

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : DOWNER EDI WORKS PTY LTD -v- STEENSMA
[2022] WASC 396

CORAM : ALLANSON J

HEARD : 17 NOVEMBER 2022

DELIVERED : 24 NOVEMBER 2022

FILE NO/S : CIV 1664 of 2022

BETWEEN : DOWNER EDI WORKS PTY LTD
Applicant

AND

DR AUKE STEENSMA
Respondent

RCA CIVIL GROUP PTY LTD
Other Party

Catchwords:

Judicial review - Adjudication determination under construction contract - Where respondent to adjudication had applied set off against other contracts before payment claim made - Where respondent did not claim set off as defence to claim in adjudication - Where applicant for adjudication sought payment of set off sum in adjudication - Whether set off was part of payment claim and payment dispute - Whether adjudicator had jurisdiction to order payment of set off sum to applicant

Legislation:

Construction Contracts (Former Provisions) Act 2004 (WA)

Result:

Application allowed
Paragraphs 2 and 3 of the of the adjudicator's determination quashed

Category: B

Representation:

Counsel:

Applicant : L N Firios
Respondent : No appearance
Other Party : C S Gough

Solicitors:

Applicant : Ashurst Australia
Respondent : Steensma Lawyers
Other Party : Mills Oakley

Case(s) referred to in decision(s):

Alliance Contracting Pty Ltd v James [2014] WASC 212
Cheatley v The Queen [1972] HCA 63; (1972) 127 CLR 291
Cooper & Oxley Builders Pty Ltd v Steensma [2016] WASC 386
Duro Felguera Australia Pty Ltd v Samsung C&T Corporation [2018] WASCA 28; (2018) 52 WAR 323
Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corp [2016] WASCA 130; (2016) 50 WAR 399
Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217; (2011) 43 WAR 319
Re Narula, Ng & Hammersley; Ex parte Atanasoski [2003] WASCA 156

ALLANSON J

ALLANSON J:

Introduction

1 The respondent to this application is an adjudicator under the *Construction Contracts (Former Provisions) Act 2004* (WA).¹ On 17 June 2022, he determined a payment dispute between RCA Civil Group Pty Ltd and Downer EDI Works Pty Ltd. Downer (the respondent in the adjudication) now applies for judicial review of that determination, alleging the adjudicator fell into jurisdictional error on four grounds.

2 The adjudicator filed a submitting appearance. RCA appeared to contest the application.

Background

3 Downer and RCA were parties to a Plant and Equipment Hire Agreement, pursuant to which RCA agreed to hire equipment and the services of an operator to Downer for payment at rates in accordance with the terms of the agreement.²

4 On 25 March 2022, RCA submitted a payment claim to Downer, claiming \$148,973 divided into four subclaims:³

- (1) Claim 6: September re-claim for \$25,945;
- (2) Claim 7: October re-claim for \$16,402.50;
- (3) Claim 8: October re-claim for \$83,343,40; and
- (4) Claim 9: December re-claim for \$23,282,50.

5 Also on 25 March 2022, before RCA submitted the claim, Downer sent a letter to RCA, headed 'Notice of Overclaim and Set-Off', in which it stated that it had reconciled amounts claimed between September 2021 and December 2021 and determined that there were periods in which RCA had been paid 'overclaim' and that it had no entitlement to those amounts. Downer itemised three amounts which it said were due to it, totalling \$116,975. It stated that it had set those

¹ The Act was renamed by the *Building and Construction Industry (Security of Payments) Act 2021* (WA), s 136. Unless stated otherwise, references to legislation in these reasons are to the *Construction Contracts (Former Provisions) Act*.

² See affidavit of Katherine Madeline Swann, affirmed 28 June 2022, CV-01, 800.

³ Swann Affidavit, KMS-01, 213, 220, 224 and 231.

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amounts off against two identified invoices due for payment, leaving a debt due from RCA to Downer of \$21,817.96.⁴

6 On 1 April 2022, Downer rejected the payment claim submitted on 25 March 2022, stating that RCA had not provided any new evidence.⁵

7 That rejection gave rise to a 'payment dispute' for the purposes of s 6 of the Act. In the letter of rejection, Downer did not refer to or purport to set off the amounts it had claimed in its notice of 25 March 2022 against RCA's payment claim.

8 On 13 April 2022, RCA wrote to Downer and said that the set-off was unlawful. Downer responded on 14 April 2022.⁶

9 On 20 May 2022, RCA applied for adjudication of a payment dispute under the Act.

The adjudication

10 Each party filed submissions before the adjudicator.

11 RCA stated that it had, in February 2022, submitted a claim under its agreement with Downer, but that claim contained errors and 'is not pursued'.⁷ RCA submitted that, following the February claim, it submitted a payment claim on 25 March 2022 which corrected the earlier errors, and that was the payment claim upon which the adjudication was based.⁸

12 RCA asserted that its application was based on the rejection of its payment claim of 25 March 2022.⁹ It identified Downer's letter of 1 April 2022 as the 'dispute notice' forming the basis of the application.¹⁰

13 In his statutory declaration in support of the adjudication claim, Mr Steven Sutherland, a director of RCA, set out the basis on which he calculated the payment claim RCA made on 25 March 2022.¹¹ He

⁴ Swann Affidavit 44.

⁵ Swann Affidavit 548.

⁶ Adjudication application, 4.10, 4.11, Swann Affidavit 14, 60 and 67.

⁷ Adjudication application, Introduction [15], Swann Affidavit 7.

⁸ Adjudication application, Introduction [16], Swann Affidavit 7.

⁹ Adjudication application [3.1] - [3.3], [3.6], [4.1], [4.2], [4.6] and Section 8, Swann Affidavit 7, 11 - 12, 16.

¹⁰ Adjudication application, Introduction [17], Swann Affidavit 7.

¹¹ Swann Affidavit 90 - 92.

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stated that he did not have time to address or account for the Downer set-off before completing and submitting the payment claim.

14 Section 8 of the submission to the adjudicator dealt with the payment dispute 'with reference to the Relevant Payment Claim'.¹²

15 RCA submitted to the adjudicator that, while the dispute notice was silent on the matter, the payment dispute contained 'a continuation of Downer's assessments from the February Assessment and the Overclaim Letter'.¹³ It submitted that the amount it claimed in the March payment claim 'has to be adjusted to correct the "previously paid" amount arising from the set-off made by the Downer assessment'.¹⁴

16 RCA submitted that it rejected Downer's Overclaim assessment on grounds including the absence of Downer records or further details, or that the disputed works had been directed by Downer.¹⁵

17 As a result of its rejection of the Set-Off Notice, RCA claimed \$265,948.40 - the sum of its claim and the amount claimed by Downer as a set-off.

18 In its adjudication response, Downer submitted that the adjudicator's jurisdiction was limited to determining entitlement to a payment claim that was the subject of a payment dispute.¹⁶ Downer challenged the payment claim on the basis that it was unsubstantiated and inconsistent and could not give rise to an obligation on Downer to pay the amount claimed in the payment claim.¹⁷ It expressly did not counterclaim, or seek to set off the 'overclaim' amount against RCA's payment claim.

The determination

19 The adjudicator was satisfied of the preliminary matters in pt 3, div 1 of the Act. Those findings are not in dispute.

20 He was also satisfied that the set-off was raised in both the adjudication application and the response.

¹² Adjudication application, Swann Affidavit 16.

¹³ Adjudication application [8.7], Swann Affidavit 18.

¹⁴ Statutory Declaration of Steven Sutherland [36] - [37], Swann Affidavit 92.

¹⁵ Adjudication application [8.12], [8.20], Swann Affidavit 18.

¹⁶ *Alliance Contracting Pty Ltd v James* [2014] WASC 212 [59] - [60]; *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corp* [2016] WASCA 130; (2016) 50 WAR 399 [201].

¹⁷ Adjudication response, Swann Affidavit 595 - 603.

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21 The adjudicator identified the dispute as that arising on 1 April 2022 when Downer rejected the payment claim of 25 March 2022. He broke it down into an amount claimed by RCA (\$148,973.40) and an amount claimed by Downer for set-off (\$116,975.00).¹⁸

22 The adjudicator found, in effect, that there was not enough evidence to substantiate RCA's payment claim, and dismissed RCA's claim on the four invoices.¹⁹

23 The adjudicator then considered the set-off amount in Downer's letter of 25 March 2022. He characterised the issue in this way:

The second amount sought by the Applicant was to estop the Respondent from claiming \$116,975.00 (Excl GST) in overclaims.²⁰

24 The adjudicator considered the set-off was raised by way of defence to RCA's payment claim, requiring him to take into account the merits of that set-off in reaching his determination.²¹

25 The adjudicator began his analysis by stating, incorrectly, that RCA had sought an amount of \$265,948.40 in the payment claim, and then the Set-Off Notice arrived.²²

26 Although Downer's letter advising that it had set off an 'overclaim' was sent before RCA submitted its payment claim, the adjudicator apparently reasoned that Downer must have intended to use the set-off in response to RCA's payment claim because it was in a letter sent as a formal notice (not a casual letter),²³ and because it claimed a set-off against monies due 'on any account'.²⁴

27 The adjudicator also asked, rhetorically, as part of his analysis, 'Coincidental that the Notice of Overclaim and Set-Off came the same day as the rejection of the payment claim?'²⁵ The question is based on a false factual premise: Downer's letter rejecting the payment claim was dated 1 April 2022. The Notice of Overclaim and Set-Off was sent on 25 March 2022, before RCA sent the payment claim.

¹⁸ Adjudicator's Determination [31], Swann Affidavit 998.

¹⁹ Adjudicator's Determination [36.8], [37.1], Swann Affidavit 1002.

²⁰ Adjudicator's Determination [38], Swann Affidavit 1003.

²¹ Adjudicator's Determination [39], Swann Affidavit 1003, citing *Cooper & Oxley Builders Pty Ltd v Steensma* [2016] WASC 386 [23].

²² Adjudicator's Determination [40], Swann Affidavit 1003.

²³ Adjudicator's Determination [40.6], Swann Affidavit 1006.

²⁴ Adjudicator's Determination [40.7], Swann Affidavit 1006.

²⁵ Adjudicator's Determination [40.8] (repeated in substance at [40.9.1]), Swann Affidavit 1007.

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28 The adjudicator noted that Downer had provided no evidence of the set-off. He then held that RCA was 'due the amount of \$116,975.00 (Excl GST) against the \$265,948.40 payment claim that the Applicant submitted on 25 March 2022'.²⁶

29 The adjudicator further found that interest was to be paid from 11 April 2022 at a rate of 6%, the rate under the *Civil Judgment Enforcements Act 2004* (WA).

30 The formal determination was set out in seven paragraphs, paragraphs 4 to 7 dealt with matters of costs and the adjudicator's fees. He determined, relevantly:

- 1 I DETERMINE that the Respondent does not owe the Applicant the amount of \$148,973.40 (Excl GST) against the \$265,948.40 (Excl GST) payment claim, as no additional evidence was provided to give rise to that amount.
- 2 I DETERMINE that the Applicant is due the amount of \$116,975.00 (Excl GST) against the \$265,948.40 payment claim that the Applicant submitted on 25 March 2022, as no evidence or breakdown had been presented by the Respondent. The amount is to be paid within seven days, on or before Friday, 24 June 2022.
- 3 I DETERMINE that the Applicant is due, from the Respondents, an amount of \$1,442.16 in interest.²⁷

The application for judicial review

31 Section 46 of the Act provides that a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed. The adjudication can, however, be challenged in these proceedings for judicial review if the applicant establishes jurisdictional error.²⁸

32 Downer relies on four grounds:

- (1) failure to comply with s 32(2)(a) of the Act by failing to make the determination on the basis of the application and the response;
- (2) erroneously finding that the set-off sum formed part of the payment dispute that arose from non-payment of the payment claim;

²⁶ Adjudicator's Determination [41.1], Swann Affidavit 1008.

²⁷ Adjudicator's Determination, Swann Affidavit 990.

²⁸ *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217; (2011) 43 WAR 319.

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- (3) failing to afford Downer procedural fairness as the determination was made on the basis contended for by neither RCA nor Downer, that the set-off sum formed part of the payment dispute;
- (4) the determination was legally unreasonable or irrational.

33 Each party filed written submissions.

34 The central issue in this application (which underlies grounds 1 and 2) is whether the set-off claimed by Downer formed part of the payment dispute referred to the adjudicator for determination. The court is not now concerned with whether the set-off was correctly claimed. The issue is whether it lay within the jurisdiction of the adjudicator in determining the particular payment dispute.

35 The function of the adjudicator under s 31(2)(b) was to determine, on the balance of probabilities, whether any party to the payment dispute was liable to make a payment and, if so, determine the amount to be paid and any interest payable on it.

36 A payment dispute arises, for the purposes of the Act, if a payment claim is rejected or wholly or partly disputed, or by the time when the amount claimed is due to be paid, the amount has not been paid in full.²⁹ Payment claim is a defined term in s 3:

payment claim —

- (a) means a claim made under a construction contract —
 - (i) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract; or
 - (ii) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract; and
- (b) includes a payment claim that includes matters covered by a previous payment claim;

37 RCA's application for adjudication was expressly based on the payment claim made on 25 March 2022, and the rejection of that claim

²⁹ Section 6(1). The provisions of s 6 regarding disputes over money retained or security held do not arise in this application.

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by Downer in its letter of 1 April 2022. The set-off claimed by Downer in its notice of 25 March 2022, preceded RCA making the payment claim and was not part of Downer's rejection of that claim. In the notice, Downer identified that it had set off all but part of the amount it described as 'overclaim' against other invoices, issued under different contracts. It did not seek to set off any amount against the four re-claims made by RCA in claims 6, 7, 8, and 9.

38 RCA submitted that, although Downer did not raise the set-off, it was a defence in fact to the adjudication application and the adjudicator was required to deal with it. RCA made a variety of submissions directed to how the set-off could be properly regarded as part of the payment claim.

39 First, it submitted that the set-off letter was an attempt to pre-empt the payment claim that Downer knew was coming by unilaterally assessing the claim and determining, even before it was filed, that the claim would be zero. That argument is not consistent with the facts: the 'overclaim' amount was set off against other invoices, not those which founded the payment claim; and it was not raised by Downer in either the notice of dispute or the adjudication as a defence to the payment claim that was made. Had RCA made out its payment claim of 25 March 2022, pursuant to s 31(2)(b), the adjudicator would properly have determined the amount to be paid without regard to any set-off.

40 Second, RCA submitted that there was a running account balance between RCA and Downer in relation to the 'wet hire' of equipment.³⁰ The argument, as I understood it, was that RCA was entitled to be paid an hourly rate for the plant and operator. The amount RCA claimed in its payment claim should be understood as a claim for the balance then owing on the running account, being the difference between the total amount claimed and the amount already assessed and paid. By improperly setting off amounts (although against amounts owing on other contracts) Downer had decreased the amount it had already paid, so that the amount in the payment claim should correspondingly increase. Faced with the definition of 'payment claim', RCA submitted that the payment claim was made with a belief that the facts were as they existed before the set-off letter. The actual claim widens if the set-off is effective.³¹

³⁰ That is, hire of equipment and operator.

³¹ ts 26.

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41 RCA appeared to submit that the set-off was being asserted as a 'shield', not to the payment claim actually made but to the claim that RCA would have made if it had taken the set-off amount into account.

42 RCA referred to the decision of Beech J in *Alliance Contracting Pty Ltd v James*. The passages referred to, in my opinion, support the argument of Downer. His Honour observed that, as a matter of practical reality, it may be necessary for an adjudicator to give attention to the merits of the respondent's competing claims in order to determine the merits of a payment claim. But, as his Honour emphasised, 'that practical reality does not control or detract from the proper identification of the payment claim and the payment dispute the subject of the adjudication, and of the scope of the adjudicator's powers'.³² The definition of payment dispute directs attention to the payment claim which had been made and had been rejected.

43 RCA referred also to the decision of Le Miere J in *Cooper & Oxley Builders Pty Ltd v Steensma*.³³ His Honour there held that while an adjudicator may not adjudicate simultaneously two or more payment disputes, that did not preclude him from considering the respondent's counterclaim or set-off raised by way of defence to the applicant's claim.³⁴ Le Miere J held that, by failing to take into account the respondent's response, the adjudicator had failed to take into account a matter the Act required that he take into account in determining the payment dispute. That is not what happened here. The payment claim made on 25 March 2022 did not include the amount Downer had set off against other invoices, and Downer did not raise any right to set off those amounts as a response to RCA's payment claim, either in rejecting the claim or in the adjudication response.

44 There is nothing in either decision that supports the determination by the adjudicator.

45 As Downer submitted, it is necessary to properly identify the payment dispute under the Act. The payment dispute giving rise to the adjudication was constituted by RCA's payment claim of 25 March 2022, and Downer's rejection of that payment claim on 1 April 2022. The set-off was not a component of the payment dispute because it was not part of RCA's payment claim, and it was not raised by Downer to reject or dispute the payment claim.

³² *Alliance Contracting Pty Ltd v James* [65] - [66].

³³ *Cooper & Oxley Builders Pty Ltd v Steensma*.

³⁴ *Cooper & Oxley Builders Pty Ltd v Steensma* [23].

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46 Further, when the payment dispute went to adjudication, the set-off was not a part of Downer's response to the claim for payment of the disputed amount. Downer had already set off most of that sum off against other invoices.

47 In proceeding on the basis that he had jurisdiction to determine the set-off sum, the adjudicator misconceived the function which he was performing in determining a payment dispute, and misconceived and exceeded the extent of his powers.

48 The error identified in ground 2 of the application is clearly material. It results in an order for payment that lay outside the jurisdiction of the adjudicator.

49 It is unnecessary to consider the other grounds.

Severance

50 The Act, properly construed, does not manifest a legislative intention that a determination must operate as an indivisible whole.³⁵

51 The general rule is that where part only of a decision of an administrative body is beyond power, and is capable of severance from the unexceptionable parts, the court may quash the part that is beyond power without interfering with the remainder.³⁶

52 The determinations in paragraphs 2 and 3 of the adjudicator's determination are not dependent or conditioned upon the determination in paragraph 1. The adjudicator's jurisdiction was confined to the claim that Downer owed RCA the amount of \$148,973.40 claimed in RCA's payment claim. The finding that Downer must pay the set-off amount and interest lies outside the adjudicator's power because it was not part of the payment claim and the payment dispute. The error identified is confined to a severable part of the determination, and there is no reason (and no grounds have been advanced) to disturb the determination on the payment dispute.

Result

53 The application for judicial review should be allowed. The determination in paragraphs 2 and 3 of the adjudicator's determination,

³⁵ *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28; (2018) 52 WAR 323.

³⁶ *Cheatley v The Queen* [1972] HCA 63; (1972) 127 CLR 291, 308 - 309; *Re Narula, Ng & Hammersley; Ex parte Atanososki* [2003] WASCA 156 [48] - [51].

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requiring Downer to pay to RCA the amount of \$116,975 and interest of \$1,442.16, should be quashed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

TB
Associate to the Honourable Justice Allanson

24 NOVEMBER 2022

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IN CHAMBERS

CITATION : DOWNER EDI WORKS PTY LTD -v- STEENSMA
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CORAM : ALLANSON J

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BETWEEN : DOWNER EDI WORKS PTY LTD
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AND

DR AUKE STEENSMA
Respondent

RCA CIVIL GROUP PTY LTD
Other Party

Catchwords:

Judicial review - Where determination under *Construction Contracts (Former Provisions) Act 2004* (WA) quashed - Where Applicant seeks repayment of amount paid - Where parties had made agreement following service of statutory demand by Other Party - Whether claim for repayment should be summarily determined in judicial review proceedings

Legislation:

Nil

Result:

No order for repayment made

Category: B

Representation:

Counsel:

Applicant : No appearance
Respondent : No appearance
Other Party : No appearance

Solicitors:

Applicant : Ashurst Australia
Respondent : Steensma Lawyers
Other Party : Mills Oakley

Case(s) referred to in decision(s):

John Holland Pty Ltd v Chidambara [2017] WASC 179

Sandvik Mining and Construction Australia Pty Ltd v Fisher [2019] WASC 352

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ALLANSON J:

Introduction

54 On 24 November 2022, I allowed the application by Downer EDI Works Pty Ltd for judicial review of a determination under the *Construction Contracts (Former Provisions) Act 2004* (WA). I quashed that part of the determination that required Downer to pay to RCA Civil Group Pty Ltd the amount of \$116,975 and interest of \$1,442.16.

55 Downer sought an order in the judicial review proceedings that RCA repay the amount Downer had paid. RCA opposed repayment on the basis of an agreement entered into between Downer and RCA by letter dated 17 October 2022.

The evidence

56 Downer relied on the affidavit of Benjamin Norrish, Legal Counsel for the Downer Group, affirmed 29 November 2022.

57 On 18 August 2022, RCA sent to the solicitors for Downer an email to which it attached a copy of a statutory demand, dated 18 August 2022, together with a copy of the Registration of a Judgment in the District Court of Western Australia, dated 4 August 2022. The statutory demand was served on Downer's registered office on 25 August 2022.

58 Downer applied to set aside the statutory demand by originating process in this court, filed 7 September 2022.

59 Mr Norrish prepared an agreement, dated 17 October 2022, set out in a letter addressed to Mr Steve Sutherland of RCA and also Yarta Civil Group Pty Ltd, another subcontractor. Mr Norrish understood Mr Sutherland to be the subcontractor's representative under contracts between Downer and both RCA and Yarta.

60 On 25 October 2022, there were unsuccessful discussions between the parties.

61 Downer paid the amount of the statutory demand.

The power to order repayment

62 In *John Holland Pty Ltd v Chidambara*, Chaney J considered whether it was appropriate to grant an order for repayment of funds

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paid pursuant to a determination that had been quashed. His Honour held that, where payment had been made only because of the requirements of a determination, and was thus a payment made under the compulsion of the Act, it would be unjust for the payment to be retained pending the final resolution of the dispute between the parties and the court should restore the position to that which would have subsisted had the determination not been made.³⁷

63 In *Sandvik Mining and Construction Australia Pty Ltd v Fisher*,³⁸ on an application for an injunction to restrain enforcement of a determination, Archer J discussed the decision in *John Holland Pty Ltd v Chidambara*. Her Honour accepted that an order for repayment could be made as part of the judicial review orders and, if Sandvik was successful on judicial review, such an order ought to be made.

64 Downer also relies on the power under O 56 r 5(2)(l) of the *Rules of the Supreme Court 1971* (WA), by which the court may grant any other remedy if it considers the remedy applied for on an application for judicial review is inadequate.

65 I am satisfied that the court has power to order repayment. The question in this case, however, is whether the court ought do so where there is, intervening, an agreement of the parties in the terms set out below.

The agreement

66 The operative terms of the agreement provided:

3. In consideration for the payment by Downer referred to in clause 6 and the other terms of this agreement, RCA and Yarta agree to not make, bring or pursue, and to ensure that none of their Related Entities make, bring or pursue, any Claim on and from 12 October 2022 up to and including 27 October 2022 (or such other date as may be agreed between the parties in writing) (**Standstill Period**).³⁹
4. The parties and their Related Entities agree:
 - (a) to, on or before 27 October 2022, engage in good faith discussions in person and on a without prejudice basis

³⁷ *John Holland Pty Ltd v Chidambara* [2017] WASC 179 [78] - [80].

³⁸ *Sandvik Mining and Construction Australia Pty Ltd v Fisher* [2019] WASC 352.

³⁹ Related Entities and Claims are both defined terms. Claims has an expansive definition including claims under the *Construction Contracts (Former Provisions) Act* or any other type of claim arising out of or in connection with any Contracts.

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aimed at resolving all matters in dispute between the parties; and

- (b) at those discussions, to each have a person present with absolute authority to settle all matters in dispute between the parties ...
5. This agreement may be pleaded as a bar to any Claim made, brought or pursued by Yarta, RCA or any of their Related Entities during the Standstill Period.
6. Within 3 business days after the date of execution of this agreement by the last party to execute this agreement, Downer will pay to RCA the amount of \$123,917.16.
7. Upon Downer providing to RCA proof of payment of \$123,917.16, RCA will immediately withdraw the Creditor's Statutory Demand for the Payment of Debt and provide to Downer reasonable evidence of such withdrawal.
8. Upon Downer providing to RCA proof of payment of \$123,917.16, Downer and RCA will consent to the Application to Set Aside the Statutory Demand being discontinued or dismissed, with no order as to costs with the intention that each party pay its own costs.
9. Subject to execution of this agreement by RCA, Downer consents to RCA being granted an extension of time to 21 October 2022 to file and serve its evidence and submissions in the Judicial Review Proceedings.

Should the court order repayment

67 The applicant submitted that the effect of the agreement was that Downer agreed to pay RCA the amount determined in the adjudication on an interim basis so that both the statutory demand proceedings and the application to set aside statutory demand would be withdrawn.

68 Downer submitted that RCA's construction of the agreement is liable to result in a commercial nonsense as it assumes Downer agreed to pay the determined amount solely in order to negotiate with RCA during the 'Standstill Period'. Further, RCA's construction ignores the express wording of the agreement that, following the standstill period, the proceedings relating to the statutory demand would be discontinued and the judicial review proceedings would continue. Downer submitted that the agreement expressly or by necessary implication preserved the capacity of Downer to claw back the amount it had paid by the judicial review proceedings.

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69 RCA submitted that, once the adjudication had been entered as a judgment, the judicial review application did not, itself, constitute a genuine dispute sufficient to set aside the statutory demand.

70 RCA submitted that pursuant to the agreement, Downer paid the amount for consideration set out in par 3 of the agreement. That consideration was given by RCA, but also by Yarta and other unnamed entities.

71 RCA further submits that the agreement did not deal with the reservation of the rights or the repayment of the amount in the event of successful judicial review proceedings.

72 There is a genuine dispute about the proper construction and effect of the agreement, and the character of the payment to RCA. It is regrettable that it should arise in circumstances where RCA was able to and did rely on a determination that was patently affected by jurisdictional error. Downer may be able to claw back the amount it had paid by other proceedings. But, in my opinion, the dispute that has now been articulated between the parties should not be summarily determined by an order for repayment in this action.

73 I will not make the further orders sought by Downer for the repayment of the amount it has paid.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

KK
Associate to the Honourable Justice Allanson

7 DECEMBER 2022