Mr Corrigan is a civil engineer specialising in the management of large infrastructure projects. He was Martinus' project manager for the Contracts until July 2023. In his declaration, he gave a lengthy description and explanation of Martinus' claims.

106 Qube's adjudication responses were likewise prepared by its solicitors, and consisted of lengthy written submissions together with supporting witness statements and other evidentiary material. Among the witness statements were ones from Mr Marshall, the Superintendent, and one from Mr Simon Barney. Mr Barney is a Qube executive who had management responsibility for the administration of the Contracts.

107 On 24 March, having obtained his first extension of time (see [20] above), the Adjudicator made a request for supplementary submissions pursuant to s 21(4)(a) of the Act. Under the heading "new jurisdictional issues" the request stated:

> The respondent [Qube] has raised a number of jurisdictional issues in response that the claimant [Martinus] has not previously been given the opportunity to consider and provide submissions [sic].

108 Martinus was invited to "make submissions about new jurisdictional issues (only) raised for the first time in the response or new reasons for withholding payment not stated in the payment schedule" and Qube was invited to "reply to the claimant's submissions

(only)".

109 The invitation was taken up by Martinus which provided supplementary written submissions on 28 March addressing what were described as "new jurisdictional issues". Qube duly responded on 5 April.

110 The description of jurisdictional issues raised by Qube in its response as having been "new", and "only" raised "for the first time", was somewhat tendentious. Qube was contending that Martinus, in its adjudication applications, had advanced claims which fell outside the payment claims initially made. *Ex hypothesi* such contentions could only be raised in the adjudication responses. But no point was taken about the Adjudicator's decision, in effect, to give Martinus a right of reply on these points. Further supplementary submissions were provided at the request of the Adjudicator, the latest in July (I describe these in some detail later in the judgment).

111 The reasons for both adjudication determinations listed Qube's adjudication response, and the supporting statements, as having been received by the Adjudicator. But a recurring complaint by Qube in the proceedings was that, so Qube asked me to infer, the Adjudicator had failed to consider this material (and later submissions). Counsel produced an *aide memoire* of references in the adjudications which showed that there were no other references in the Adjudicator's reasons to the statements of Mr Marshall or Mr Barney (or indeed any other Qube witness). Counsel contrasted this with numerous mentions of Mr Corrigan's statement, and indeed those of other Martinus witnesses.

112 In the end, I did not understand that counsel for Martinus disputed that this was correct on a factual level. Of course, what inferences could be drawn from it was a matter of argument and I deal with it below.

Resequencing variation CN-420

113 This challenge arose out of a claimed variation under the INTS Contract resulting from the resequencing of part of the works. Martinus alleged that the resequencing resulted in an increase in the costs associated with providing temporary access to the site, resulting from the construction of temporary "haul roads" and the provision of concrete barriers for safety purposes.

114 The amount claimed was $9.5 million, which was entirely disputed by Qube. The Adjudicator upheld the claim and awarded the full amount in the INTS determination.

115 The INTS Contract defined "work under the Contract" or "WUC" as meaning:

> the work which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes variations, remedial work, construction plant, temporary works, and the *Preparatory Works,…*

116 Clause 32 of the Contract dealt with the programming of the works. Clause 32.1 provided (emphasis added):

32.1 Progress

The *Contractor* shall proceed with *WUC* with due expedition and without delay.

The *Superintendent* shall give to the *Contractor* the information, materials, documents and instructions by the times or within the periods both stated in Annexure Part A.

The *Contractor* shall give the *Superintendent* reasonable advance notice of when the *Contractor* needs other information, materials, documents or instructions from the *Superintendent* or the *Principal*.

The *Principal* and the *Superintendent* shall not be obliged to give any information, materials, documents or instructions earlier than the *Principal* or the *Superintendent*, as the case may be, should reasonably have anticipated at the date of the *Contract*.

The *Superintendent* may direct in what order and at what time the various stages or portions of *WUC* shall be carried out. If the *Contractor* can reasonably comply with the *direction*, the *Contractor* shall do so. If the *Contractor* cannot reasonably comply, the *Contractor* shall give the *Superintendent* written notice of the reasons.

If compliance with any such directions under this clause, except those pursuant to the *Contractor's* default, **causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *Contractor* not been given the *direction*, the difference shall be assessed by the *Superintendent* and added to or deducted from the *contract sum***.

117 The relevant variation provisions of the Contract were clauses 36.1 and 36.3A:

36.1 Directing variations

The *Contractor* shall not vary *WUC* except as directed in writing by the issue of a *variation order*.

The *Superintendent*, before the *date of commissioning completion*, may direct the *Contractor* to vary *WUC* by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the *Contract* (***'variation'***):

a) increase, decrease or omit any part;

b) change the character or quality;

c) change the levels, lines, positions or dimensions;

d) carry out additional *work*;

e) demolish or remove material or *work* no longer required by the *Principal*.

A *variation* may involve the omission of any part or parts of *WUC* and the *Contractor* acknowledges and agrees that the *Principal* may engage others to carry out that part or parts so omitted. The *Contractor* further acknowledges that any one or more omission will not constitute a basis to allege that the *Principal* has repudiated the *Contract* notwithstanding the extent or timing of the omission.

…

36.3A Contractor's claim for a variation

If the *Contractor* considers that it has been required to carry out a *variation* (whether as a result of a *direction* or any other event) but the *Superintendent* has not given a written direction in the form of a *variation order*, the *Contractor* must, within 5 *business days* after receipt of the direction or after that other event, give written notice of:

a) its opinion that the work involves a *variation* which should have been directed in the form of a *variation order*;

b) the reasons for its opinion; and

c) the *Contractor's* estimate of the:

i) effect of the work on the approved delivery program (including the date for practical completion and the date for commissioning completion); and

ii) cost (including all time-related costs, if any) of the work calculated in accordance with the principles in subclause 36.4, including a full breakdown of costs in support of the estimate.

In response to a written notice by the *Contractor* under this subclause, the *Superintendent* may:

e) confirm that the work involves a *variation* and issue a *Variation Order* under subclause 36.1;

f) withdraw the relevant direction; or

g) notify the *Contractor* that the work does not involve a *variation*.

If the *Contractor* fails to give the notice required by this subclause, it shall have no *Claim* against the *Principal* for any additional time or cost arising out of or in any way connected with the *direction* or event to the extent that either is claimed to be the basis for a *variation* claim.

118 On 10 October, Qube formally notified Martinus that the access date for part of the site was to be deferred from early November to 30 June the following year. At the end of March, a further formal direction was given bringing the access date forward from 30 June to 26 May, with some limited access available from 5 May.

119 Five months later, on 31 August, (after the Show Cause Notice had been issued but before formal termination of the Contract on 25 September), Martinus formally gave notice for the purpose of cl 36.3A of the Contract that, in its opinion, the relevant work involved a variation which should have been the subject of a Variation Order. The amount claimed was $1.1 million. The claim was rejected by the Superintendent on 18 September.

120 On 8 February this year, Martinus sent Qube a further notice renewing the variation claim. The new variation claim was, I assume, incorporated by reference into Martinus' INTS payment claim which was lodged on the same date. It was expressed to be made in accordance with cll 32.1, 36.1 and 36.3A. The amount claimed was $14.2 million.

121 In rejecting the claim, Qube's payment schedule referred to an accompanying response document and summarised the grounds for refusal. Among the summary grounds identified in the schedule were:

(1) "the works which are the subject of the Initial CN 420 Claim and the Updated CN 420 Claim do not constitute a variation under the Contract";

(2)

"the Contractor failed to submit CN 420 in accordance with clause 36.3A of the Contract and therefore has no entitlement to claim for any additional time or cost arising out of or in any way connected with the alleged directions or delay in the provision of site access";

(3) "in the event CN 420 is not time barred (which is denied), the construction and location of the Haul Road, site access roads and associated infrastructure works form part of WUC and remain the responsibility of the Contractor";

(4) "there is no causal link between alleged directions or delay in the provision of site access and the alleged construction and relocation of the Haul Road, additional site access roads and associated infrastructure works".

122 The response document began with a summary which identified the grounds for rejection of the claim in substantially the same terms as had been used in the payment schedule. The document then went on to set out a detailed argument in support. It described the new variation claim as a claim under cll 36.1 and 36.3A. The arguments addressed the application of those clauses.

123 Martinus reduced its claim to $9.5 million in the adjudication application. The submissions in the application addressed the claim at length, summarising Qube's grounds of objection and inviting the Adjudicator to reject them. One point made in the submissions was that Qube's grounds for rejecting the claim did not refer to cl 32.1.

124 In its adjudication response, Qube replied to Martinus' application submissions in detail. In particular, Qube made the following submissions in support of the contention that the works were not a "variation":

> 10.111 Clause 36.1 of the Contracts is clear: a variation to the WUC occurs only when the Superintendent issues a written direction to Martinus to do so.
>
> 10.112 Only the Superintendent has discretion under clause 36.1 to direct a variation, and this discretion was not exercised in respect of the Haul Road or site access roads. This has been confirmed by Peter Marshall, the Superintendent at the material times.
>
> 10.113 In the Adjudication Application, Martinus seeks to paint a picture that there was an "agreed staging" or "agreed sequence" between Martinus and Qube of the Haul Road and Site access routes such that this "agreed staging" formed the WUC. Martinus reels off several reasons why Qube purportedly caused the "agreed sequence" to change, including various alleged Site access delays. It does so to then assert that any change to that "agreed sequencing" constituted a direction from Qube or the Superintendent to carry out additional works, so as to vary the WUC and be paid for doing so. This is entirely contrived.
>
> 10.114 *First*, there was never an "agreed staging" of the Haul Road and Site access routes. As explained by Peter Marshall, who was Superintendent on the Project at the material times:
>
> "*the Martinus Staging Plan did not at any point form part of the Contracts. It was a part of the precontract process for Martinus to put together a suitable plan depicting the way in which Martinus would carry out the works. The purpose of the Martinus Staging Plan was to demonstrate to Qube that Martinus was capable of carrying out the works in a credible way. However, it was always evident to the parties that the Martinus Staging Plan was only one way of delivering the works".*

"*Mr Corrigan claims that the Martinus Staging Plan was essential to the successful completion of the Project. This is incorrect. As explained, the Martinus Staging Plan was only one depiction of the delivery of the works, and it is common in projects of this size that any non-contractual plans are going to be subject to change during the delivery of the Project. Again, this is evidenced by Martinus' changes to the Area boundaries to suit their construction program during the delivery of the Project*".

10.115 The Approved Delivery Program included in the Contracts also did not demonstrate any sort of "agreed sequence", as Martinus and Mr Corrigan suggests. As Mr Marshall explains:

"At execution, the Contracts included the Approved Form of Program in Annexure H of the Contracts, which was a detailed program setting out key events and milestones related to the Project. However, this was just a form of program. Then on 23 August 2022, the Approved Delivery Program was completed after several revisions were sent between Martinus, RPS and Qube. These are not the same programs. The Approved Delivery Program took into account scope changes and the actual date of execution. It was more detailed than the Contract Program. Contrary to Mr Corrigan's assertions, the Martinus Staging Plan sat separately to both the Annexure H Approved Form of Program and the later Approved Delivery Program. It was finalised prior to the execution of the Contracts, and did not form a part of either mentioned programs".

10.116 *Second*, Martinus seeks to – untenably - link several communications as purportedly evidencing that a direction was issued to it to vary its WUC. For example:

10.116.1 At paragraph 1115 of the Adjudication Application, Martinus relies on Mr Corrigan's evidence to maintain that the minutes of a meeting on 26 July 2022 constitute a direction by the Superintendent, who was Peter Marshall at that time. However, Mr Marshall has confirmed that this email is merely a meeting minute which denoted all of the actions of the relevant parties coming out of the 26 July 2022 meeting and that "*it cannot be construed as a direction under the Contracts*".

10.116.2 At paragraph 895 of the Statutory Declaration of Mitchell Corrigan, Mr Corrigan claims that Mr Marshall's email of 13 September 2022 confirmed that Martinus was required to undertake additional works to adjust the Haul Roads. However, Mr Marshall has confirmed that this, again, is incorrect.

10.116.3 Mr Marshall also confirms that the various documents and correspondence discussed at paragraphs 844 to 960 of Mr Corrigan's Declaration, which Martinus allege contain directions to undertake additional works in relation to the Haul Road do not contain contractual directions.

10.117 Martinus also alleges that Qube, having not provided Site access in the manner in which it ought to have done under the Contract, had also resulted in Martinus revising the Vehicle Management Plan ("**VMP**") on several occasions to "*accommodate directions related to Site access from Qube*". As set out below, the revision of a VMP is in no way related to directions from Qube or the Superintendent. Reference is also made to the paragraphs below in respect of Site access.

10.118 In short, Martinus has not demonstrated that the Superintendent ever directed it to vary WUC by the issue of a variation order.

10.119 *Finally*, even if Martinus could demonstrate that the Superintendent issued a variation order to it (which it cannot), the works that are the subject of the alleged variation under CN 420 are within the scope of the WUC for all of the reasons set out below. The works are therefore not capable of constituting a variation under Clause 36.1.

125 As to the argument about WUC, Qube stated:

10.141 *Additional Haul Road*

10.142 The works Martinus was obliged to do under the INTS Contract (emphasis added) in relation to the Haul Road and additional site access roads includes:

10.142.1 Section 3.1.3(a)(i) of the Principal's Project Requirements (**PPR**) in Annexure Part I of the Contract **provides that "*The Contractor must undertake all*** *site preparation works necessary for WUC, including but not* *limited to: (i)* ***temporary haul roads***".

10.142.2 Section 5.3(b) of the PPR provides that "*The Contractor is required to prove a shared access road suitable for use by heavy and light vehicles in all weather conditions… The Contractor must at a minimum …* ***maintain the shared access road on a daily basis***".

10.142.3 Section 5.3(f) of the PPR provides that "*The Contractor must also* ***interface with Other Contractors****, the Principal, and the Superintendent with regards to shared access roads…*".

10.143 The costs associated with this work was included by Martinus in the Pricing Schedule to the INTS Contract as follows: "*1.7.2 Construct and maintain temporary haul roads, pedestrian walkways and access tracks* ***as required***". This was a lump sum item of the Contract priced at $495,543.94.

10.144 Pursuant to clause 2.2(f) of the Contract, Martinus also warranted that it was responsible for and bears all risk in connection with the construction of the Works, including in respect of the coordination, management and interface of the processes necessary to carry out the WUC in accordance with the Contract and overcoming any constructability or engineering issues. As such, any alleged 'additional' work claimed by Martinus for the construction and relocation of access roads was not additional and formed part of the work it was obliged to perform and bear the risk for under the Contract.

10.145 This position is supported by the evidence of Nicholas Pennings and Peter Hayes. In particular, Qube relies on the following evidence:

10.145.1 Mr Pennings reiterates that the relocating, altering or resequencing falls within the scope of Martinus' WUC:

"That Martinus thinks that they can claim additional costs for carrying out "resequencing" of the Haul Roads and Site access routes does not make sense to me. The construction and location of the Haul Road, Site access roads and associated infrastructure works form part of the WUC. The key point here is that the Haul Roads on any project will constantly require to be moved, and this project is not an exception. In fact, the majority of the works here were being carried out beneath the ground, which is even more reason why it would be anticipated that access roads would constantly be shifting".

[…]

"This is the very purpose of the Haul Road and Site access routes – they are required to allow contractors on site to be able to safely access the part of site that is being worked on at that time. As work progresses, the Haul Road and Site access roads will be required to move to allow work at the locations where the previous access roads were to be worked on. This is standard. That is not additional work and it would certainly not have been unexpected by Martinus. It is completely unrealistic for Martinus to say that they only ever anticipated having to move the Haul Road and Site access roads twice throughout the Project"

10.145.2 This is also confirmed by Mr Hayes at paragraphs 4 – 6 of his Statutory Declaration. As Mr Hayes summarises: *"To adjust, relocate and maintain the Haul Road and Site access roads was their job. This includes to reshape the Haul Road and Site access roads as and when required on Site. That was not additional work."*

10.146 *Concrete barriers*

10.147 Martinus also claims that its use of concrete barriers on Site was required because of Qube's alleged variation to the WUC. The assertion is that, had Qube not required Martinus to alter or re-sequence the Haul Road, Martinus would have used WFBs (as it says had been priced for) rather than requiring to use concrete barriers.

10.148 The works Martinus was obliged to do under the Contracts (emphasis added) in relation to the concrete barriers includes:

10.148.1 Section 3.1.1(b)(iv) of the PPR provides that "*The Contractor must also address the following requirements: … road access points must have traffic control and safety barriers…".*

10.148.2 Section 2.2.2 of the Traffic Management Plan130 provides that "*Construction work zones shall be* ***adequately delineated*** *to ensure the protection of Martinus employees and subcontractors, the Client, other contractors and any other personnel on site*…".

10.148.3 Section 5.4.1. of the Traffic Management Plan provides that "*Pedestrians to be segregated from live vehicular traffic by safety barriers were required*".

10.148.4 Section 7.4 of the Traffic Management Plan provides that "*Traffic management controls will be implemented as detailed within the TGS/WTMP/VMP as part of the mobilisation works. These controls include, but are not limited to the following: Delineation barriers (concrete and water filled)…".*

10.149 Martinus was therefore obliged to protect the Site by whichever method it chose, but the cost of doing so was included in the lump sum item for this work. There was no assumption included by Martinus in this lump sum item as to the use of water filled barriers.

10.150 Qube also relies on the evidence of Nicholas Pennings and Pete Hayes:

10.150.1 Mr Pennings states:

"*I understand that Martinus are also claiming the cost to hire concrete barriers from July 2022 to September 2023 because, Martinus say, that concrete barriers were necessary for site safety to protect workers, pedestrians, plant and equipment in place of the water filled barriers ("WFBs") that would have been required if Martinus were able to implement the sequencing they intended to for the Haul Road.*

The point is that Martinus' works in relation to the Haul Road and Site access roads never changed and so neither did their requirements to protect the site. Importantly, it was always intended that the Haul Road, and so vehicles including the heavy moxies, would run through Site. If Martinus are now claiming that concrete barriers are the appropriate equipment to protect areas of the Site from heavy plant and vehicles, then this should have always formed part of their lump sum costs for this part of the works. In particular, Martinus were responsible for the traffic controls and safety barriers.

However, it is up to Martinus to decide what barriers/protection they wish to use. If they priced for using WFBs and ultimately chose to use concrete barriers, then that is up to them. No one from RPS or Qube ever directed Martinus to use concrete barriers. It was their choice to do so."

10.151 For all of the reasons set out above, the work the subject of CN 420 is not a variation to the WUC and does not constitute a variation under the Contract.

126 In his reasons, the Adjudicator quoted Qube's summary grounds for refusing the application from the beginning of the supporting document which accompanied the payment schedule. He then summarised Martinus' argument and stated:

1346) I have reviewed the documents provided by the Claimant in Appendix 6F of the Payment Claim and the documents provided by the Respondent in Appendix C.I of the Payment Schedule, and I am satisfied that;

a) the Respondent issued directions changing the dates for access to various parts of the site that were latter in time than that which was set out in Part S of the Annexure to the Contract and that had the effect of dealing the works and requiring the Claimant to re-sequence the works **(Directions to Re-sequence the Works);**

b) the Claimant notified the Respondent of the effects of the Directions to re-sequence the works including that it would have to construct additional haul roads and that it would incur costs in performing that work, which it would claim as a variation in due course; and

c) provided details of the nature and extent of the additional work to give effect to the Respondent's Directions to Re-sequence the works.

127 The Adjudicator then addressed Martinus' reliance on cl 32.1:

> 1351) The Respondent's directions of 10 October 2022, 30 March 2023 and instances of further directions changing the dates for access to parts of the site identified in the Claimant's notice dated 31 August 2023 directed the order and time the various stages or portions of WUC should be carried out.
>
> …
>
> 1356) The Respondent's directions of 10 October 2022, 30 March 2023 and instances of further directions changing the dates for access to parts of the site identified in the Claimant's notice dated 31 August 2023 directed the order and time the various stages or portions of WUC should be carried out.
>
> 1357) I am persuaded that the Respondent's directions of 10 October 2022, 30 March 2023 and instances of further directions changing the dates for access to parts of the site identified in the Claimant's notice dated 31 August 2023 were directions given under clause 32.1 of the Contract.
>
> 1358) Upon giving a direction under clause 32.1, the Respondent became liable for the Claimant's additional costs if compliance with any such directions caused the Claimant to incur more or less cost than otherwise would have been incurred had the Claimant not been given the direction.

128 The Adjudicator then addressed cl 36.1 (emphasis added):

> 1361) The Respondent's directions of 10 October 2022, 30 March 2023 and instances of further directions changing the dates for access to parts of the site identified in the Claimant's notice dated 31 August 2023 were directions and compliance with that direction, required the Claimant to carry out additional work.
>
> 1362) Accordingly, I accept the argument that the Directions to Re-sequence the Works given in writing by the Respondent under clause 32.1, required the Claimant to perform additional work and were variation orders under clause 36.1 **for all intents and purposes**.

129 The Adjudicator dealt with the argument under cl 36.3A as follows (emphasis added):

> 1364) The Claimant argued above that as the Respondent's Directions to Re-sequence the Works given in writing under clauses 32.1 and or 36.1, the Claimant is entitled to payment for the work pursuant to the Respondent's Directions to Re-sequence the Works and clause 36.3A does not apply.
>
> 1365) I prefer the Claimant's argument because that is in accordance with the Contract.
>
> …
>
> 1367) Clause 36.3A only applies if the Respondent has not given a written variation order. I decided above that the Respondent's written notices under clause 32.1 were also **deemed** variation orders for the purposes of clause 36.1 and, therefore, 36.3A.
>
> 1368) Accordingly, the time bar set out in 36.3A does not apply to this claim for a variation referenced CN - 420.

130 The Adjudicator addressed Qube's argument that the works were part of the WUC very briefly:

> 1372) The Respondent provides no further explanation in the Payment Schedule no provides any reference to any part of the Contract that supports that assertion.

131 The Adjudicator continued:

> 1373) The Claimant argues above that the construction of the haul roads was a variation to the Contract under clauses 32.1 or 36.1.
>
> 1374) I accept the Claimant's argument because I found above that the construction of the haul roads was performed under directions given by the Respondent and was a variation to the Contract.

> 1375) Further, I cannot find anything in the Contract that says that construction of all haul roads that may be required throughout the course of the works is included in the Claimant's preliminaries regardless of whether the work is part of the original lump sum or a variation to the Contract. ...

132 Counsel for Qube submitted that it was clear that the Adjudicator had failed to deal with the arguments advanced by Qube in its adjudication response. The Adjudicator said that he had read the payment schedule but did not mention having reviewed the submissions in Qube's adjudication response. His reasons did not refer to those submissions or to any of the factual material which accompanied them although they did refer to, and quote from, evidence from Martinus to which Qube was responding.

133 Counsel invited me to infer from the form of the reasons that the Adjudicator never in fact considered the points made in the adjudication response on this issue, or the supporting evidence marshalled by Qube, at all. In particular, counsel highlighted [1372], which, the submission ran, would not have taken the form which it took if the Adjudicator had considered the response. Counsel submitted that the Adjudicator had failed to comply with s 22(2)(b) and this was a jurisdictional error.

134 Counsel also seized on the Adjudicator's finding that the "direction" was "to all intents and purposes" a variation, or a "deemed" variation, under cl 36.1. Counsel submitted that no such argument had been put by Martinus and, accordingly, there was a denial of procedural fairness. Furthermore, the reasoning did not disclose any logical or rational basis for the conclusion that the "direction" could be effective for the purpose of cl 36.1. Both of these errors were said to be jurisdictional.

135 Counsel for Martinus submitted that the Adjudicator's reasons showed that he had "engaged with" the grounds advanced by Qube in the payment schedule for rejecting the claim. In passing, counsel noted that Qube had not, in its response, addressed the cl 32.1 basis for the claim. In any event, none of the complaints made by Qube, even if they demonstrated error, disclosed a jurisdictional error. This was for two reasons. First, the alleged errors were not jurisdictional in nature, as a matter of law. Second, they lacked materiality, without which they could not be jurisdictional.

136 **Consideration of Qube's submissions**: There is nothing in the Adjudicator's reasons which demonstrates affirmatively that he considered the submissions in Qube's response to Martinus' claim (or the supporting evidence referred to in those submissions). The question is whether I can infer from this that he did not in fact consider those submissions. This is essentially a factual question. In answering it, I must consider alternative possibilities which might explain why, having considered the submissions, he nevertheless did not refer to them.

137

In this regard, the tight timetables under which adjudications normally operate are relevant. Counsel for Qube emphasised, however, that in the present case the Adjudicator had 19 weeks to consider the application, and, having regard to the fees he charged, he can have done little else over that period. Counsel submitted that in the circumstances, this factor was of little weight.

138 Counsel for Martinus did not agree. They argued that the content of the obligation of natural justice in the particular case was to be determined by reference to the Act, and not the circumstances of the particular case.

139 I do not accept this argument. The nature of the obligation is, I accept, constrained by the terms of the Act. But this does not go very far. While in general the Act provides for tight timetables, it also provides for extensions.

140 The true rule is that the degree to which consideration may be expected is constrained by the amount of time available. But for the purpose of drawing an inference about the facts of a particular case, it is necessary to have regard to the facts of that case. In my view, it would be absurd to suppose that the Court would take the same approach to the drawing of the relevant inference where an adjudicator was dealing with a single claim involving a single issue as it would if that same issue arose in another adjudication involving twenty other claims each involving multiple issues.

141 In the present case, there were no doubt many claims and issues for consideration. But the issue currently in question was an important one. I see no reason to think that the time pressures on the Adjudicator were so extreme as to prevent him from dealing with Qube’s submissions or explaining why he did not consider it necessary to do so.

142 Similar reasoning applies to the point made by the Court of Appeal in *Ceerose* about the value (absolute and relative) of the claim. The claim under consideration by the Adjudicator was worth $9.5 million, which was significant in both absolute and relative terms.

143 Another possibility suggested is that a submission may not have been referred to because the adjudicator considered that it did not justify a response or that it did not, because of other findings or conclusions, arise. But the plausibility of that explanation depends upon the nature of the submission. The more extensive the submission is, and the weightier it appears to be, the less likely the explanation becomes.

144 The Adjudicator effectively accepted that cl 36.3A was not available; it was unnecessary to go into Qube’s submissions in any detail on that point. But that was not so for the argument about cl 36.1, or for the argument that Martinus was contractually responsible for the works the subject of the claim.

145

In my view, these arguments from Qube were arguments of apparent substance. In particular, Martinus' proposition that a "Variation Order" could be created for the purposes of cl 36.1 without the Superintendent signing a formal order under the Contract was a surprising one. Qube's arguments were relevant to issues which the Adjudicator addressed in his reasons. I find it difficult to accept that the Adjudicator would, if he had considered those arguments, felt that they were so inconsequential that they did not call for mention.

146 Of particular significance, in my view, is what the Adjudicator said at [1372]. Even if it was correct to say that there was no supporting evidence in the payment schedule, there was in the adjudication response. It was not suggested that Qube's submissions in the response were not "duly made". Similarly, Qube's response submissions did go into the contractual position, contrary to the point the Adjudicator seems to have been making in [1375]. I agree with counsel for Qube that it is highly unlikely that the Adjudicator would have expressed himself in this way if he had considered the submissions.

147 Naturally I have hesitated, when the Adjudicator was required to consider Qube's submissions, to draw the inference that he did not do so. Nevertheless I find myself driven to that conclusion. It is the most straightforward explanation for why the submissions were not referred to in the Adjudicator's reasons and, in my opinion, the most probable.

148 This brings me to materiality. Counsel for Martinus pointed out that the Adjudicator made findings in his reasons about cl 32.1. As we have seen, Martinus appeared to have asserted that this was, or at least might be, an independent basis for sustaining the claim. If so, the suggestion was, any failure to consider Qube's submissions on cl 36.1 was not material.

149 An initial difficulty, however, is that I do not think it is clear that the Adjudicator reasoned along these lines. In theory, there was a clear distinction between a variation of the works to be performed under the Contract, which was the subject of cl 36.1, and a direction to change the sequence in which those works were to be performed, which was the subject matter of cl 32.1. But the Adjudicator's reasoning (for instance at [1362], [1367] and [1373]) seemed to run the two concepts together.

150 In fairness to the Adjudicator, the apparently clear distinction may break down where temporary works are involved. But if that was so, it is hard to see why there should be some independent right to claim for such works under cl 32.1 which would avoid the mechanisms, and the time limits, in cl 36.1 (to say nothing of the termination of the Contract in the meantime).

151

A second difficulty is that Qube's point that the construction of the works in question were always Martinus' under the Contract was not just an answer to the claim for a variation under cl 36.1. It was, at least arguably, an answer to the claim under cl 32.1. What Qube's witnesses seemed to be saying was that, as a matter of fact, Martinus' obligation had always been to construct such roads on the site as were required by the exigencies of the work, and that the delay in access had made no practical difference to that obligation. If correct, that undermined the notion that a direction as to access was necessarily a direction about the sequencing of the works for the purposes of cl 32.1.

152 What this means is that, if the Adjudicator had considered the submissions, he might have come to a separate conclusion on whether cl 32.1 justified the claim (assuming, for the sake of argument, that he did in fact reach such an independent conclusion.

153 I have found the question of materiality a finely balanced one. On the one hand, the point was clearly made in the application that Martinus was relying on cl 32.1, and Qube in its response failed to address that point expressly. But at the same time, although the Adjudicator referred to other points raised by Martinus, he did not refer to that one. If it was a factor in his thinking, it is surprising that he did not say so.

154 Furthermore, it was perfectly clear that Qube was fighting the claim tooth and nail. Whether or not it expressly referred to cl 32.1, Qube's position was clearly that it had no obligation to pay. Counsel for Martinus did not submit that it would not have been open to Qube, having regard to the terms of its payment schedule, to oppose a claim under cl 32.1.

155 In these circumstances, I think that the answer must be found in the High Court's statement of the materiality principle in *LPTD*. What needs to be demonstrated is the possibility, not the being "fanciful or improbable" of a different outcome, and this test is "not demanding".

156 In applying the test, I am obliged not to "assume the functions" of the decision maker. In particular, I should not proceed on the basis that the Adjudicator was predisposed to reject or put aside Qube's submissions and the evidence on which they were based. Rather, I should proceed on the assumption that the Adjudicator was trying to do his best, within the confines of the time allowed and the need to deal with all of the claims in issue, to resolve the claim according to what Martinus' legal entitlements truly were on the evidence as a whole.

157 In my judgment, applying this test, the failure to consider Qube's submissions was material. I think that if the submissions had been considered there is a real possibility that the Adjudicator could have seen matters differently and rejected Martinus' claim. Jurisdictional error is established.

158 **Other grounds of challenge**: Given the conclusion I have just reached, I do not find it necessary to decide whether the references in the Adjudicator's reasons to the directions being "deemed" directions or "directions" "for intents and purposes" for the purposes of cl 36.1 impermissibly introduced a new point into the adjudication which had not been the subject of notice, or prior dispute between the parties. Nor is it necessary to go into the complaints about the logic and rationality of the Adjudicator's reasoning.

Design variation CN-521

159 This component of the INTS adjudication arose out of design variations by Qube. Variation Orders (VOs) were issued by the Superintendent which specified figures to which the Superintendent considered Martinus was entitled on account of the variations. Martinus claimed to be entitled to more and issued a formal claim (numbered CN-521, as already mentioned) for the value of work allegedly attributable to the variation.

160 The total amount to which Martinus claimed to be entitled was $20.5 million, but in the payment claim Martinus acknowledged credits for allowances which had been made. The Adjudicator allowed the full amount claimed, but made some deductions from the amount awarded.

161 In Martinus' payment claim, CN-521 was shown as a single line item, but the spreadsheet contained a reference to supporting documents which accompanied the payment claim. Those supporting documents contained detailed information and calculations to support the alleged entitlement under CN-521.

162 Qube's answer to CN-521 was one of those items in the payment schedule which did not marry up with the payment claim. The spreadsheet did however contain a row referring to CN-521. That row contained a notation indicating that the quantum for the relevant VOs was disputed. It further stated that as part of the schedule, the Superintendent had assessed the value of the claim and "further details of the superintendent's approach to the assessment works which are the subject of CN-521" were contained in a supporting document, identified as Appendix C.5.

163 It appears that the difference between the parties about how to format payment claims and schedules had first arisen before the Contracts were terminated. According to submissions made by Martinus in its adjudication application, Qube's approach, which was described as a "blended schedule", was a departure from the approach used on the previous payment claim and a reversion to a practice which had been followed earlier. Martinus criticised the approach as "incoherent". In its adjudication response, Qube defended its approach and pointed out that a reconciliation had been provided.

164 The Adjudicator's decision to allow Martinus' claim in full was based on a perceived deficiency in Qube's payment schedule. In his reasons, the Adjudicator quoted from Martinus' submissions. He stated that, in its submissions, Martinus "asserts it does not understand [Qube's] assessment of CN-521".

165 The Adjudicator's conclusion was:

> 1563) I have reviewed the Respondent's reasons for withholding payment in the Payment Schedule of the claim referenced CN 521 (inclusive of post-IFC design changes up to 30 September 2023 directed by VO 054, VO 055 and VO 061) contained in the Superintendent's response to CN 521 at Appendix C.5 to INTS PS 15.
>
> 1564) The Respondent's approach is uncertain as it cannot be compared to the claim. Furthermore, the Respondent provides no explanation of each quantity or rate that it applied that was different to those claimed in the Payment Claim by the Claimant. That explanation, if it had been provided would have constituted a reason for withholding payment as required under clause 37.2 of the Contract and under section 14(3) of the Act.
>
> …
>
> 1569) The Respondent's reasons for its assessment of the quantum for each claimed item are not clear and cannot be understood.

166 The Adjudicator continued:

> 1571) It is dear from the Act, the Contract and the guidance provided in *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140 by HH Palmer J that the Respondent must consider the Payment Claim and, if it does not accept any part of that Payment Claim and decides to withhold payment, then the reasons for withholding payment set out in the Payment Schedule must be sufficiently clear that Claimant can understand the basis of rejection of any part of that Payment Claim and which parts of that payment Claim have been accepted and payment has been scheduled accordingly.
>
> 1572) The Respondent has not, therefore, complied with s. 14(3) of the Act because it failed to provide reasons for withholding payment that the Claimant could consider and to which it could respond if it chose to do so.
>
> 1573) The Respondent did not provide any other assessment of the quantum claimed by the Claimant.
>
> 1574) … it is clear from *Insite Construction Services Pty Ltd v Daniels Civil Pty Ltd & Anor [2023] QSC 33* that where the Respondent fails to provide its assessment of quantum that can be understood by the Claimant, that is essentially a failure to provide a reason for withholding payment, In such circumstances, it is open to the adjudicator to accept the Claimant's valuation of the corresponding claimed item in the Payment Claim.

167 Counsel for Qube submitted that, in saying that Martinus was alleging it could not understand the payment schedule, the Adjudicator had made a fundamental mistake about what was in issue, which had led to the adjudication miscarrying on this point. Counsel acknowledged there had been a complaint about the use of a "blended schedule". But, they submitted, this had not led to any misunderstanding about the nature of the issue at stake in Qube's response.

168 In particular, counsel referred to the following paragraphs in Martinus' submission in support of the application (emphasis added):

> 603. **The dispute regarding the design change variation is about quantum**. In the Payment Schedule, Qube relies on a competing assessment by Currie & Brown of the design change under VO-54, VO-55, and VO-61.

> 604. In broad terms, the dispute between the parties relates to:
>
> > (a) whether the design change is to be administered as a "*remeasurement*" (per Qube's / RPS'/ Currie & Brown's position) or as a variation (Martinus' position);
> >
> > (b) how new or changed items of work are to be reflected as part of the valuation of the design change; and
> >
> > (c) the rates to be applied to the work.
>
> 605. In the Payment Schedule, Qube states that Martinus has:
>
> > (a) attempted to change the rates/prices "beyond the scope of remeasurement exercise for variations";
> >
> > (b) not substantiated what the design changes are;
> >
> > (c) not substantiated the rates applied by Martinus; and
> >
> > (d) changed previously agreed quantities.

169 In the following paragraphs of the submissions, Martinus urged the Adjudicator to reject the grounds summarised in [605].

170 Counsel for Qube submitted that these submissions showed that Martinus clearly understood the grounds advanced by Qube for rejecting the payment claim. The Adjudicator had confused a lack of understanding of the content of the schedule with a lack of understanding of the reasons for adopting the format which had been used. It followed that the conclusion in [1572] that Qube had failed to provide reasons for withholding payment was simply not open.

171 Counsel for Qube accepted that the Court was bound by the decision in *Icon* to proceed on the basis that it was a matter for the Adjudicator to determine, as a matter of interpretation, the nature and extent of Qube's response, in its payment schedule, to Martinus' payment claim. But counsel submitted that this did not extend to a determination which was "legally unreasonable".

172 Equally, in counsel's submission, the supposed misunderstanding by the Adjudicator had resulted in an effective failure to consider the reasons advanced for refusing the claim, contrary both to s 22(2) and the obligation to afford Qube natural justice. Whichever way this was put, it amounted to a jurisdictional error.

173 Counsel for Martinus did not accept that the Adjudicator had been guilty of the error alleged. Counsel submitted that the Adjudicator's reasons showed that he had considered the substance of Qube's response in the payment schedule. If there was an error, it was an error in the way the schedule had been understood by the Adjudicator, which was not a jurisdictional error.

174 The proposition that, where the payment schedule does not advance any reason for refusing a claim, it is open to the Adjudicator to accept the amount claimed rather than verify it independently, was confirmed by the Court of Appeal in *Ceerose* at [82], Payne JA stated:

> Section 22(1) does not create a freestanding jurisdictional obligation to consider the merits of a payment claim, and in particular whether the construction work identified in the payment claim has been carried out, and what is its value. The only matters an adjudicator is required to consider in determining an adjudication application are set out in s 22(2). As explained at [69] above, there are likely to be few cases in which an applicant for judicial review can establish a breach of the duty to consider the matters set out in s 22(2). Only sometimes is a failure to refer to relevant material evidence of a failure to refer to a mandatory relevant consideration. A fortiori, where there is *no* relevant material before the adjudicator, it cannot be a jurisdictional error to fail to refer to it. Paragraph [52] of *Hargreaves*, insofar as subsequent cases have understood that it suggests that s 22(1) provides a freestanding jurisdictional obligation to consider the merits of a payment claim, and in particular whether the construction work identified in the payment claim has been carried out, and what is its value, is not correct and should not be followed.

175 In principle, it is difficult to see why, so long as Qube responded logically and comprehensively to the claim made by Martinus, it should have been obliged to do so using the same format as Martinus had used in its payment claim. Ordinarily, one would think, while that might make things more difficult for the Adjudicator, it would not allow the response to be ignored. And on the face of it, the allegation that Martinus was unable to understand the payment schedule appears contestable.

176 But the Adjudicator did say in his reasons that he himself had found the schedule incomprehensible. Once it is accepted that the interpretation of the payment claim and the payment schedule, and thus the determination of the scope of the dispute for the purposes of the Act, was a matter for the Adjudicator, the scope for judicial review is greatly reduced.

177 It may be accepted that, like any other decision of the Adjudicator on the merits, there is a possibility that a decision by an adjudicator of this type could be subject to review on the grounds of “legal unreasonableness”. But I do not think that this has been demonstrated in the present case. Qube’s allegation is simply an allegation of an ordinary error in reasoning. It is not an allegation of decision-making alien to an adjudicator’s function under the Act.

178 It may be that the Adjudicator failed to address, or address fully, the grounds of rejection advanced in Qube’s payment schedule. But if so, that still gave him an unreviewable justification for not addressing consequential submissions by Qube and meant that there was no jurisdictional error in failing to address such submissions. This challenge fails.

Contract works variations 2.1-2.6, 2.8-2.9, 2.11, 2.14-2.15 and 2.17

179 These components of the adjudication concerned twelve contract works items for which Martinus claimed to be entitled to variation payments. The Adjudicator allowed the full amounts claimed but again applied some deductions.

180

In each case, the Adjudicator adopted the same reasoning to deal with the claims as he adopted for CN-521. Indeed, the same paragraphs (including quotations from the case law) appear to have been copied and pasted into the relevant parts of the adjudication.

181 In oral submissions, counsel for Qube indicated that the determinations were challenged on the same grounds as the CN-521 determination and did not address the items individually. In these circumstances, I proceed on the basis that the reasons I have given for rejection of the challenge concerning CN-521 apply equally to these claims.

Extension of time

182 This component of the adjudication concerned a claim for delay costs under the INTS Contract as a result of a claimed extension of time. Martinus claimed the contractual maximum of $80,000 per day for 71 days ($5.7 million). In its payment schedule, Qube rejected the claim completely. The Adjudicator awarded $80,000 per day for 13 days, a total of $1.0 million.

183 The applicable provision of the INTS Contract was cl 34. It relevantly provided:

> **34.3 Claim**
>
> The *Contractor* shall be entitled to such extension of time for carrying out *WUC* (including reaching *practical completion* or *commissioning completion* (as applicable)) as the *Superintendent* assesses ('***EOT***'), if and only if:
>
> a) the *Contractor* is or will be delayed in reaching:
>
> > i) *practical completion* by the *date for practical completion*; or
> >
> > ii) *commissioning completion* by the *date for commissioning completion*,
> >
> > by a qualifying cause of delay;
>
> b) the *qualifying cause of delay* was beyond the reasonable control of the *Contractor* (or an *Associate* of the *Contractor*) and affects the critical path of activities required to complete *WUC* as shown on the relevant *approved construction program*;
>
> c) the *Contractor* gives the *Superintendent*, within 14 days of when the *Contractor* should reasonably have become aware of that causation occurring, a written claim for an *EOT* setting out (to the extent reasonably practicable):
>
> > i) the facts of causation and of the delay to *WUC* (including extent);
> >
> > ii) details of the obligations which have been affected by the *qualifying cause of delay*;
> >
> > iii) details of the steps which the *Contractor* has taken to mitigate the effects of the relevant *qualifying cause of delay*; and
> >
> > iv) details of the *EOT* required to the *date for practical completion* or *date for commissioning completion* (as applicable) and how it has been calculated,
> >
> > and including all necessary supporting documentation; and
>
> d) the *Contractor* has taken all reasonable steps to preclude the occurrence of the cause of delay and minimise the consequences or duration of the delay, including by applying additional resources or re-sequencing *WUC*.

If further delay results from a *qualifying cause of delay* evidenced in a claim under paragraph c) of this subclause, the *Contractor* shall claim an *EOT* for such delay by promptly giving the *Superintendent* a written claim evidencing the facts of that delay.

If the *Contractor* fails to comply with this subclause 34.3 in respect of an event which causes it delay, the *Contractor* acknowledges and agrees that it shall have no entitlement to an *EOT* in respect of that event.

…

34.9 Delay Costs

The *Overall Delay Cost Limit* is an aggregate daily cap on costs recoverable under this subclause 34.9 and subclause 34.9 of the *Interstate Rail Access Contract*. An amount payable pursuant to this subclause 34.9 for a given day will not, when aggregated with an amount payable pursuant to subclause 34.9 of the *Interstate Rail Access Contract* on that same day, exceed the *Overall Delay Cost Limit* (with the relevant apportionment to be determined by the *Superintendent*).

Where the *Contractor* has been granted an *EOT* for a *compensable cause* pursuant to subclause 34.5, the *Principal* shall pay to the *Contractor* such costs as are demonstrated to have been necessarily and justifiably incurred by the *Contractor* as a direct result of the delay, subject to the limitation in the first paragraph of this subclause 34.9.

…

184 The claim the subject of the adjudication was based on further delay allegedly attributable to events which had already been the subject of two delay claims, one made on 8 May last year and the other on 4 September last year. Those earlier claims had been the subject of the adjudications which took place in the second half of last year and Martinus had been successful. The claim in the present adjudication concerned additional costs allegedly resulting from the ongoing effect of the late delivery of certain drawings, referred to as “IFC drawings”.

185 The present claim was not made until 8 February this year. In the payment schedule, Qube took the point that this was after the termination of the Contract. Qube contended that the right to make the claim did not survive termination. Qube also denied that any costs covered by cl 34.9 had been incurred.

186 The Adjudicator’s reasons for partially upholding the extension claim were:

2006) … I accept the Respondent’s argument that the Claimant had no right to make any further claims under the Contract after 25 September 2023, being the date of termination.

2007) The Claimant should have claimed extension of time for delays occurring up to 11 September 2023 no later than 25 September 2023. It failed to do so, therefore, any claim it could have submitted for qualifying causes of delay up to 11 September 2023 (and associated claims for delay damages) are barred by the operation of clause 34.3 from 25 September 2023.

2008) For delaying events occurring after 11 September 2023, the Claimant was not required to submit any claims for EOT up to the date of termination.

2009) However, the Act provides the Claimant certain rights to claim for work completed and for delay damages incurred up to the date of termination as follows;

13 Payment Claims

…

> *(4) A payment claim may be served only within—*
>
> *(a)the period determined by or in accordance with the terms of the construction contract, or*
>
> *(b) the period of12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),*
>
> *Whichever is the later.*

2010) Section 13(4)(b) of the Act preserves the Claimant's entitlement to claim payment for work and other entitlements (including delay damages) under the Contract for 12 months from the last date that work was performed under the Contract.

2011) I do not, therefore, accept that delaying events commencing on 17 July 2023 and extending to 11 September 2023 could have been claimed under the claims for EOT 34 made on 17 May 2023 or the claim for EOT 34 Update made on 4 September 2023.

2012) The Claimant did not notify its intention to claim an extension of time for qualifying causes of delay encountered up to 11 September 2023 and cannot now claim extension of time for events that occurred and delay costs incurred up to that date. That bar to claim that was enforceable while the Contract was on foot survives to disentitle the claim under section 13(4)(b) of the Act.

2013) However, given the Respondent's termination of the Contract and the operation of section 13(4)(b) of the Act, the Claimant was entitled to claim EOT for delays arising from qualifying causes of delay during the period 12 September 2023 up to 25 September 2023.

2014) The Respondent has not persuaded me that the Claimant's analysis (i.e., Baseline Program and Impacted Programme) of the effects of the delays on the date for Practical Completion due to qualifying causes of delay being late issue designs and variations instructed programming was not correct nor that it was unsupported by evidence.

2015) In the context that the Contract was terminated on 25 September 2023, the Claimant can only be entitled to an extension of time from the date that the qualifying cause of delay commenced up on 12 September 2023 until the date that the qualifying cause of delay ceased to have any effect, which was 25 September 2023.

187 The reasons given by the Adjudicator for allowing the full amount claimed, up to the contractual limit, for the period for which the claim was successful were:

2017) I am persuaded the Claimant is entitled to delay costs pursuant to Item 26 of Part A of the Annexure and clause 34.9 of the Contract at the rate of $80,000 per day because the Pavements, Drainage and Utilities were underway at the time of Termination and the Claimant was at peak manning levels and which the Claimant explained in Appendix C of its CN - 277.5 claim that forms a part of the Payment Claim.

2018) I acknowledge the Respondent's assertions about having made certain payments for preliminaries. That is, however, not relevant in determining whether the Claimant is entitled to an extension of time and delay costs under the Contract.

2019) If the Respondent has made an overpayment, and as all payments are on account of the final payment, it is for the Respondent to exercise its rights of certifying the appropriate amount accounting for any overpayments it may have made.

188 Counsel for Qube submitted that the reasons advanced by the Adjudicator for concluding that Martinus was entitled to an extension of time for the 13 days from 12-25 September were, at best, incoherent. On the one hand, the Adjudicator expressly accepted that Martinus had no right to make claims under the contract after 25 September. Yet he accepted that Martinus *could* make a claim for delay costs under the

Contract for that period. In counsel's submission, the Adjudicator failed to give sufficient, or really, any, reasons for this. Alternatively, the determination was "legally unreasonable".

189 So far as the quantum issue was concerned, counsel pointed to the bare statement by the Adjudicator that he was "persuaded" that Martinus had made out its claim. In its response, Qube had made detailed submissions on the quantum issues which referred to various witness statements and an expert report. The Adjudicator did not refer to these at all. In counsel's submission, I should infer that he had not considered them.

190 Counsel for Martinus responded that Qube's complaints were no more than assertions of error within jurisdiction and did not even *prima facie* raise any contention of jurisdictional error. They submitted that the Adjudicator had considered and "engaged in detail" with Qube's submissions, accepting them to some extent (that is, as to the EOT claim for the period from 12 September). Just because he had not referred to particular submissions, did not mean that any inference could be drawn that he had not considered them.

191 **Entitlement issue:** The Adjudicator's decision to uphold the extension of time claim for the period from 12 to 25 September was essentially the result of his understanding of the effect of s 13(4) of the Act. That understanding is certainly contestable. The enactment, in its terms, apparently deals with the timing of payment claims, not extension of time claims. If its effect was to "preserve" an entitlement to make an extension of time claim for the purposes of the Contract after 11 September, it is difficult to see why it would not equally have preserved such an entitlement for the period prior to 11 September.

192 But in my view, if the Adjudicator's reasoning was in error, it did not rise to the level of "legal unreasonableness". It would be only an unreviewable error of law on the face of the record: see [94] above. Again, I do not think that the allegation of error reaches the level where it can be said that the Adjudicator's reasoning process was in some way alien to what is required under the Act.

193 **Quantum issue:** Qube's challenge here covers a different type of alleged jurisdictional error, namely a failure to consider submissions made by Qube. In considering this ground I will follow the same approach as I did when considering the challenge to the decision on variation CN-420.

194 It is of course clear that the Adjudicator was obliged, if he was to uphold the claim, to find that Martinus had incurred additional costs attributable to the relevant delaying event for each of the days for which the EOT was allowed, and that each day's costs

exceeded $80,000. It was not enough simply to identify the existence of some ongoing effect. It is equally clear that, so far as Qube was concerned, this was in dispute, and had been addressed by Qube in their submissions to the Adjudicator.

195 The Adjudicator did not refer to those submissions in his reasons. Again, the question is whether that justifies an inference that he did not consider them.

196 Again, counsel for Martinus did not, in my view, advance any persuasive reason for declining to draw the inference. On the face of it, the submissions were relevant. The amount involved was significant in absolute terms, if not large in a relevant sense. I do not think that I should infer that the Adjudicator had no time to deal with it. If he thought that for some reason he did not have to, he could readily have said so.

197 Again, I draw what seems to me to be the natural and straightforward inference on the probabilities, namely that for some reason the Adjudicator overlooked Qube's submissions. I did not understand materiality to be in dispute. In my view, jurisdictional error is established.

Termination for convenience

198 Termination for convenience claims were made by Martinus, and allowed, under both Contracts. As already mentioned, the threshold question was whether Qube validly terminated the Contracts for cause. There were some separate challenges to some of the specific costs allowed which were not addressed by counsel in their oral submissions. I will return to these later.

199 The terms of the relevant contractual clauses and of the show cause notices were the same in each case. In accordance with the parties' wishes, the Adjudicator dealt with the questions as to the validity of the termination notices under both Contracts in the INTS reasons. The same approach was taken in the proceedings before me. For convenience I will refer to the notices in the singular even though the Adjudicator's reasons refer to them in the plural.

200 Three separate show cause notices were issued by Qube and relied upon to support the validity of the purported termination for cause. Two of those are relevant for the present proceedings.

201 In the first notice, Qube alleged breaches of Martinus' obligations under the Contract not to depart from the "Approved Delivery Program" and to proceed with the works with due expedition. This notice was referred to as the "Program Show Cause Notice". The other notice relied on failure by Martinus to comply with directions from the Superintendent. This was referred to as the "Directions Show Cause Notice".

202

Each notice, if valid and not complied with, was a sufficient justification to allow Qube to have terminated the Contract for cause. The notices were addressed separately by the Adjudicator and in the parties' arguments before me.

203 **Program Show Cause Notice:** Clause 39 of the INTS Contract relevantly provided (emphasis added):

> **39.2 Contractor's default**
>
> If:
>
> a) the *Contractor* [Martinus] commits a **substantial breach** of the *Contract*;
>
> …
>
> the *Principal* [Qube] may give the *Contractor* a written notice to show cause. **Substantial breaches include, but are not limited to**:
>
> …
>
> e) substantial departure from an *approved delivery program* without reasonable cause or the *Superintendent's* approval;
>
> f) where there is no *approved delivery program*, failing to proceed with due expedition and without delay;
>
> …
>
> **39.3 Principal's notice to show cause**
>
> A notice under subclause 39.2 shall state:
>
> a) that it is a notice under clause 39 of these General Conditions of *Contract*;
>
> b) the alleged substantial breach;
>
> c) that the *Contractor* is required to remedy or overcome the substantial breach; and
>
> d) the date and time by which the *Contractor* must remedy or overcome the substantial breach (which shall not be less than 7 clear days after the notice is received by the *Contractor*).
>
> **39.4 Principal's rights**
>
> If the *Contractor* fails to remedy or overcome the substantial breach to the *Principal's* satisfaction (as appropriate) by the stated date and time, the *Principal* may by written notice to the *Contractor*:
>
> …
>
> b) terminate the *Contract*.

204 The Program Show Cause Notice relevantly stated:

> The Principal considers that the Contractor has committed a substantial breach of the Contract by reason of one or more of the following:
>
> (a) it has failed to provide and obtain approval for a proper revised Approved Delivery Program since September 2022;
>
> (b) it has substantially and repeatedly contravened the requirement in cl 32.2 to not depart from an Approved Delivery Program without reasonable cause;
>
> (c) it has substantially departed from the last Approved Delivery Program without reasonable cause or the Superintendent's approval; and /or
>
> (d) it has failed to proceed with due expedition and without delay.

> The Contractor should immediately remedy these matters by providing a revised Approved Delivery Program in accordance with the requirements of the Contract, including the Superintendent's review and commentary on what that program should contain and properly reflect. The Contractor should also bring its works back into line with the Approved Delivery Program (or any revised Approved Delivery Program subsequently approved by the Superintendent, after the Contractor has properly complied with its programming obligations).

205 The "Approved Delivery Program" referred to in the notice was dealt with in cl 32.2 of the INTS Contract, which provided (emphasis added):

> **32.2 Program**
>
> The approved form of program is set out in Annexure Part H.
>
> **The *Contractor* must supply to the *Superintendent* no later than 10 days prior to commencement of any *WUC* or within such other period as directed by the *Superintendent*, a proposed program for *WUC*** which must include:
>
> a) the dates by which or the times within which and the sequence in which the various stages or portions of *WUC* are to be carried out or completed, including a critical path network analysis;
>
> b) the dates and times for the relevant *WUC* specified in Annexure Part X; and
>
> c) any other information reasonably requested by the *Superintendent*.
>
> Upon review and notification in writing from the *Superintendent* to the *Contractor* that the *Superintendent* has no objection to the proposed program, the proposed program shall become the *approved delivery program* for the purposes of the *Contract*. **If the *Superintendent* does not accept the proposed program, the *Contractor* must promptly amend or revise the proposed program until the *Superintendent* accepts it.** The *Superintendent* may only reject a proposed program if, in the *Superintendent's* reasonable opinion, the proposed program:
>
> d) does not comply with the *Contract*; or
>
> e) is inconsistent with actual progress.
>
> The *approved delivery program* will be used by the *Contractor* and the *Superintendent* to:
>
> f) convey information to the *Superintendent* about the construction and commissioning of *the Works*;
>
> g) measure and report on the progress of *the Works* towards meeting the *date for practical completion* and *date for commissioning completion*; and
>
> h) assess delays and any *EOT*.
>
> **The *Contractor* must issue a revised version of the *approved delivery program* in accordance with the requirements set out in the *drawings and specifications* within 5 *business days* after:**
>
> **i) the last day of each month**; and
>
> j) being notified of an *EOT* being granted under the *Contract*.
>
> Within 15 *business days* after receipt, the *Superintendent* may review a revised *approved delivery program* to assess conformity with the presentation and technical requirements specified in the *drawings and specifications* and either:
>
> k) approve the revised *approved delivery program*; or
>
> l) request the *Contractor* in writing to amend the revised *approved delivery program*.

> If the revised *approved delivery program* is approved by the *Superintendent*, the *Contractor* must submit to the *Superintendent* the *approved delivery program* in the format set out in Annexure Part H indicating the date of the program within 5 *business days* of the approval by the *Superintendent*.
>
> Without reducing the *Contractor's* responsibility for programming *the Works*, the *Contractor* must incorporate the *Superintendent's* requested amendments to a revised *approved delivery program*. Within 5 *business days* after the *Superintendent's* response under subclause 32.2l), the *Contractor* must resubmit the revised *approved delivery program* to the *Superintendent* in the format set out in Annexure Part H.
>
> **The *Contractor* must not, without reasonable cause, depart from an *approved delivery program*.**
>
> The supply of a revised *approved delivery program* under this subclause 32.2 or any review, comment or approval of it (or failure to do so) by the *Superintendent* will not relieve the *Contractor* from or alter any of its obligations and liabilities under the *Contract* including the obligation not to depart, without reasonable cause, from an earlier *approved delivery program*. The *Contractor* shall have no *Claim* against the *Principal* or the *Superintendent* arising from or in connection with such furnishing or review, comment or approval (or failure to do so).
>
> The *Contractor* shall prepare and submit any *approved delivery program* at its own cost.
>
> Neither the form of program contained in Annexure Part H nor any *approved delivery program* will form part of the *Contract*.

206 The argument from counsel for Qube focused on the following paragraphs of the Adjudicator's reasoning in the INTS determination:

> 1613) The Respondent asserts that the Claimant substantially and repeatedly contravened the requirement in cl 32.2 not to depart from an Approved Delivery Program without reasonable cause.
>
> 1614) I do not accept that assertion because the Respondent provided no examples or particulars of any such alleged departure.
>
> 1615) The Respondent asserts that the Claimant substantially departed from the last Approved Delivery Program without reasonable cause or the Superintendent's approval.
>
> 1616) I do not accept that assertion because the Respondent provided no examples or particulars of any such alleged departure.
>
> 1617) The Respondent asserts that the Claimant failed to proceed with due expedition and without delay.
>
> 1618) I do not accept that assertion because the Respondent provided no examples or particulars of any such alleged departure.

207 Counsel for Qube submitted that this reasoning failed to address the real issue between the parties concerning the validity of the termination. Counsel referred in particular to the following passages from Qube's adjudication response (emphasis original):

> 6.107 … at the time of termination, Martinus had completed less than 54% of the INTS Contract Works and less than 40% of the ISRA Contract Works. That is, in a period of some 15+ months and as at the date of termination of the Contracts, Martinus was only able to deliver half of the works it had promised to complete. Even if regard is had to the delays "recognised" in previous adjudication determinations, a consequential extension of time does not deprive the termination for cause of a proper basis. Even on this hypothetical scenario, there remains clear evidence of a failure to progress the works with due expedition and without delay. That consequential extension would provide a further 9 months to complete the works – with more than 46% of the INTS Contract Works remaining, and more than 60% of the ISRA Contract Works remaining.

> …
>
> 6.108.6 … the position taken by Martinus conveniently ignores the breaches relied upon by Qube in issuing “Notices to Show Cause” and, subsequently, “Notices of Termination”. In each case, Qube clearly notified that there had been a substantial breach by reason of a substantial departure from the “Approved Delivery Program”. Relevantly, the “Approved Delivery Program” at the time of issuing the relevant notices was that the program issued by Martinus, and approved by the Superintendent, in September 2022. That much is not in dispute. It is also not in dispute that, at the time of issuing the relevant notices, there had been substantial departures from that program. **That much is conceded by Martinus – who acknowledges at paragraph [364] of the INTS Adjudication Application and [301] of the ISRA Adjudication Application that, by August 2023, “there had obviously been substantial departures from that program”**. Faced with this “obvious” reality, Martinus seeks to avoid the consequences of those substantial departures by simply asserting – without any explanation as to the factual foundation or the legal basis for the submission – that compliance with that program was “impossible”, and so “Qube cannot rely on it”. Qube rejects any such suggestion. There is no suggestion that there was some frustration of the contracts by reason of impossibility—indeed, that Martinus asked for acceleration directions on a number of occasions undermines any suggestion of real impossibility of performance. The fact of the matter is that Martinus was obliged to carry out the works in accordance with the “Approved Delivery Program”. The significant departures in the logic, sequence and timing of works set out in the “Approved Delivery Program” plainly constituted a substantial breach, and empowered Qube to take the action that it did.
>
> …
>
> 6.108.8 Qube denies that “reasonable cause” has been shown for the departure from the “Approved Delivery Program”. Even if it were accepted that there were significant delays in the works outside of the control of Martinus – which is denied – the mere fact of delay does not, without more, justify or excuse such substantial departures from the “Approved Delivery Program”. As noted above, the departures in question did not just involve delays. The departures in question were more fundamental than that, and involved substantial departures in the logic, sequence and timing of the works set out in the “Approved Delivery Program”.

208 In counsel’s submission, the issue between the parties was clear. At the time Qube issued the Show Cause Notice, the most recent approved delivery program had been issued in September 2022, almost a year before. There was no dispute that there had been departures from that program. The debate was about whether such departures were justified.

209 Counsel for Qube submitted that the quoted passage from the Adjudicator’s reasons disclosed error in two ways. Counsel’s first point was that the Adjudicator had failed to deal with the real issue, namely justification of the delay. Instead, using a process which counsel described as “invented formalism”, the Adjudicator had focused on the existence or otherwise of the delay, which was a non-issue. Secondly, counsel for Qube submitted that the repeated statement that Qube had provided “no examples or particulars” of its allegations was simply wrong.

210 In support of the second point, counsel for Qube referred to the statement from Mr Barney (see [106] above) which accompanied Qube’s adjudication response. The statement included a table showing, from month the month, how the date for practical completion had blown out. Mr Barney also described, in detail, correspondence from

Qube to Martinus in the period leading up to the issue of the Show Cause Notices complaining about delays with particular items of work and asserting that the delays were interfering with the completion of the work program.

211 Counsel also referred me to passages in an expert report from Mr Bradley Giller which likewise accompanied Qube's response. In those passages, Mr Giller reviewed the "baseline" program issued by Martinus in June 2022, and subsequent programs between May and September 2023. He concluded, by reference to specific items of work, that specified elements of the programs could not have been achieved as planned in the baseline program and had not in fact been achieved.

212 At the beginning of Qube's response on termination, the Adjudicator had been invited to read both the statement and the report (among other statements and documents). But neither of them was referred to in the relevant part of the Adjudicator's reasons. Again, counsel asked me to infer that the Adjudicator had not considered them. In counsel's submission, this amounted to jurisdictional error.

213 Counsel for Martinus disputed that any error had occurred. Counsel submitted that the Adjudicator would have been in no doubt that there had been a delay in the date for practical completion; the question before the Adjudicator was: who was to blame? In this context, it was understandable that the Adjudicator found no need to refer to Mr Barney's statement. Furthermore any error which might have occurred was not jurisdictional.

214 Counsel pointed out that cl 39.2, unlike some other clauses of building contracts which depend upon a good faith determination by the principal, required the existence of breaches in fact. Counsel further submitted that, as a matter of construction, cl 39.3 had to be interpreted so that particulars were given of the alleged breaches. Otherwise, it would be impossible for Martinus to be able to rectify them.

215 Counsel submitted that these points were well understood by the Adjudicator, referring, in particular, to a paragraph in his reasons which appears shortly before the dispositive reasoning which I have quoted above:

> 1609) The Claimant argued that the Program Show Cause Notices do not comply with clause 39.3 of the Contract because the Program Show Cause Notices do not show;
>
> > a) the clause in the Contract that the Principal alleges were breached;
> >
> > b) the details of each beach relied on by the Respondent for the Program Show Cause Notices sufficient for the Claimant to understand the Respondent's contention;
> >
> > c) how each alleged breach of the Contract relied on by the Respondent for the Program Show Cause Notices is a substantial breach so as to enliven the Respondent's rights under clause 39.4(b) of the Contract.

216

Counsel submitted that the statement that there was a lack of "examples or particulars" in [1612], [1614], [1616] and [1618] should be understood as a reference back to this argument.

217 Whether the terms of the Contract were such as to require a cl 39.3 notice to contain "examples or particulars" of the alleged breaches, and whether the notices failed to do so, were both contestable questions. In terms, cl 39.3 required only that the notice should "state" the breaches in question and "state" that Martinus was required to remedy or overcome the breach, and the date and time by which it had to do so. While there may be an argument that, implicitly, as a matter of fairness to Martinus, it had to be told enough to know what it had to do to comply with such a notice, the Program Show Cause Notice at least did arguably provide sufficient information.

218 It may be accepted that the Adjudicator did not refer in his reasons to Qube's submissions about the delay in progress of the works and the lack of a current Approved Delivery Program. But evidently he thought it unnecessary to do so because the Show Cause Notice was invalid. That was the critical finding for present purposes.

219 The language in the dispositive paragraphs of the Adjudicator's reasons is ambiguous insofar as it refers to Qube not having "provided" particulars or examples. Qube's reading is that "provided" means "provided in its submissions in the adjudication". Martinus' is that it means "provided in the Program Show Cause Notice".

220 It is true, as counsel for Qube pointed out, that the wording of the dispositive paragraphs is not a very accurate paraphrase of the submission by Martinus recorded at [1609]. But on balance, I think Martinus' interpretation is preferable. I am unwilling to interpret the reasons so as to create a complete non sequitur.

221 As I have already said, the interpretation which I have attributed to the Adjudicator, by way of somewhat inaccurate paraphrase of Martinus' submissions, is certainly contestable. Those submissions in turn were not rigorously tied to the language of cl 39.3. But I was not referred to any submissions by Qube to the Adjudicator concerning the interpretation of the that clause. It follows that there was no failure to take account of submissions on the relevant question.

222 It follows that the Adjudicator's reasoning, at most, involved an erroneous interpretation of cl 39.3 of the Contract. For reasons already given, this complaint does not disclose jurisdictional error. The challenge to this part of the Adjudicator's decision on the termination issue fails.

223 **Directions Show Cause Notice:** This Notice picked up the failure to comply with two directions made by the Superintendent which had not been (or at least had allegedly not been) complied with. One was a direction to Martinus to remove its building

materials from part of the site known as the "LOGOS area". The other was a direction to Martinus to provide details of its sub-contracting arrangements in accordance with (or purportedly in accordance with) a term of the Contract.

224 The power of the Superintendent to give directions was set out in cl 20:

> **20 Superintendent**
>
> The *Principal* shall ensure that at all times there is a *Superintendent*. In the performance of its role and functions under:
>
> a) the first paragraph only of subclause 34.5;
>
> b) subclauses 37.2 and 37.4; and
>
> c) subclause 41.5,
>
> the *Superintendent* shall act independently.
>
> Other than in respect of the role and functions referred to in the preceding paragraph of this clause 20, the *Superintendent* shall give directions and carry out its other functions under the *Contract* on and behalf of and as agent of the *Principal* and not as an independent certifier, assessor or valuer.
>
> Except where the *Contract* otherwise provides, the *Superintendent* may give a *direction* orally but shall as soon as practicable confirm it in writing. If the *Contractor* in writing requests the *Superintendent* to confirm an oral *direction*, the *Contractor* shall not be bound to comply with the *direction* until the *Superintendent* does so.
>
> The *Contractor* must promptly comply with any *direction* given by the *Superintendent* in connection with the *Contract* or *WUC*.
>
> If the *Contractor* fails to comply with a *direction* of the *Superintendent* given under the *Contract* or fails to perform any of its obligations under the *Contract*, the *Superintendent* may issue a notice to the *Contractor* requiring such performance and specifying a reasonable time for performance. If the *Contractor* does not comply with the notice, then, in addition to any other rights of the *Principal* under the *Contract* or at law, the *Principal* may, by further notice to the *Contractor*, perform or have others perform that obligation. The *Principal* may recover the costs and expenses of it or others performing the obligation as a debt due to the *Principal* by the *Contractor*.

225 A critical question was whether the failure to comply with these directions was a "substantial breach" of the contract. The relevant parts of the definition of substantial breach have already been set out at [203] above.

226 In Martinus' application, it presented arguments about the significance of the breaches (or the alleged breaches) concerning the LOGOS area (application [517]-[522]) and sub-contracting arrangements (application [501]-[515]). In its response, Qube replied (6.130-6.132 6.125-6.127).

227 It is sufficient to refer to Qube's submissions on the LOGOS area direction. The submissions stated (emphasis original):

> 6.125 Martinus states that it has not breached the Contracts by its failure to comply with a direction from the Superintendent relating to the use of a "laydown area" along the route. It is entirely unclear to Qube on what basis Martinus could maintain such a position. There is no dispute that, on 4 September 2023, the Superintendent directed Martinus to remove track rails from an area known as the "LOGOS Area". Similarly, there is no dispute that Martinus failed to comply with that direction within the time requested by the Superintendent, or at all. As noted above, **a disagreement as to the basis for the direction does not entitle Martinus to ignore a direction issued by the Superintendent, or otherwise excuse performance of its obligations under the Contracts.**

> 6.126 If Martinus disagrees with a direction issued by the Superintendent, it is entitled to raise a dispute in respect of the direction, which is to be determined in accordance with the dispute resolution provisions set out in clause 42 of the Contracts. However, even if it disagrees with the basis of / premise for a direction issued by the Superintendent, Martinus is still obliged to comply with that direction and to do so promptly. A failure to do so constitutes a breach of the Contracts.
>
> 6.127 In response to the specific matters raised by Martinus, Qube says as follows:
>
>> …
>>
>> 6.127.5 Martinus' access to [the LOGOS area] was specifically subject to the above-mentioned limitation [requiring Martinus to facilitate access to the area]. It had no right to use that area indefinitely and for its convenience. The right to access and use this area was always liable to be revoked upon request. Further, and more importantly, Qube is under no obligation to provide access to additional areas of land, outside of the project boundaries, by means of "assistance" to Martinus. In executing the Contracts. Martinus warranted that it had informed itself of the site constraints. It took all risks associated with performing the WUC within the confines of the site. It cannot now complain that it had nowhere to store trackwork materials. That was entirely a matter to be coordinated and managed by Martinus.
>>
>> 6.127.6 If it required additional land for the purposes of a "laydown area", then it was obliged to make those arrangements itself. It cannot seek to shift responsibility for site logistics and materials storage onto Qube and/or the Superintendent. The Superintendent was under no obligation to propose some alternative location for the storage of such materials, and so Martinus' complaints in this regard are misconceived and go nowhere.
>>
>> 6.127.7 Martinus does not say that it could not have complied with the direction. Instead, it says compliance with that direction would have required "double-handling", and consequential impacts to other works along the route. The fact that the movement of such supplies would have resulted in some inconvenience to Martinus does not mean that it is entitled to completely disregard the direction.
>>
>> 6.127.8 Martinus has not disclosed any intelligible basis on which to defend this ground.

228 The emphasised portion referred back to an earlier part of the submissions where Qube presented its argument on failure to comply with another direction (not here relevant). That earlier argument included:

> 6.108.3 The authorities also make clear that, when the qualifier of "substantial" is applied to the phrase "breach of this contract", the concept of "substantial" can apply to a breach of any term of the contract: see Stojanovski v Australian Dream Homes [2015] VSC 404, as affirmed in Australian Dream Homes Pty Ltd v Stojanovski [2016] VSCA 133 at [44]; see also, e.g., Dimitropoulos v Capital Constructions Pty Ltd [2018] NSWCATAP 100. The protean quality of "substantial" serves a purpose and the precise meaning intended by the use of the word will be revealed by the nature of the breach. The proper approach to determining whether a party is in "substantial breach" of the contract is to first identify the term or terms breached, and the breach must then be evaluated by considering its nature and the consequences of the breach. In other words, a failure to proceed with the works "with due expedition and without delay" can plainly constitute a "substantial breach", provided the failure in question rises to the requisite level (i.e. is more than an ephemeral or de minimis breach).
>
> …
>
> 6.111 In relation to this aspect of the dispute, Martinus does not deny that it failed to comply with the above-mentioned directions. Instead, Martinus says that, (i) each direction was "not reasonably issued", and / or (ii) Martinus could not reasonably comply with the direction such that it is somehow excused from a requirement to comply with said direction.

> 6.112 As to the first issue, Martinus seeks to import a requirement that a direction be "reasonably issued" in order for a direction to be valid and effective. The basis for importing such a requirement is not explained and it has no textual foundation in the Contracts. There is no such basis for such a requirement. It is not a term that would be implied at law. There is no basis on which such a term could be implied in fact – such a term is not reasonable and equitable, nor is it necessary to give business efficacy to the parties' bargain. Further, and more fundamentally, the implication of such a requirement would be inconsistent with the balance of the contractual terms when read as a whole. The starting point for the analysis is that Martinus must promptly comply with any direction given by the Superintendent in connection with the Contracts or the "Works Under Contracts" (WUC): see clause 20. A failure to comply with this requirement constitutes an actionable breach. For the reasons set out above, a failure to "promptly comply" with any direction given by the Superintendent is capable of constituting a "substantial breach" provided the failure in question rises to the requisite level (i.e., is more than an ephemeral or de minimis breach).

229 The Adjudicator's reasons on this issue were again brief. He set out cl 20 of the Contract and continued:

> 1636) The failures to comply with directions relied upon by the Respondent in the Directions Show Cause Notices under clause 39.3 of the Contract, cannot be categorised as any of the substantial breaches of Contract listed in clause 39.2 of the Contract.
>
> 1637) Further, clause 20 of the Contract sets out the Respondent's remedies for a breach of a direction given under that clause by the superintendent. None of those remedies include a right to terminate the Contract under clause 39.4 of the Contract. In other words, a failure to comply with a proper direction given by the superintendent under clause 20 of the Contract is not a substantial breach of Contract.

230 Counsel for Qube pointed out that, in his reasons, the Adjudicator made no reference to the submissions of Qube (or Martinus for that matter) concerning the LOGOS area direction or the sub-contracting arrangements direction. Nor did he refer to the submissions by Qube on the nature of a "substantial breach" for the purposes of the Contract. Counsel submitted that this was a further instance of the Adjudicator failing to have regard to Qube's submissions, and gave rise to a jurisdictional error.

231 Counsel for Martinus again submitted that, in his reasons, the Adjudicator had addressed the relevant grounds for termination. Any error in his reasoning was not a jurisdictional one.

232 It is apparently common ground that the Adjudicator did not refer to the submissions in question in his reasons. The question, again, is what inference I should draw from that.

233 As with the alleged breaches which underpinned the Program Show Cause Notice, after the Adjudicator decided that the Directions Show Cause Notice was invalid it was unnecessary to refer to Qube's (or Martinus' submissions) on the merits of the breach allegations. Again, whether the Notice satisfied the requirements of the Contract was the critical question for present purposes.

234 Again, the Adjudicator's construction of the Contract was a contestable one. Effectively, he was saying that the only remedy which Qube had for breach of the Superintendent's direction, no matter how important to the carrying out of the works, and no matter how contumacious, was for Qube to undertake that task itself under cl 20 (and how would

that be done if it required the cooperation of Martinus?). It is notable that, at [1636], the Adjudicator stated that failure to comply could not be categorised as any of the substantial breaches listed in cl 39.2, ignoring the provision of the chapeau which stated in terms that the list was not exhaustive.

235 So far as the Adjudicator’s actual decision is concerned, all that this discloses is an arguable error of law on the face of the record, which would not be jurisdictional. But (and this is the difference between the Directions Show Cause Notice and the Program Show Cause Notice) Qube made submissions on the construction question which are not referred to in the Adjudicator’s reasons on that question.

236 Again, the issue was an important one and Qube’s submissions were apparently weighty. I do not find it plausible to suppose that the Adjudicator lacked the time to address the submissions, or felt that he did not need to do so on some ground which is not disclosed in his reasons. Again, I draw what seems to me to be the straightforward and natural inference that, on the balance of probabilities, the Adjudicator did not consider the submissions in question.

237 Obviously, if the Adjudicator had formed a different view on the construction question, there would still have been a debate about whether the failure to comply with the directions involved a breach which was sufficiently serious to amount to a “substantial breach” for the purpose of cl 39.2. To say the least, it is far from certain whether Qube would have prevailed on that question. But because of the Adjudicator’s approach, it never had the opportunity. In my view, the test of materiality is satisfied.

Bank guarantees

238 This component of the adjudication represents the proceeds of the bank guarantees which were called on (or “encashed”) by Qube on 8 February after the refusal of the injunction last December. The security obligations were summarised by Rees J at J1 [15]-[18]. For present purposes, it is only necessary to refer to cl 5, which relevantly provided:

> **5.2 Recourse**
>
> The *Principal* may have recourse to the *security* (and convert into money any *security* which does not consist of money):
>
> a) to pay for or recover (as applicable) any costs, expenses or damage which the *Principal* or *PDC* has incurred or (acting reasonably) claims to have incurred or might in the future incur as a consequence of any act or omission of the *Contractor* which the *Principal* (acting reasonably) asserts constitutes a breach of the *Contract* by the *Contractor,* including to pay for or recover any such costs, expenses or damage that are or incurred or might in the future be incurred due to termination of the *Contract* pursuant to clause 39.4b);
>
> b) if an event described in clause 39.11 occurs in respect of the *Contractor*;
>
> c) to recover any moneys which are due and payable by the *Contractor* to the *Principal* under the *Contract* and remain unpaid.

The parties acknowledge and agree that:

d) where the amount of any *security* then held by the *Principal* under this *Contract* is insufficient to meet the amount of the costs, expenses or damage of, or moneys due to, the *Principal* or *PDC* described in this subclause, the *Principal*, at its discretion, may have recourse to any other *security* then held by the *Principal* under the *Interstate Rail Access Contract*; and

e) where the amount of any *security* then held by the *Principal* under the *Interstate Rail Access Contract* is insufficient to meet the amount of any costs, expenses or damage of, or moneys due to, the *Principal* or *PDC* described in subclause 5.2 of the *Interstate Rail Access Contract*, the *Principal,* at its discretion, may have recourse to any *security* then held by the *Principal* under this *Contract*.

The *Contractor* undertakes to the *Principal* that the *Contractor* will not take any steps to injunct, prevent or restrain or seek to injunct, prevent or restrain:

f) the *Principal* from having recourse to any *security* or otherwise exercising any if its rights in respect of *security* under this clause 5; or

g) the issuer of any *security* from providing recourse to *security*.

…

5.4 Reduction and release

Upon the later of the:

a) issue of the *certificate of practical completion*; and

b) the date on which the *Post-Practical Completion Documents* are supplied by the *Contractor* to the *Superintendent*,

the *Principal's* entitlement to *security* (other than in *Item* 13(e)) shall be reduced by the percentage or amount in *Item* 13(f), and the reduction shall be released and returned within 14 days to the *Contractor*.

The *Principal's* entitlement to *security* in *Item* 13(e) shall cease 14 days after incorporation into *the Works* of the plant and materials for which that *security* was provided.

The *Principal's* entitlement otherwise to *security* shall cease 20 *business days* after the *final payment schedule*.

Upon the *Principal's* entitlement to *security* ceasing, the *Principal* shall release and return forthwith the *security* to the *Contractor*.

5.5 Trusts and interest

The *Principal* does not hold the *security* or the proceeds of the *security* (including interest earned) on trust for the *Contractor*, and is not obliged to pay the *Contractor* interest in any way associated with the *security*.

239 As already noted, the bank guarantees (which totalled $7.0 million) were called on 8 February, the same day Martinus' payment claimed was lodged. The call was actually made before Martinus lodged the claim, but Martinus was not aware of that until afterwards. The claim therefore made no reference to the call and included no claim to have the monies "returned" (I use the term "return" in inverted commas because, once the monies had been "encashed", the remedy was not to have the guarantees reinstated by the bank, but rather a claim for restitution directly from Qube as the party receiving the proceeds of the security: *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56).

240

In its payment schedule, Qube allowed a credit against Martinus' claims in the sum of $0.5 million. This was described on the summary page as "Defective/Incomplete Works/Contra-Charges/Termination for Cause/BGs". The amount was calculated as follows.

241 First, Qube claimed payments it had made to contractors who had replaced Martinus on the site, on the footing that Qube was contractually entitled, having terminated for cause, to recoup these amounts. The amounts paid to the contractors which were claimed totalled $5.4 million. Secondly, Qube added the sum of $2.1 million which it had paid voluntarily (as counsel described it, in "in good faith") on account. Third, Qube credited against these claims the $7.0 million which had been received from calling on the bank guarantees. Each of these components of the calculations appeared in the spreadsheet which was attached to the payment schedule.

242 In its adjudication application, Martinus accepted that the $2.1 million payment on account "should be deducted from amounts determined by the Adjudicator to be payable" but disputed the claim for payments to the replacement contractors on the ground that Qube's purported termination for cause was invalid, and that Qube had no right to recoup the payments based on a termination for convenience.

243 In addition, Martinus made a claim for the proceeds of the bank guarantees. The claim was developed in section L of the application. It was based on an argument concerning the effect of the accounting undertaken by Qube in the payment schedule:

> 908. PC15 is a claim for payment by Martinus for contractual entitlements for construction work carried out by Martinus. PC15 does not include any claim by Martinus for the cash proceeds of the bank guarantees provided under the INTS and ISRA Contracts and converted by Qube on or about 8 February 2024.
>
> 909. At the time that Martinus served PC15 on Qube on 22 February 2024, it did not know that Qube had (earlier that day) converted the security then held under both the INTS Contract and ISRA Contract (totalling $7,029,849.50). The security was in the form of bank guarantees from the CBA. Martinus came to know of the conversion of the bank guarantees in the days after the conversion by Qube (and after serving PC15).
>
> 910. At the time that Qube converted the security from the form of bank guarantees and into cash, at that point in time, it still had the status of security (albeit in the form of cash rather than in the form of bank guarantees).
>
> 911. As set out in the Payment Schedule, Qube now no longer holds the proceeds of the call as security – it has drawn down on the cash which it obtained after calling on the bank guarantees so as to partially satisfy the alleged debts set out in Section 6 of the INTS Payment Schedule. Qube no longer holds any security provided by Martinus (in the form of bank guarantees or cash consequent upon converting the bank guarantees). It has applied the cash to alleged debts. Qube now has Martinus' money to which it is not entitled.
>
> 912. Qube was not entitled to terminate the Contracts 'for cause' either under the Contracts or at law. Qube terminated the Contracts under clause 40A. Under clause 40A(e) of the Contracts, Qube was obliged after 25 September 2023 to return the security to Martinus. Qube did not do this.
>
> 913. Irrespective of whether Qube was (or was not) entitled to hold the security on or after 25 September 2023, it has purported to apply the security as set out in Section 6 of the INTS Payment Schedule. For the reasons set out above, with the exception of

> the sum of $2,060,000 for the reversal of the on-account payment for VO-02 …, Qube is not otherwise entitled to the amounts deducted in Section 6 of the INTS Payment Schedule. This being the case, when the Adjudicator calculates the amount of the progress payment to which Martinus is entitled under the Act in respect of PC15 (the adjudicated amount), he or she must (as is the usual course):
>
> > (a) Determine the cumulative amount which Martinus is entitled to be paid under the INTS Contract; and
> >
> > (b) Reconcile the previous cash position as between the parties (and deduct) from the cumulative amount which Martinus is entitled to be paid under the INTS Contract, amounts on account of previous payments. ...
>
> 914. The Adjudicator must account for the reversal of the cashed proceeds of the security (which is now no longer security) in the sum of $7,029,849.50 which was purported to be drawn down and applied by Qube to satisfy alleged debts which (as set out above, with the exception of $2,060,000 which is conceded) are not debts.

244 In advancing this claim, Martinus was concerned to escape from a problem apparently created by the recent first instance decision in *Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd* [2023] NSWSC 1565. Martinus' submissions dealt with that decision as follows:

> 915. On this point, the recent decision of [Acciona] is irrelevant and of no application to this case. In that case the claimant claimed in the payment claim, sums for the return of the cashed proceeds of a bank guarantee. The Court held that this invalidated the payment claim as a payment claim for the purposes of the Act because it was not a claim for construction work. That is not the case here - none of those sums appear in the PC15 payment claim. In light of the Payment Schedule issued by Qube, Qube no longer holds any security - it has purported to apply the cash to alleged debts (which are not debts). Qube is not entitled to those amounts (for the reasons set out above) and the Adjudicator ought to so determine.

245 Martinus' submission concluded:

> 916. The Adjudicator must therefore bring to account the reversal of the cashed proceeds of the security in the final reconciliation of the quantum of the progress payment. Qube has included this sum in its Payment Schedule for the purpose of setting out the amount of the progress payment to which it considers Martinus is entitled under the Act in respect of the INTS PC15. Qube's election to bring this to account requires the Adjudicator to consider the position on this sum in determining the adjudicated amount for the purposes of section 22(1)(a), having regard to the matters in section 22(2) which includes the Payment Schedule.

246 As already noted, in its response, Qube submitted that some of Martinus' claims were outside the Adjudicator's jurisdiction. Qube accepted that in general the Adjudicator had jurisdiction "to make a decision pursuant to s 22 of the Act". But Qube submitted that the Adjudicator's jurisdiction did not extend to four nominated claims. These included the bank guarantee claim.

247 After dealing with the formal matters in part 1 and 2 of its response, Qube addressed jurisdictional matters in part 3. In support of this general contention, Qube developed an argument based on cases where further particulars are provided in support of the application to which the principal has had no opportunity to respond, thus denying the principal natural justice: *John Holland v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 at [22]-[25], [41]; *Minister for Commerce v Contrax Plumbing* [2004] NSWSC 823 at [57]. Qube's conclusion was that the Adjudicator had no jurisdiction with respect to the

specified claims and should not deal with them. If, nonetheless, the Adjudicator considered he had jurisdiction, the Adjudicator should give Qube natural justice by considering its submissions in response.

248 Qube's general jurisdictional argument was not really apposite to the bank guarantee claim. But it did address the jurisdictional aspect of that claim separately as part of section 9 of its submissions, which dealt with its off-set claim generally. Qube made the following submissions:

> 9.22 By seeking a reversal of the cashed proceeds of securities, Martinus seeks to re-agitate an issue which was determined by the court in *Martinus Rail Pty Ltd v Qube RE Services* (No 2) Pty Ltd [2023] NSWSC 1550. A court, with the benefit of detailed evidence and submissions from the parties, held that the position advanced by Qube was coherent and had a reasonable basis, and further, that no facts were advanced by Martinus which indicated that its claims were "unreasonable". That remains the position.
>
> 9.23 Further, and in any event, Martinus itself acknowledges that *"PC15 does not include any claim by Martinus for the cash proceeds of the bank guarantees provided under the INTS and ISRA Contracts".* Despite this acknowledgement, the proposal put forward by Martinus for some "balancing exercise", has the practical effect of inviting the Adjudicator to determine that there was no such entitlement to call on those securities, and that those proceeds – or an amount in lieu of the proceeds – ought to be returned to Martinus. That is an entirely new claim, presented for the first time as part of the Adjudication Application. For the reasons set out in Section 3 above, if the Adjudicator were to embark on a consideration of these issues, the Adjudicator would be assuming jurisdiction for a claim which was not validly made (i.e., not a claim the subject of a payment claim), and in respect of which the Respondent has not been afforded a proper opportunity to consider and assess. Further, the pursuit of this entirely new claim, under the guise of some balancing exercise, is an abuse of process and will result in a denial of procedural fairness to Qube.

249 When responding to the Adjudicator's invitation to address jurisdictional issues raised by Qube's adjudication response (see [108]-[109] above), Martinus responded both to the general jurisdiction argument and the specific bank guarantee argument. On the bank guarantee argument, Martinus referred the Adjudicator back to its submissions on this argument in its adjudication application.

250 Qube's supplementary submissions in response began:

> 6.2 In section B.5 of the Claimant's Further Submissions, Martinus concedes, at paragraph [62], that its claim relating to the return of proceeds of bank guarantees is a new claim, which was not in any way included in PC15. In fact, Martinus specifically acknowledges that it "*did not claim the bank guarantee proceeds in PC15"*. Despite these acknowledgements, Martinus maintains that the Adjudicator has jurisdiction to undertake some "balancing exercise", which has the practical effect of inviting the Adjudicator to determine that there was no such entitlement to call on the relevant securities, and that the proceeds from a call on the relevant securities – or an amount in lieu of those proceeds – ought to be returned to Martinus.
>
> 6.3 Martinus seeks to avoid the obvious conclusion that the Adjudicator lacks jurisdiction to hear and determine any such claim by suggesting that its submissions contained in Section L of its Adjudication Application are "responsive" and arise as a result of the way in which Qube applied and accounted for the proceeds of the bank guarantees in PS15. This is no answer to the jurisdictional challenge and is simply wrong in any event.
>
> 6.4 The matters raised in Section L of Claimant's Adjudication Application, whilst said to arise in response to matters raised by Qube in PS15, are plainly and in substance matters giving rise to a new claim for the reversal of the cashed proceeds of securities. In fact, in Section L of its Adjudication Application, Martinus itself states that the

> Adjudicator ought to *"account for the reversal of the cashed proceeds of security"* in the sum of $7,029,849.50. The only way that such a "reversal" could occur would be for the Adjudicator to determine that Qube had no entitlement to seek recourse to the securities, and is obliged to "repay" those amounts to Martinus, despite no claim being presented on this basis in PC15. Whilst Martinus seeks to characterise this issue as nothing more than a "balancing" or "accounting" exercise, the fact remains that Martinus is inviting the Adjudicator to determine a claim which was not identified or included in PC15, and therefore, a claim for which the Adjudicator has no jurisdiction.

251 The submission then went on to refer to the *Icon* decision:

> 6.11 It is important to understand the effect of the appeal:
>
>> 6.11.1 The Court of Appeal did not take issue with the Parker J's review of the relevant authorities and restatement of the relevant principles as to the task of an adjudicator and the matters which can and cannot be taken into consideration by an adjudicator in exercising his or her statutory function.
>>
>> 6.11.2 The reasoning of the Court of Appeal expressly left open that the result could have – and likely would have – been different had the adjudicator awarded more than the amount that had been claimed by the claimant in its payment claim.
>>
>> 6.11.3 The Court of Appeal accepted the proposition that, if in fact the adjudicator had awarded an amount for a claim which had not been made at all in the payment claim, such an award would amount to jurisdictional error.
>>
>> 6.11.4 The Court of Appeal was not required to – and did not deal with – a situation in which an adjudicator allows a claim that was not made in the payment claim at all. The decision turned on the way in which the payment claim was expressed and is not inconsistent with the proposition that an award of an amount which is not claimed at all will result in a jurisdictional error.
>
> 6.12 As Basten JA made clear in the appeal decision:
>
>> *[25]. It was part of the respondent's case that the adjudicator allowed an amount on account of "backcharges".* ***If a backcharge were an amount which reduced the claim, it would not properly be described as an amount for which a claim was made. It would only be part of a payment claim if the claim included amounts which had previously been made and allowed, or perhaps disallowed and were now sought to be reinstated.*** *It is not clear that either party used the language in that sense.*
>
> 6.13 It follows that even the proceeds of the bank guarantees had the effect of reducing the amount claimed / assessed as payable to Martinus – as appears to have been suggested by Martinus – that would not properly be described as an amount for which a claim was made, or part of the relevant payment claim.

252 The further submission then made an additional point:

> 6.14 In addition to constituting a new claim raised for the first time in the Adjudication Application, the claim is otherwise objectionable for the reason that it attempts to re-agitate an issue which was determined by the Supreme Court of New South Wales in *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2023] NSWSC 1550. In that case, a court, with the benefit of detailed evidence and submissions from the parties, held that the position advanced by Qube was coherent, and that Qube had a reasonable basis to seek recourse to the securities in satisfaction of its claims, and further, that no facts were advanced by Martinus which indicated that the claims by Qube, including insofar as the termination was concerned, were "unreasonable". That remains the position.

253 In early July, the *Acciona* decision at first instance was reversed by the Court of Appeal: *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162. The Adjudicator invited further submissions from the parties on the significance of the appeal decision.

254 The Adjudicator's request stated:

> 1. On 8 February 2024, the Respondent claimed its right to have recourse to the Claimant's Bank Guarantees and redeemed the securities accordingly. This action was taken at the same time or after the Claimant submitted its Payment Claim PC15.
>
> 2. On 15 February 2024, the Respondent issued a Payment Schedule, which accounted for the redeemed value of the Bank Guarantees in Section 6 of the Payment Schedule. The redemption of the Bank Guarantees was categorised as a "Deduction / Recovery".
>
> 3. In the Adjudication Application, the Claimant provided its reply to the "Deduction / Recovery" first raised by the Respondent in the Payment Schedule. The Claimant made certain claims about how I should account for the redeemed funds in the circumstances that the Respondent has had recourse to the Contract in circumstances where it terminated for convenience. The Claimant's requests are set out at paragraphs 908 to 916 of the submissions to the Adjudication Application.
>
> 4. On 11 July 2024, the judgment of the NSW Court of Appeal of *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd - [2024] NSWCA 162* was handed down. That judgment appears to raise several issue related to the determination of the requests made by the Claimant in the Adjudication Application.
>
> 5. Please provide your submissions by 4:00pm AEST Tuesday 16 [July] 2024. Please send a copy of your submissions to the other party at the same time.
>
> 6. Please provide your reply to the other party's submissions by 4:00pm AEST Wednesday 17 [July] 2024. Please send a copy of your submissions to the other party at the same time.

255 Martinus duly provided submissions in answer to the Adjudicator's invitation. In its submissions, Martinus took the opportunity to restate its earlier position:

> Qube no longer holds any security. It converted the form of security on 8 February 2024 from bank guarantees into cash. It then held security in the form of cash from 8 February 2024 (when it converted the bank guarantees) until 22 February 2024 when it drew down on the security (in the form of cash) so as to partially satisfy alleged debts set out in Section 6 of the INTS Payment Schedule (this is addressed at [911] of the Application Submissions).
>
> As set out at [913] (and following) of the Application Submissions, given the contents of the INTS Payment Schedule, when the Adjudicator determines the amount of the progress payment (if any) to be paid by Qube to Martinus (section 22(1)(a) of the Act) he must:
>
> > (a) Determine the cumulative amount which Martinus is entitled to be paid under the INTS Contract.
> >
> > (b) Make a deduction of $2,060,000 to reverse the on account cash payment for VO-02.
> >
> > (c) Bring to account the reversal of the cashed proceeds of the security in the final reconciliation of the quantum of the statutory progress payment to which Martinus is entitled. This is because Qube attempted to bring these matters to account in the INTS Payment Schedule and if the Adjudicator agrees with Martinus that the alleged debts by way of set off are not debts at all (with the exception of VO-02), then Martinus has been short-paid and Qube holds money (no longer in the form of security) for alleged debts under the INTS Contract which are not debts.

256 The submissions continued:

> Martinus submitted at [915] of the Application Submissions that the first instance decision in *EnerMech* was irrelevant to the current Adjudication Application. That remains the case following the appeal in *EnerMech*. Nothing in that case (either at first instance or on appeal) alters the analysis in Section L of the Application Submissions.
>
> The ratio in the Court of Appeal in *EnerMech* is summarised succinctly at [8] in that decision. In *EnerMech*, the payment claim included a claim for credit for amounts obtained as a result of having recourse to security. The NSW Court Appeal held that this does not invalidate a payment claim for the purposes of the Act, such that whether

> or not there is an entitlement on the part of the claimant to such sums included in a payment claim is a matter to be determined by the adjudicator which may not be the subject of judicial review.
>
> As set out at [908]-[916] of the Application Submissions, the first instance decision in *EnerMech* is irrelevant to the disposal of the current adjudication application. Since the appeal in *EnerMech* has been handed down (overturning the first instance decision), nothing has changed – it still remains the case that the ratio in the EnerMech appeal is irrelevant to the present case. In EnerMech, the respondent commenced a jurisdictional challenge, seeking to impugn the validity of the payment claim in that case because it contended that the payment claim included a claim for a credit for the proceeds of security which it alleged was not "for construction work". In this case, Martinus has not claimed the proceeds of any converted security in the INTS PC15. In this case, Qube does not dispute validity of the INTS PC15.

257 Qube's submissions in response began (emphasis original):

> …
>
> 1.2 For the reasons that follow, the decision in *Enermech* has no relevance to the issues at hand:
>
> > (a) In *Enermech*, two **discrete** issues arose for consideration and determination.
> >
> > > (i) **First**, does the validity of a payment claim depend on some independent requirement that the claim be, in substance, a claim "for construction work"?
> > >
> > > (ii) **Second**, and irrespective of the answer to the above, is the validity of a payment claim a matter which is to be determined by an adjudicator or, alternatively, does the Court have jurisdiction to determine that question?
> >
> > (b) Neither of the above-mentioned issues arise for consideration in the present adjudication application. The decision does not provide for any other principles of general application.
> >
> > (c) The real issue for determination is whether the Adjudicator has jurisdiction to hear and determine any "claim" relating to the return of the proceeds of bank guarantees, being a claim which was neither identified nor included in the Payment Claim. The inescapable conclusion is that, even if the "accounting" for proceeds of bank guarantees by Qube had the effect of reducing the amount claimed / assessed as payable to Martinus (which is denied), that would not properly be described as an amount for which a claim was made, or part of the relevant payment claim. No such claim arises for consideration or determination by the Adjudicator.
>
> 1.3 As such, the fundamental reason that *Enermech* is inapt and irrelevant to the present application is that the issue which arises on Martinus' payment claim goes to whether there is actually a claim made in respect of the guarantees (which goes to the heart of the Adjudicator's jurisdiction), not whether such a claim could have been brought (which *Enermech* establishes at, inter alia, [20] per Basten AJA to be possible).

258 In s 3 of the submissions, Qube repeated the point in greater detail and then went on to explain why the issue in the adjudication was different. Qube first repeated the point that Martinus had expressly accepted that it had made no claim for the return or reversal of the monies called under the guarantees. For this reason, the decision in *EnerMech* was irrelevant. In fact, it was a "distraction to the real issue for determination" for the Adjudicator.

259 The submissions then went on to explain why:

> 3.10 In this respect, it is essential that careful consideration is given by the Adjudicator to the way in which the proceeds of bank guarantees were "accounted for" by Qube in the Payment Schedule.

3.11 Martinus' description of how the proceeds of bank guarantees have been accounted for to date is apt to mislead. In the Payment Schedule, contrary to what is suggested by Martinus, Qube did not "claim" to be entitled to set-off from the amount of the progress payment owed to Martinus an amount of **$7,029,849.50**, representing the cash proceeds of the encashed securities. That is simply incorrect. The amount which is "claimed" by Qube by way of set-off is an amount of **$463,703.76**.

3.12 That is clearly recorded in the Payment Schedule, an extract of which is included below.

Figure #1 – Extract of Payment Schedule #15 – Summary

		Adjudicator's Determination & On Account Payments	Cumulatively Assessed
1	Contract Works & Preliminaries (Including VO-054, V0-055 & VO-061)		75,846,561.76
2	Variations		691,277.24
3	Extension of Time Claims		-
4A	Post Termination - Defective / Incomplete Works / Contra-Charges / Termination for Cause / BG'S	-	463,703.76
4B	Contractor's Termination for Convenience		-

260 The submission continued:

3.13 This represents the amount of outstanding liability in respect of the "Post Termination Conduct" that has not been satisfied by Martinus to date. The proceeds of bank guarantees are "accounted for" in the Payment Schedule in the same way that any discharged liability, whether that be pursuant to a payment by Martinus, or some other recovery mechanism, are accounted for. There is no "claim" for any amount of the proceeds of bank guarantees, by Qube or Martinus. The call on the securities, and the conversion of them into cash proceeds, was a matter which occurred entirely independently from the payment claim and payment schedule process. Qube exercised a freestanding right to call on the securities; a right which the Supreme Court of New South Wales held was open to be exercised by Qube in the circumstances. The inclusion of a figure referable to the cash proceeds in the Payment Schedule was nothing more than an acknowledgement that certain liabilities had been discharged – in part – by a call on the securities. Such an acknowledgement in the Payment Schedule does not somehow enliven any jurisdiction in the Adjudicator to hear and determine an entirely new claim for the return of encashed securities, when no such claim has been made by Martinus to date.

261 Qube then went on to refer the Adjudicator to its April submissions, restating them in detail, including the reference to *Icon*, at [25]. It ended:

The statutory function of the Adjudicator is not to resolve all outstanding disputes as between the parties. The parties' respective rights and obligations in connection with the bank guarantees is a substantive dispute that will be resolved as part of the broader escalation of the disputes between the parties, pursuant to the contract to which they are parties.

262 In his reasons on the issue, the Adjudicator first dealt with Martinus' position:

2046) The Claimant has not included in the Payment Claim any claim that security (or its proceeds if redeemed) held under the Contract by the Respondent is due for release.

2047) The Claimant has in the submissions to the Adjudication Application and in its submissions in response to the Request for Further submissions dated 11 July 2024 asserted that the Respondent has no rights to retain any of the proceeds of the amount obtained from the redemption of the Bank Guarantees because the Respondent is not entitled to payment of the "deductions / recovery items" claimed in section 6 of the Payment Schedule.

2048) The Claimant has not included in the Adjudication Application any claim that security (or its proceeds if redeemed) held under the Contract by the Respondent is due for release.

263 The Adjudicator continued:

2049) The Claimant, however, has claimed that the Respondent terminated for its convenience pursuant to clause 40A of the Contract and claimed certain amounts under that clause under its claim CN-522, which formed a part of the Payment Claim and ask me to determine that claim.

…

2051) I have determined above that the Claimant terminated for its convenience under clause 40A and following that determination, the Claimant accrued a right to claim for the return of any security held by the Respondent pursuant to clause 40A(e) of the Contract.

2052) I have also determined below that the Respondent is not entitled to payment for “deduction / recovery” items referenced items 6.1, 6.2, 6.3 and 6.4.3 [the payments to replacement contractors] in the Payment Schedule.

2053) In those circumstances, the Contract requires the Respondent return any security held by the Respondent. Security is defined by clause 1 of the Contract and includes cash.

2054) The Claimant asserts that the Respondent had no right to have recourse to the Bank Guarantees, but the Claimant has made no claim for the return of that cash received from the redemption of Bank Guarantees in these circumstances nor for any Bank Guarantees that the Respondent may hold in the Payment Claim or the Adjudication Application.

2055) The Respondent’s notice to have recourse to the Bank Guarantees was disputed by the Claimant and has been the subject of a judgement in the NSW Supreme Court referenced; *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd [2023] NSWSC1550.*

2056) The issue before the court was whether, in the extant circumstances at the time of hearing the dispute, the Respondent was entitled to have recourse to the security provided by the Claimant.

…

2058) The court made no finding about whether or not the Respondent terminated for cause or convenience.

2059) Her Honour made no judgement about how the accounting of money received by redeeming the security or any other aspect relating to the entitlement and how valuation of amounts included in a Payment Claim under the Act should be determined.

2060) There is nothing in this determination that is inconsistent with the judgment of Rees J in *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd [2023]NSWSC1550,* because Her Honour determined whether or not to grant the Claimant an interlocutory injunction restraining the Respondent from having recourse to security and did not determine either party’s rights under the Contract relating to the Payment Claim or the Payment Schedule.

264 The Adjudicator then returned to the payment claim:

2061) Section 13(3) of the Act provides;

13 Payment Claims

…

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

2062) The Claimant did not include any claim for the release of any money held by the Respondent regardless that it is in the form of Bank Guarantees or proceeds from the redemption of those Bank Guarantees in its Payment Claim.

265

After referring to the argument in the payment application at [913] and following (and repeated in the further submissions made in July 2024), the Adjudicator referred to the payment schedule:

> 2064) Section 14 of the Act provides;
>
> *14. Payment Schedule*
>
> *…*
>
> *(2) A Payment schedule-*
>
> > *(a) must identify the payment claim to which it relates, and*
> >
> > *<u>(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).</u>*
>
> (3) *If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.*
>
> 2065) The Respondent simply added an amount that had the effect of increasing the amount certified by $7,029,849.50 and provided the following explanation in the Payment Schedule:
>
> > *The Principal had recourse to the Contractor s Bank Guarantees on 8 February 2024, following the dismissal of the Contractors application in the Injunction Proceedings (see Appendix E) and the expiry of the agreed standstill period between the parties, to pay for/recover costs, expenses and damage which the Principal had incurred or would in the future incur as a consequence of the Contractors breaches of the Contract and the Principal's consequent termination of the Contract.*
> >
> > *Clause 5.2(d) of the Contract states:*
> >
> > > "*where the amount of any security then held by the Principal under this Contract is insufficient to meet the amount of the costs, expenses or damage of, or moneys due to, the Principal or PDC described in this subclause, the Principal, at its discretion, may have recourse to any other security then held by the Principal under the Interstate Rail Access Contract*
> >
> > *Clause 5.2(e) of the Contract states:*
> >
> > > *"where the amount of any security then held by the Principal under the Interstate Rail Access Contract is insufficient to meet the amount of any costs, expenses or damage of, or moneys due to, the Principal or PDC described in subclause 5.2 of the Interstate Rail Access Contract, the Principal, at its discretion, may have recourse to any security then held by the Principal under this Contract."*
>
> 2066) The amount scheduled by the Respondent in the Payment Schedule relates to the amount that it must pay.
>
> 2067) Section 16 of the Act provides the following in relation to amounts scheduled for payment in a payment schedule;
>
> > *16 Consequences of not paying claimant in accordance with payment schedule*
> >
> > *(1) This section applies if-*
> >
> > > *(a) a claimant serves a payment claim on a respondent, and*
> > >
> > > *(b) the respondent provides a payment schedule to the claimant—*
> > >
> > > > *(i) within the time required by the relevant construction contract, or*
> > > >
> > > > *(ii) within 10 business days after payment claim is served, whichever time expires earlier, and*

> *(c) the payment schedule indicates a scheduled amount that the respondent proposed to pay to the claimant, ad*
>
> *(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress to which the payment claim relates.*
>
> *(2) In those circumstances, the claimant-*
>
> *(a) may-*
>
> *(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or*
>
> *(ii) make an adjudication application under section 17(l)(a)(ii) in relation to the payment claim, and*
>
> 2068) From the above, it follows that the scheduled amount indicated in the Payment Schedule is a debt owing to the Claimant.

266 The adjudicator next addressed the jurisdiction issue:

> 2071) The Respondent asserts I have no jurisdiction to consider any dispute about whether the Respondent was entitled to have recourse to the Bank Guarantees and whether I can determine that the Claimant is entitled to the return of the Bank Guarantees or the redeemed value of the Bank Guarantees.
>
> 2072) In relation to whether the Respondent was entitled to have recourse to the Claimant's Bank Guarantees on 8 February 2024, neither party has asked me to consider that point and it has been adjudged in *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd [2023] NSWSC1550.*
>
> 2073*)* In relation to the whether I can determine that the Claimant is entitled to the return of the Bank Guarantees or the redeemed value of the Bank Guarantees, I do not agree.
>
> 2074) The Claimant has made a claim for costs of termination pursuant to clause 40A of the Contract. That is a claim for payment of costs incurred in the performance of the Contract. In order to determine whether the Claimant was entitled to payment for those costs, I have been required to interpret the Contract and the relevant facts submitted by the parties and determine whether the Respondent terminated for convenience of for cause.

267 After referring to s 22, and the appeal decision in *EnerMech*, the Adjudicator continued:

> 2077) The Respondent's has elected to account for the proceeds of the Bank Guarantees at item 6.4.1 of the Payment Schedule as an amount that is added to the adjusted Contract sum.
>
> 2078) The fact that it appears under the heading *"Deductions /Recovery"* is of no consequence.
>
> 2079) The relevant fact is that the Respondent has assessed and scheduled for payment in the Payment Schedule an amount that is equivalent to the redeemed value of the Bank Guarantee to which it had recourse on 8 February 2023. That amount of course is a positive amount from which appropriate deductions could be made.

268 The Adjudicator then referred again to the appeal decision in *EnerMech*, emphasising the entitlement of an adjudicator to determine disputes raised in the payment schedule.

269 The Adjudicator continued (emphasis original):

> 2083) The Claimant has claimed costs for the Respondent's termination for convenience under clause 40A under CN-523 in the Payment Claim.
>
> 2084) I determined that claim above and found that the Respondent terminated for its convenience under clause 40A on 25 September 2024 pursuant to its notice so given.
>
> …

> 2086) On the basis of my determination of the Payment Claim including the determination of the claimed "Deductions / Recovery" in the Payment Schedule, the Respondent is not entitled to retain the proceeds of the redeemed securities because the Claimant does not owe the Respondent any amount under the Contract.
>
> 2087) The Respondent has scheduled an amount in relation to item 6.4.1 of the Payment Schedule [the bank guarantee credit] which has been accounted for pursuant to the Contract and the Act.
>
> 2088) Save for that which is set out above in this section, there is also nothing in the Act that requires me to ***"...account of sums paid by Martinus to Qube on 22 February 2024 (the source of which was drawn down cash from conversion of a bank guarantee) as referenced in the INTS Payment Schedule to satisfy alleged debts which are not debts"***.
>
> 2089) In any event, I do not consider that any "accounting" or "reversal" other than that provided by the Respondent in the Payment Schedule is required.
>
> 2090) Accordingly, I will consider the amount scheduled in the Payment Schedule indicated by the Respondent at section 6.4.1 of the Payment Schedule [sic].

270 The first point taken by counsel for Qube was that the Adjudicator had, in substance, upheld a claim by Martinus for reimbursement of the bank guarantee monies as a consequence of the Adjudicator's conclusion that Qube had not been entitled to terminate for cause. Counsel submitted that no such claim had been included in Martinus' payment claim (as Martinus' submissions and the Adjudicator's reasons acknowledged) and was therefore not available in the adjudication.

271 Counsel for Qube acknowledged what the Court of Appeal said in *Icon*, especially at [26], quoted above, and of course accepted that it is binding on the Court. But they argued that the present case is distinguishable. In *Icon*, the dispute was about the interpretation of the payment claim. In the present case, there is no such dispute. Everyone agrees that a claim for restitution of the bank guarantee proceeds was not included in Martinus' payment claim.

272 It followed, in counsel's submission, that there was nothing in the payment schedule relevant to respond to. The suggestion in the Adjudicator's reasons that the payment schedule contained some sort of freestanding acknowledgment of the liability under the restitution claim was therefore simply wrong. As the summary page of the payment schedule made clear, the set-off amount claimed by Qube was only $500,000. The $7 million figure was simply a reduction in the quantum of the set-off claim.

273 Counsel also relied on remarks recently made by Ball J in *Binah Constructions Pty Ltd v PTMG Pty Ltd* [2024] NSWSC 872. The question in the case was whether the contractor's payment claim included a claim for payment of a previously unpaid determination. His Honour said (at [13]-[17], emphasis added):

> The jurisdiction of an adjudicator appointed under s 19 of the Act is to adjudicate the payment claim which is the subject of an adjudication application that has been referred to the adjudicator for adjudication by the authorised nominating authority to whom the adjudication application was made: see ss 17, 19. Although s 17(2) of the Act requires the adjudication application to contain certain information, it is the payment claim and

> not the application that is to be determined by the adjudicator. Consequently, **it is the payment claim and not the adjudication application that defines the issues to be determined by the adjudicator**.
>
> However, the proper interpretation of the payment claim and accordingly the issues raised by it are matters for the adjudicator. [His Honour set out the passage from *Downer* at [87] reproduced above.]
>
> Binah submits that this passage must be understood as being limited to the scope of the work the subject of the payment claim and **cannot justify the Adjudicator awarding an amount in excess of the payment claim. The second half of this proposition is correct.** But it does not alter the fact that the scope of the payment claim is a matter for the adjudicator; and it is unclear why the amount claimed in the payment claim is not as much a part of the scope of the payment claim as the nature of the work covered by it.
>
> In some cases, there may be a question whether what the adjudicator has done has come to a conclusion, albeit possibly erroneous, about the scope of the payment claim including the amount claimed or has **in truth made a determination that goes beyond the payment claim**. The first does not involve a jurisdictional error. **The second does**.
>
> It is perhaps with that distinction in mind that Giles JA commented in *Downer* that “it could not be said that the adjudicator’s decision was without foundation.” If it were without foundation, that would strongly suggest that the adjudicator had gone beyond the payment claim rather than simply made a determination within jurisdiction about its scope. However, putting that possibility to one side, it is a matter for the adjudicator to determine the amount claimed.

274 It followed, in counsel’s submission, that it was not open to the Adjudicator to uphold the restitution claim when that claim had only been made for the first time in Martinus’ adjudication application.

275 Counsel also submitted that, even if the availability of the restitution claim was characterised as a matter of interpretation for determination by the Adjudicator, the adjudication had still miscarried on this point. Counsel pointed out that the arguments summarised above were put to the Adjudicator most clearly in Qube’s supplementary submissions. The Adjudicator dealt with the point in a single sentence, in which he said he did not agree with Qube’s jurisdiction contention. He did not refer to Qube’s arguments and, counsel submitted, I should infer that he had not considered them.

276 Finally, counsel submitted that if the Adjudicator did in fact conclude that the restitution claim was included in the payment claim, or was otherwise available for determination in the adjudication, that conclusion was “legally unreasonable” and a jurisdictional error was disclosed on that basis also.

277 Counsel for Martinus did not accept that the effect of the *Icon* decision was confined to the proposition in [26] that there would be no jurisdictional error if, in substance, the dispute was a dispute as to the interpretation of the payment claim or the payment schedule. Counsel submitted that the decision was not distinguishable, and that what Ball J said in *Binah* went too far.

278

As to the other grounds of challenge, counsel again submitted that the Adjudicator had addressed Qube's arguments and any challenge to his reasoning did not disclose a jurisdictional error.

279 **Scope of adjudication:** The Adjudicator's reasons show that he awarded to Martinus a sum by way of restitution of the proceeds of the bank guarantees on the ground that, as a consequence of his finding on the termination issue, Qube had no right to retain that sum. The problem is that, as the Adjudicator repeatedly acknowledged, no such claim had been included in Martinus' payment claim.

280 Contrary to the Adjudicator's statements at [2065] and following, Qube did not, in its payment schedule, add the bank guarantee proceeds to the amount for which it was liable under Martinus' payment claim. What Qube actually did was to claim a set-off of $500,000. The credit for the bank guarantee proceeds was a credit allowed by Qube in calculating the amount of the set-off claimed. It was in no way an acknowledgment of some freestanding liability to Martinus.

281 There is a clear distinction, as a matter of law, between advancing a claim and resisting a claim brought back against oneself by way of set-off. The scope of Martinus' payment claim could not be expanded because of the way in which Qube calculated its set-off.

282 The point can be illustrated by considering what would have happened if Qube had not made the allowance in Martinus' favour in its payment schedule, but had instead claimed the whole $7.5 million. In that event, all Martinus could have done would have been to try to deploy the credit as a reduction of the set-off. That might have led to an argument about whether Qube, given the terms of the Contract, was obliged to allow the bank guarantee proceeds against its delay damages claim, or could enforce the claim fully by way of set-off and retain the funds against some other claimed liability of Martinus. But on any view, Martinus would only have been entitled to a credit to the extent that Qube's termination losses claim succeeded. The set-off claim could only be reduced to zero; it could not be reduced to a negative number and then added back onto Martinus' claim.

283 The wording of the Adjudicator's final conclusion at [2090] is perhaps suggestive. The Adjudicator did not, as might have been expected, say that he was upholding a claim by Martinus. To say that would have clearly exposed the problem that no such claim had been included in the payment claim. Instead, he said only that he would "consider" the amount.

284 Another aspect of the problem is illustrated by what the Adjudicator said about s 16(2) of the Act, at [2067] and [2068]. He seems to have treated his conclusion that Qube was obliged to pay the proceeds of the bank guarantees back to Martinus by way of

restitution as a statutory debt of some sort.

285 Of course, this did not mean a thing if that claim for restitution was not included in Martinus' payment claim. But I think it was unsound anyway.

286 The Adjudicator had of course determined for the purpose of the adjudication that the purported termination for cause was invalid. But this finding did not bind the parties outside the adjudication proceedings. Qube would only have been required to pay the bank guarantee proceeds over to Martinus under s 16(2) if an action for debt had been brought in a court of competent jurisdiction. If that had happened, it would have been for the court, not an adjudicator (*ex hypothesi* there would of course have been no adjudication) to determine, as a matter of construction of the payment schedule, whether Martinus was entitled to judgment.

287 Incidentally, this illustrates the validity of the point made by Qube about the earlier judgment of Rees J. Her Honour may not have had a restitution claim before her (that was the subject of the arbitration). But in awarding the proceeds of the bank guarantees to Martinus, the Adjudicator did indeed nullify her Honour's decision.

288 As to whether judicial review is available, I agree that the facts of *Icon* are distinguishable. The Court of Appeal's decision proceeds on the basis that the "backcharges" were claims by the principal against the contractor introduced by the principal by way of set-off. In the present case, the bank guarantee proceeds were a separate credit allowed by the principal against its set-off claim. The distinction is, I think, effectively recognised in *Icon* at [25].

289 Counsel for Martinus drew attention to the broader statement in *Icon* at [26] about an adjudicator's authority to determine the construction of the payment claim and the payment schedule. But, again, I do not think that broader language applies to this case either. Clearly, no question of the construction of the payment claim arose. Nor, I think, was there any argument about the construction of the payment schedule in the relevant sense. Martinus' argument to the Adjudicator was that the payment schedule had some effect quite independent of the claims advanced by Martinus in its payment claim.

290 Counsel argued that the distinction drawn in *Binah* by Ball J, between an error in the interpretation of a payment claim or payment schedule on the one hand, and an error in determining a claim not validly before him on the other, was, on analysis, unsustainable. I do not agree, and I do not think *Icon* goes so far.

291 In my view, the award of the bank guarantee proceeds went beyond the scope of the adjudication proceedings. It was not an adjudication "of the payment claim" by Martinus. Jurisdictional error is established.

292

Consideration of Qube's submissions: In considering this ground of alleged jurisdictional error, I apply the principles which I have applied concerning earlier alleged errors of the same type. Essentially, again, it is a question of fact, to be determined as a matter of inference from the reasons, whether or not the Adjudicator considered Qube's submissions on this claim in accordance with the requirements of s 22(2).

293 The Adjudicator described Qube's argument on jurisdiction at [2071]. He identified two points in the argument. One was that he had no jurisdiction to decide whether Qube was entitled to have recourse to the bank guarantees. The other was that he had no jurisdiction to award the bank guarantee proceeds to Martinus.

294 Exactly where the Adjudicator obtained this description from is not clear from the reasons. It is not clear to me that Qube actually argued the first point. Qube's submissions did refer to the judgment of Rees J, but in a way which appears to me to be merely illustrative of the second point.

295 I will nevertheless accept, for present purposes, that [2071] derived from s 9 of Qube's adjudication response. But the Adjudicator did not, in [2071], or in his subsequent reasons, paraphrase what the second point actually was, nor did he paraphrase or quote from the supplementary submissions from April and July which developed that point further. The question is whether he considered Qube's submissions on the point.

296 Of particular importance was the argument based on [25] of *Icon* which pointed up to the difference between what had been considered legitimate in that case and what Martinus was attempting in the present case. This reference appeared in both the April and July submissions. In the July submissions, it was coupled with a reminder to the Adjudicator that in fact, on its face, the schedule only claimed a set-off of $500,000.

297 Again, the starting point is that the Adjudicator did not say anything in his reasons which indicated that he considered Qube's submissions. In particular, there was no reference to *Icon*. And there was no reference to the point about the form of the schedule.

298 Again, it is theoretically possible that the Adjudicator might have analysed the submissions but decided that it was so unsound as not to require a response. But again, the apparent strength or weakness of the argument should be taken into account when considering the likelihood of that having happened. I have already said that I consider the argument, in substance, to be correct. But even if I am wrong in that view, it was one which plainly merited serious attention.

299 Counsel for Martinus pointed out that both parties ultimately agreed in their July submissions that the Court of Appeal's decision in *EnerMech* was not determinative of the bank guarantee issue, and indeed was not even relevant. Counsel suggested this

as a possible explanation as for why the Adjudicator might not have considered Qube's July submissions.

300 I do not find this suggestion persuasive. Martinus' submissions did not merely state that the *EnerMech* decision was irrelevant. Rather, Martinus took the opportunity to restate its submissions and to place the *EnerMech* decision in that context. Qube adopted a similar approach. Rather than simply agreeing that *EnerMech* was irrelevant to the issue, Qube's submissions sought to illustrate that by developing and explaining what Qube's argument was. This was an integral part of the conclusion that the issue before the Adjudicator was different form that in *EnerMech.*

301 Qube had been invited to "reply" to Martinus' supplementary submission and it did so, including by providing a reply to Martinus' restatement of its argument. It was not suggested that the submission was not, in that regard, "duly made".

302 In these circumstances, for the Adjudicator to have decided not to analyse Qube's submission on its merits might have led to a question about natural justice. But there is no reason to think that the Adjudicator did in fact make any such decision. If he had had that view, it would only have taken him a sentence to say it. It is notable that, instead of doing so, he went into the *EnerMech* decision in some detail. Evidently, he thought that the decision was worth referring to in the context.

303 In my view, further speculation as to what the Adjudicator's reasoning process might have been is unhelpful. The Adjudicator was presented with apparently weighty submissions, which, if accepted, would have defeated Martinus' claim. He did not refer to those submissions in his reasons and upheld the claim. The natural and straightforward inference is that he did not refer to them. That is the inference which I draw on the balance of probabilities.

304 For these reasons, I think jurisdictional error is also made out on this ground. It is not necessary to consider Qube's other challenge based on "legal unreasonableness".

Conclusions so far and other challenged items

305 These proceedings were brought on for hearing urgently, and only two days were set aside. In the end, it took a further half day to complete the argument, which I was able to make available.

306 Qube's written submissions were extremely comprehensive and dealt with all of the items challenged. But when presenting the argument, senior counsel for Qube concentrated on only some of the challenges. Clearly, it would have been impractical to

do otherwise, given the amount of time allotted for the hearing. At the end of his argument on the judicial review proceedings, he said that he had "tried to identify the high points".

307 I have now addressed all of the issues which were the subject of oral argument. I have upheld some, but not all, of Qube's challenges. Even if all the remaining challenges were to succeed, I do not think it would be proper for me to accede to the request by counsel for Qube to set aside the adjudication determinations, and the judgments on which they are based, entirely. Rather, I should exercise the power under s 32A of the Act to set the determinations and judgments aside to the extent that Qube has succeeded on the challenged items. This will require further consideration by the parties in order to determine the precise numerical result for those items.

308 What then I should I do about the challenges articulated by Qube in its written submissions which were not the subject of oral argument? To give them all an equivalent level of consideration as the ones which were the subject of argument would delay the delivery of judgment considerably.

309 I have decided that the best course is to make orders now which deal, to the extent possible, with the matters that were argued. It may be that the parties can agree, based on my reasoning on the "high points" argued orally, that some or all of the other challenges should be resolved in the same way.

310 If challenges still remain for resolution, then the convenient course may be, if there is an appeal, to dismiss the other challenges and allow them to be dealt with by the Court of Appeal. Alternatively, it might be possible to arrange a short supplementary hearing to deal with them. I will leave this in the first instance to the parties.

Costs of adjudication

311 The Adjudicator gave the following reasons for requiring Qube to pay the whole of the costs of the INTS Adjudication:

> 25) I have found the Respondent adopted a harsh contractual approach to the determination of the claimed amounts and to the termination.
>
> 26) For example, the Respondent did not apply the agreement to value IFC changes after the date of Contract as agreed by the parties consistently across all IFC design changes. I have considered that conduct and the cost of making this determination and determined that the Respondent is liable for 100% of the Adjudicator's fees and expenses accordingly.

312 The same reasons were given, and determination made, in the ISRA Adjudication.

313 Counsel for Qube contended that this reasoning disclosed jurisdictional error on the basis that it was "legally unreasonable". Counsel pointed out that the amount allowed in the adjudication was over $60 million less than Martinus had claimed. Counsel

submitted that the Adjudicator appeared to have exercised his power so as to punish Qube for adopting what he had clearly seen as an overly legalistic approach to the task. This was not a proper basis for the award of costs.

314 If it were a matter for me, I would have some sympathy with that submission. The Adjudicator's task was to determine Martinus' contractual entitlement to the sums sought in its payment claim. I do not see why insistence by Qube on compliance with the terms of the Contracts should necessarily be seen as "harsh", or, even if so, that it is a reason to award costs, especially of the whole proceedings. But on the approach I have taken in this judgment, the complaint does not disclose jurisdictional error.

315 But that is not the end of the matter. Section 32A gives the Court power to set aside an adjudication determination in part where the error in question "affects" a component of the determination only. It is well established that this power extends to a determination on costs: *Ceerose* at [87]-[106].

316 It seems to me that the errors which I have identified do affect the Adjudicator's determination on costs in this sense. On three items of the claim, Qube's submission before the Adjudicator has been vindicated, at least in the sense that I have decided that the submission was one of substance which the Adjudicator should have, but did not, consider. Collectively these will result in a significant reduction in the determinations. As with the question of materiality, I do not think that one can assume that the Adjudicator had a preconceived view in favour of one party or the other. I therefore conclude that the Adjudicator's decision, at least to the extent that it required Qube to pay 100% of the costs, could well have been different if he had not made the errors which I have identified.

317 The power under s 32A, however, does not permit the Court to substitute its own decision, in the same way as it could by way of appeal from a discretionary decision. The power is limited to setting aside components of the adjudication to the extent "affected". But at the same time, I do not think that it is either practicable or justified for the Court to try to ask what percentage of costs the Adjudicator might have awarded against Qube in the absence of the jurisdictional errors identified. In the circumstances, I think the proper course is to set aside the costs determinations made by the Adjudicator, leaving the costs to fall on the parties in equal shares, in accordance with the default position in s 29(2) of the Act.

<u>Stay application</u>

318 Qube's application to stay the enforcement proceedings (to the extent the adjudications were not set aside in the judicial review proceedings) was described in submissions as a "*Grosvenor* application". Stays of this type originated with the decision of Einstein J in

Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico [2004] NSWSC 344. The basis for the application in that case, which was successful, was that if the adjudicated amount were paid over, the successful contractor would be unable to repay it.

319 Einstein J recognised that the intention of the Parliament in enacting the Act was to establish a "pay first, argue later" regime. But this did not necessarily exclude the grant of a stay:

> 30 … it has been observed that "[t]his Court regularly stays execution on judgments pending an appeal where there is a risk that the plaintiff will be unable to repay the money without difficulty or delay if the appeal were to succeed": *TCN Channel 9 Pty Ltd v Antoniadis [No. 2]* (1999) 48 NSWLR 381 at 385 [15].
>
> 31 Similarly, there is no reason why, in appropriate cases, a stay cannot be ordered in circumstances such as the present. Clearly the analogy with appeals is not a perfect one. Whilst payments under the Act are interim, it nonetheless is the policy of the Act that successful claimants be paid. For that reason, there is a sound reason for making stays less readily available in relation to debts arising under the Act, in contrast to the position in relation to appeals arising from curial proceedings. For example, in cases such as the present, the Court might require more than a "*real risk* that [the respondent] will suffer prejudice or damage, if a stay is not granted" (*Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737, at 741-742 [18] (emphasis added)).
>
> 32 However I accept that in a case such as the present, where there is a certainty that the defendants' rights will be otherwise rendered nugatory, and that it will suffer irreparable prejudice, the proper and principled exercise of the Courts discretion is to grant a stay.
>
> 33 This is especially so given that the plaintiff's entitlement to the adjudicated amount is apparently fully protected by the unconditional bank guarantee referred to above. (As noted above, the unconditional bank guarantee, which is in the sum of $712,757, secures the plaintiff's entitlement to the adjudicated amount of $486,324.77).
>
> 34 There are sound reasons for the above approach, and the approach adopted by the English cases. The fundamental purpose of the Act is to provide for *interim* payment. Both the second reading speech and the authorities are at pains to point out that the result which flows from an order to pay a sum following an adjudication is not a final determination of the parties' rights.
>
> 35 In the present case, if no stay is granted, an interim arrangement would be in practice converted into a final order. The effect of not granting a stay would be that the defendants' rights to recoup the adjudicated amount in the "appeal" pursuant to section 32 of the Act would be rendered nugatory, and the defendants would thus suffer irreparable prejudice.

320 In *Veolia Water Solutions v Kruger Engineering [No 3]* [2007] NSWSC 459, McDougall J adopted the principles stated by Einstein J as being generally applicable. He noted, however, that in any particular case the application of the principles and the balancing of the various considerations would require careful attention and, in particular, close analysis would be needed about the "extent or certainty of the risk or prejudice or damage if a stay is not granted".

321 Later in his judgment, McDougall J stated:

> The exercise of the discretion to grant a stay requires a balancing of the relevant factors. Two factors of particular significance in this case are:

> > (1) On the one hand, the policy of the Security of Payment Act, that successful applicants be paid promptly (recognised by Einstein J in *Grosvenor* at para [31]); and
> >
> > (2) On the other, the likelihood of irreparable prejudice, where that prejudice would flow from the refusal of the stay because cross-claims would be rendered worthless (recognised by Einstein J in *Grosvenor* at para [32]).
>
> …
>
> The second reason flows from the plain legislative intention that progress claims should be dealt with, and paid, promptly. In my view, any court faced with, and required to give effect to, that clear legislative policy should be careful before exercising a discretion in a way that would intercept the effectuation of that policy in a particular case. Thus, I agree with Einstein J that the Court would ordinarily do so (in cases such as the present) only where the failure to do so would have the practical effect of making permanent that which, clearly enough, the legislature intended to be only interim.

322 In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 118, the Court of Appeal said at [89]:

> As McDougall J said in *Veolia* at [75], a court may nonetheless intervene where there is the likelihood of irreparable prejudice. In such a case a Court will be cautious, in light of the policy of the statute, but it may do so where the practical effect is to make permanent that which the legislature intended to be merely interim.

323 In *A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144, the Court of Appeal reviewed these authorities. The Court referred to *TFM* as approving what McDougall J had said in *Veolia* at [39]. At [28], the Court also quoted [89] of *TFM* (quoted at [322] above) which cited *Veolia* at [75]. The Court then stated at [26] and [29]-[31]:

> Where it is certain that the principal will suffer irreparable prejudice, it would generally be a proper exercise of the Court's discretion to grant a stay. It is also correct that the extent or certainty of the risk of prejudice must be closely examined in each case and will depend in part on the merit of the principal's claim under the contract. It does not follow, however, that the policy of the Security of Payment Act is to encourage a searching examination into the solvency of those who receive payments made pursuant to the Act when contractual proceedings are contemplated or pending.
>
> …
>
> The conclusion that the policy of the Act is to place the risk of insolvency on the developer/principal contractor is further underlined by s 32B which was introduced in 2018:
>
> > **32B Application of Part to a claimant in liquidation**
> >
> > (1) A corporation in liquidation cannot serve a payment claim on a person under this Part or take action under this Part to enforce a payment claim (including by making an application for adjudication of the claim) or an adjudication determination.
> >
> > (2) If a corporation in liquidation has made an adjudication application that is not finally determined immediately before the day on which it commenced to be in liquidation, the application is taken to have been withdrawn on that day.
>
> In *Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd; In the matter of Kennedy Civil Contracting Pty Ltd* [2023] NSWSC 99 at [34] Ball J said, with respect correctly, that the purpose of s 32B is to deny the benefits of the legislation to companies in liquidation and not otherwise. In *Colbran, in the matter of PBS Building Pty Limited (Administrators Appointed)* [2023] FCA 276, Halley J said, again with respect correctly, dealing with a claimant subject to a deed of company arrangement (DOCA):
>
> > [96] The stated prime objective of keeping cash flowing in the contracting chain by enforcing timely payments cannot be construed as supporting any construction of the SOP Act that limits or qualifies its operation more generally

> to companies under external administration or that are the subject of a DOCA. Further, any weight that might be given to that prime objective in exercising a discretion to extend convening periods for the second creditors' meetings must necessarily have regard to the text and operation of the SOP Act. The text of s 32B makes clear that the legislature has chosen the liquidation of a corporation as the relevant event for excluding a person from taking any action under the SOP Act to enforce a payment claim, not the appointment of external administrators or entry into a DOCA.

These matters lend weight to the conclusion that there is a heavy burden on a party who seeks injunctive relief or a stay pending the outcome of proceedings contemplated by s 32 on the basis that a payment may become unrecoverable due to the possible or even likely insolvency of the payee at a later date. Considerable caution should attend the grant of such an injunction or a stay, as to do so may detract from the primary purpose of the Act.

324 In the present case, the application was similarly based on a concern that if payment of the adjudicated amounts were enforced, and Qube was ultimately successful in obtaining an order for restitution, Martinus would, or at least might, be unable to repay.

325 The application was supported by evidence from a chartered accountant, Mr Martin Cairns. Mr Cairns produced two reports for the purposes of the proceedings. For the purposes of his first report, he was given financial information from Martinus. He summarised that information to illustrate historical trends, and also calculated liquidity ratios commonly used in the assessment of solvency. He expressed the opinion, however, that there was insufficient information for him to be able to express an opinion on whether there was a "risk of insolvency" for Martinus.

326 Further information was obtained by way of notice to produce and Mr Cairns prepared a supplementary report. This did not, however, affect the conclusion which he had previously expressed that he was unable to say that there was a "risk to Martinus' solvency".

327 When tendered, these reports were the subject of objection by counsel for Martinus. Counsel submitted that, having regard to the conclusions expressed by Mr Cairns, the reports were wholly irrelevant. The point was that the question for the Court was not whether there was a "risk of insolvency" (whatever that meant in the context) but rather whether Martinus would be unable to repay the adjudicated sums if it received them.

328 I considered that counsel's point as to the issue before me was well taken. Had the objection been confined to the opinions expressed by Mr Cairns, I would have upheld it. But the objection was to the reports as a whole and I considered that some of the other information in Mr Cairns' report was relevant, or at least potentially relevant, to the question before the Court as to the degree of risk of non-repayment.

329 Another chartered accountant, Ms Dawna Wright, had prepared a report for Martinus, responding to Mr Cairns' first report. When the objection to Mr Cairns' report failed, counsel for Martinus tendered Ms Wright's report and she was briefly cross-examined on it.

330 Ms Wright was briefed to respond to what Mr Cairns had said in his initial report. She did not undertake any enquiries of her own. Her opinion was that the questions asked of Mr Cairns were of no assistance in deciding whether, if it received payment, Martinus would be able to repay that payment at some time around the first half of 2026 (which was assumed to be the date by which the arbitration would be completed). She also said that in her opinion the information presented by Mr Cairns did not establish that that would be so or that Martinus was insolvent or subject to “a risk of insolvency”.

331 There was no objection to Ms Wright’s report, but I very much doubt that it was, strictly speaking, admissible. I come back to this below.

332 In argument, counsel for Qube referred me to evidence from Martinus in the adjudication which referred to its financial position. In support of a claim for redundancy costs, a Martinus executive said that the Moorebank project was Martinus’ biggest. He also said that Martinus staggered the redundancy payments to accommodate limits on its cashflow.

333 Counsel also addressed on the trends in Martinus’ financial statements, which had been extracted by Mr Cairns in his reports. The financial statements initially summarised by Mr Cairns covered the period up to 30 June last year. Apparently the statements for this year have not been completed. In response to a notice to produce, Martinus produced current year management figures. These were included in Mr Cairns’ supplementary report.

334 As analysed by counsel, the figures show that over the last few financial years Martinus has been profitable, but cashflow negative. Debt had been increasing, apparently so as to fund purchases of plant and equipment. Counsel also submitted that current ratios (the rate of payment to debtors and so on) have been tightening.

335 Martinus’s formal financial statements were prepared on the basis that it brings to account revenue under contracts in accordance with generally accepted accounting principles, which require there to be a high degree of confidence that the monies will not have to be repaid. The management accounts for this year may not necessarily have been prepared on that basis. Counsel submitted that it was therefore impossible to say how much in the management balance sheet represents monies which had been claimed in the adjudication (bearing in mind that the Adjudicator awarded $60 million less than Martinus was claiming).

336 According to counsel, it was therefore unclear whether, if Martinus were ordered to repay the amount awarded by the Adjudicator, that would wipe out Martinus’ shareholders’ funds. Together with the other evidence, counsel submitted that there was a sufficient risk to justify a stay.

337 In response, counsel for Martinus took three points.

338 First, counsel submitted that the decision in *Grosvenor* was no longer good law. Counsel submitted that amendments to the Act since that decision make its reasoning unsound in the present circumstances.

339 Secondly, counsel submitted that expert evidence was required in order to conclude that there was a risk that Martinus would be unable to repay the monies if called upon to do so. Mr Cairns had expressed no opinion on the question and, accordingly, the application could not succeed.

340 Finally, counsel submitted that it was necessary to show much more than a risk of inability to repay. What was required was a certainty, or, perhaps, something close to that. Counsel submitted that the evidence did not establish anything like that degree of risk in the present case.

341 Counsel's first point picked up on what the Court of Appeal said in *A-Civil,* at [29]-[31]. Counsel submitted that the enactment of s 32B was a statement from Parliament that unless a contractor was in liquidation it should receive the full benefit of the Act. It followed, according to the submission, that the Court could not (apart, perhaps, from a phoenixing case) grant a stay unless the contractor was in liquidation.

342 There is no doubt that the enactment of s 32B underlines that the statutory process is available to companies under other forms of external administration which have not reached the point of formal liquidation. Accepting that this may make it harder to obtain a stay when the contractor is not in liquidation, I still think it by no means follows that a stay cannot be obtained unless that is so. That is for two reasons.

343 First, the availability of the statutory procedure depends on the contractor company not being in liquidation at the time its payment claim is issued and not going into liquidation before its adjudication application is determined. Whether a stay is to be granted depends on the circumstances at the time that judgment has been obtained. Even if the standard statutory timetables are followed, it is always possible that circumstances could alter in the meantime. And as the facts of the present case show, it may happen that a longer period of time elapses between the commencement of the statutory procedure and the obtaining of judgment.

344 The second point is related but broader. To adopt a rigid rule in dealing with a discretionary matter such as the grant of a stay is generally unwise. The Court needs to retain flexibility to deal with the variety of circumstances which may present themselves.

345

This is especially so because the grant of a stay always involves, to some degree, a balancing exercise. One factor, not present in the present case, illustrates this. Suppose the contractor in question had no need for the money but the principal would be facing insolvency if required to pay. Suppose further that the outcome of the adjudication turned on a disputed question of construction and the principal had already commenced proceedings and obtained an expedited hearing in this Court. Can it be said that the Court would lack power to grant a stay in those circumstances?

346 In my view, in accepting that there may be some circumstances falling short of liquidation (for example, phoenixing) counsel effectively acknowledged this problem in their argument. I therefore do not accept that because Martinus is not in liquidation, no stay can be granted.

347 I turn now to counsel's second preliminary point. In my view, there are two answers to it.

348 The first, and fundamental, answer is that there is no absolute rule that if an issue is capable of being the subject of expert opinion evidence, a court is unable to make a finding without such evidence. It may be so for some scientific or medical questions. But in other cases, experience and common sense can provide a sufficient guide.

349 For instance, if the value of a property is in issue, there may be evidence before the Court which enables the Court to make a finding of value, perhaps within a range, even if there is no expert report directly addressing the question. The Court may not be as confident in reaching the finding as it would be if assisted by expert evidence, but that is another matter. In the present case, even if I considered that the likelihood of repayment were a matter which was capable of being the subject of expert evidence, that would not exclude the possibility of the Court making its own finding on the question.

350 I turn to the second answer. I have already indicated why I agree with the submission made by counsel for Martinus, in the course of objections, that the issue in the present case is not whether Martinus is insolvent within the meaning of the definition in the *Corporations Act 2001* (Cth) (although, for reasons given below, I do not necessarily accept that this a proper subject for expert opinion). Nor is it that Martinus is subject to a "risk of insolvency" (whatever that means in the context). The Court is asked simply to make a determination on the likelihood or otherwise of Martinus being able to repay monies payable under the judgments in the enforcement proceedings. This is an ordinary factual issue. It is hardly the sort of question which can be answered definitively by any expert.

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Indeed, in my view, an expert opinion directly addressing the question would not even be admissible. That is because it would not involve the deployment of any specific expertise. It is hardly the sort of question which a chartered accountant would be required to answer in the course of practice. It involves an evaluative judgment based on the whole of the evidence, and bringing into account elements of common sense and general knowledge and experience.

352 In saying this, I am not saying that evidence from an accountant is of no use on an application of the present type. A report may usefully bring together relevant information, such as the financial data assembled by Mr Cairns. An expert might also inform the Court on technical matters, such as an explanation of how particular insolvency ratios are calculated, which might inform the ultimate decision. But in my view, an opinion on the question is a matter for the Court and does not involve any further element of expertise.

353 Counsel for Martinus, are, however, on stronger ground on their argument concerning the merits of the application. The Parliamentary intention is clear and the discretion must not be exercised in a way which would frustrate that intention. This means that the fact that a contractor company is at risk of insolvency cannot, of itself, justify the making of the order, since the Parliamentary intention is to place the risk of insolvency on the principal.

354 Indeed, up to a point, the more financial difficulty the contractor is in, the less reason there is for granting a stay, as the more likely it will be that the grant of such a stay will result in the contractor being deprived of the cashflow which is needed to sustain its operations. It is only when insolvency becomes inevitable, or at least highly probable, that the dynamics reverse because of the possibility that an interim payment will effectively become final. No doubt it was considerations such as this which caused Payne JA, in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33, to refuse a stay in a case where the contractor's financial position was "precarious".

355 Nothing like that is present here. I have been troubled by the fact that Martinus has failed to produce any updated accounts, and it is unclear what effect the partial failure of its claims in the adjudication proceedings, coupled with a reversal of any judgment which is enforced, would have on Martinus' balance sheet. But the arbitration proceedings have not even begun, and it is not suggested that they will fall to be determined this year, or perhaps even next year.

356 In these circumstances, it simply becomes impossible to predict within pretence of accuracy what Martinus' balance sheet will be at that point. Given that Martinus is trading profitably at present, and has a track record of profitability, I think the evidence

falls far short of demonstrating that an order for payment of the money now would be likely to convert an interim payment into a final one because Martinus will be unable to pay if obliged to do so at some point in the future.

357 For these reasons, the application to stay enforcement of the judgments obtained by Martinus until completion of the arbitration proceedings fails and will be refused. This will not, of course, affect the existing stay which will remain in place until after this judgment is delivered.

Orders

358 On 26 September I provided a draft of the above reasons to the parties and listed the proceedings for the making of orders to reflect the conclusions reached so far. The parties agreed that it was open to me to make an order setting aside the affected adjudication and judgment to the extent that the challenges addressed in this judgment have succeeded, and that this would allow me to determine the other challenges later and then make further orders if warranted. I indicated that I would follow this course for the moment rather than dismiss the remaining challenges and leave them to the Court of Appeal, but the question will need to remain under review depending on the progress of the appellate proceedings.

359 The orders made on 26 September in the judicial review proceedings were:

(1) Order pursuant to s 32A of the Building and Construction Industry Security of Payment Act 1999 (NSW):

(a) that the adjudication determination dated 22 July 2024 (ABCDRS NSW 586) (**INTS Determination**) is set aside in the amount over and above $22,703,118.54 including GST and interest;

(b) that the said adjudication determination be confirmed as the Adjudicated Amount of $22,703,118.54 including GST and interest.

(2) Order that determination of the Second Defendant (**Adjudicator**) made on 22 July 2024 to the effect that the Plaintiff is liable for the whole of the Adjudicator's fees and expenses for adjudicating the INTS Determination is set aside.

(3) Order that the judgment entered in proceedings 2024/278963 on 31 July 2024 is varied by changing the "Claim amount" to $22,925,489.49 and the "TOTAL" amount to $22,925,711.49.

(4) Reserve the question of what further or other orders, if any, should be made in respect of the components of the claim not resolved by the Court's principal reasons.

(5) Direct the Plaintiff, by 8 October 2024, to serve on the Defendant and deliver to the Associate to Parker J a notice of all components of the claim, if any, which it does not consider to have been resolved by the Court's principal reasons.

(6) Order that the unconditional bank guarantees provided to the Court in compliance with order 1(b) of the orders made on 9 August 2024 be provided to the Plaintiff on terms that the First Defendant may not make a demand under the unconditional bank guarantee provided to the Court in compliance with order 1(b)(ii) of the orders made on 9 August 2024 in an amount exceeding the amount owing under the judgment referred to in order 3 of these orders as amended by that order.

(7) Upon the Plaintiff:

(a) giving the usual undertaking as to damages; and

(b) Qube continuing to pay one month's interest at a daily rate of $16,942.76 on the last day of each month thereafter until this stay is dissolved or any appeal is determined,

order that:

(c) order 6 of these orders is stayed;

(d) the First Defendant is restrained from taking any steps by way of enforcement of the judgment referred to in order 3 of these orders (being the varied judgment entered in proceedings 2024/278983) or the judgment entered in proceedings 2024/278984,

until further order of this Court in this Division or by the Court of Appeal.

(8) Costs be reserved.

360 The orders made on 26 September in the first enforcement proceedings were:

(1) Order that the amended notice of motion filed 2 August 2024 is dismissed.

(2) Costs be reserved.

(3) Order that the judgment entered in these proceedings on 31 July 2024 is varied by changing the "Claim amount" to $22,925,489.49 and the "TOTAL" amount to $22,925,711.49.

361 The orders made on 26 September in the second enforcement proceedings were:

(1) Order that the amended notice of motion filed 2 August 2024 is dismissed.

(2) Costs be reserved.

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Decision last updated: 30 September 2024