Court of Appeal
Supreme Court

New South Wales

Case Name:	Ceerose Pty Ltd v A-Civil Aust Pty Ltd
Medium Neutral Citation:	[2023] NSWCA 215
Hearing Date(s):	19 and 20 July 2023
Date of Orders:	12 September 2023
Decision Date:	12 September 2023
Before:	Ward ACJ at [1]; Payne JA at [2]; Basten AJA at [203]
Decision:	In the York Street proceedings (2022/236818): (1) Appeal dismissed. (2) Appellant to pay the respondent's costs of the appeal. (3) Cross-appeal allowed. (4) Set aside orders 1(a) and (b) and 2(a) of the Court below made on 20 April 2023. (5) In their place: (a) order pursuant to s 32A of the Building and Construction Industry Security of Payment Act 1999 (NSW) that the adjudication determination dated 2 August 2022 (ABCDRS NSW 454), being affected by jurisdictional error, be set aside in the amount over and above $1,757,863.46; (b) order pursuant to s 32A of the Building and Construction Industry Security of Payment Act 1999 (NSW) that the adjudication determination dated 2 August 2022 (ABCDRS NSW 454), not being affected by jurisdictional error, be confirmed as the Adjudicated Amount of $1,757,863.46. (6) Order that the appellant pay to the respondent the amount of $718,284.08, together with all interest earned thereon until paid out of court on or about 5 May

2023, together with interest from the date of payment out of court, until the date of payment to the respondent.
(7) Order that 7 days after the making of this order, the remaining funds paid into Court, including any interest accrued thereon, be paid out to the respondent.
(8) The cross-respondent to pay the cross-appellant's costs of the cross-appeal.

In the Elizabeth Bay proceedings (2022/217806):
(1) Appeal dismissed.
(2) Appellant to pay the respondent's costs of the appeal.
(3) Cross-appeal allowed.
(4) Set aside order 1(b) of the Court below made on 20 April 2023.
(5) Order that the appellant pay the respondent the amount of $11,650.56, together with all interest earned thereon until paid out of court on about 5 May 2023, together with interest from the date of payment out of court, until the date of payment to the respondent.
(6) Order that 7 days after the making of this order, the remaining funds paid into Court, including any interest accrued thereon, be paid out to the respondent.
(7) The cross-respondent to pay the cross-appellant's costs of the cross-appeal.

Catchwords:

ADMINISTRATIVE LAW – Judicial review – content of obligation "to consider" – whether failure specifically to refer to a matter reveals failure to consider that matter – scope of obligation to consider under Building and Construction Industry Security of Payment Act 1999 (NSW), s 22(2)

BUILDING AND CONSTRUCTION – adjudication – judicial review – whether adjudication affected by jurisdictional error – principles of jurisdictional error under Building and Construction Industry Security of Payment Act 1999 (NSW) –– whether jurisdictional error to fail to investigate "true merits" of a payment claim – where adjudicator's task limited to deciding dispute on restricted materials

BUILDING AND CONSTRUCTION – adjudication –

judicial review – setting aside part of determination – meaning and operation of s 32A of the Building and Construction Industry Security of Payment Act 1999 (NSW) – whether adjudicator entitled to fees after making adjudication affected by jurisdictional error – whether adjudicator's decision to apportion costs affected by jurisdictional error

Legislation Cited:

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 5, 8, 9, 11,13 – 17, 20 – 27, 29, 30, 32, 32A
Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 101
Interpretation Act 1987 (NSW), s 35
Migration Act 1958 (Cth), s 476

Cases Cited:

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd (2020) 4 QR 410; [2020] QSC 133
Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd [2020] NSWSC 1423
A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2023] NSWCA 144
Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd [2010] VSC 300
Assistant Commissioner Michael James Condon v Pompano Pty Ltd (2013) 252 CLR 38; [2013] HCA 7
Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353 at 360; [1949] HCA 26
Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399
Carrascalao v Minister for Immigration and Border Protection (2017) 252 FCR 352; [2017] FCAFC 107
Ceerose Pty Limited v A-Civil Aust Pty Ltd (No 5) [2023] NSWSC 1012
Claude Neon Pty Ltd v Rhino Signmakers Pty Ltd [2010] VSC 619
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228
Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088

GJ Coles Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503
Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd (2018) 98 NSWLR 712; [2018] NSWCA 276
Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34
John Holland Pty Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19
Joye Group Pty Ltd v Cemco Projects Pty Ltd [2021] NSWCA 211
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291
Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531; [2010] HCA 1
Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd [2018] NSWSC 491
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2013] QSC 293
McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2015] 1 Qd R 350; [2014] QCA 232
Minister for Immigration and Citizenship v SZJSS (2010) 243 CLR 164; [2010] HCA 48
New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26
Pacific General Securities Ltd v Soliman & Sons (2006) 196 FLR 388; [2006] NSWSC 13
Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWCA 172
Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd [2009] NSWCA 157
Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497; [2022] HCA 17
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
Re Minister for Immigration and Multicultural Affairs; Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6
SDCV v Director-General of Security [2022] HCA 32; 96 ALJR 1002
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) (2019) 99 NSWLR 317; [2019] NSWCA 11
SSC Plenty Road Pty Ltd v Construction Engineering

	(Aust) Pty Ltd [2015] VSC 631 The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd [2005] NSWCA 142 Tickner v Chapman (1995) 57 FCR 451; [1995] FCAFC 1726
Texts Cited:	New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 12 November 2002 (second reading speech Building and Construction Industry Security of Payment Bill 1999) New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 24 October 2018 (second reading speech Building and Construction Industry Security of Payment Amendment Bill 2018)
Category:	Principal judgment
Parties:	Ceerose Pty Ltd (appellant) A-Civil Aust Pty Ltd (respondent)
Representation:	Counsel: S Robertson SC, D Hume and J Li (appellant) F Hicks SC and L Gor (respondent) Solicitors: Salim Rutherford Lawyers (appellant) M&A Lawyers (respondent)
File Number(s):	2023/138941
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity
Citation:	[2023] NSWSC 239; [2023] NSWSC 401
Date of Decision:	20 March 2023
Before:	Darke J

File Number(s): 2022/217806; 2022/236818

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant/cross-respondent, Ceerose Pty Ltd, is a building contractor undertaking two developments, one at York Street, Sydney and another in Elizabeth Bay. The respondent/cross-appellant, A-Civil Aust Pty Ltd (A-Civil), was Ceerose's subcontractor for both those developments.

In May 2022, A-Civil served Ceerose with payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") in relation to each development. Ceerose disputed some of the claims and set out its reasons for that dispute in a payment schedule. A-Civil applied for adjudication under the Act in each case and Ceerose filed an adjudication response. The second respondent, Mr Tuhtan, was appointed adjudicator in each case. For the York Street dispute, Mr Tuhtan determined that Ceerose was obliged to pay A-Civil $2,045,453.97, and for the Elizabeth Bay dispute, $349,324.36.

Ceerose brought proceedings in the Supreme Court, seeking to set aside both determinations for jurisdictional error. The primary judge held that both determinations were affected by jurisdictional error but, applying s 32A of the Act, set aside only those parts of the determinations said to be affected by jurisdictional error. The primary judge also set aside the adjudicator's apportionment of costs of the adjudications. Ceerose appealed, arguing further aspects of the determinations should have been set aside. A-Civil brought a cross-appeal against one finding of jurisdictional error in relation to the York St

development and challenged the setting aside of the adjudicator's order apportioning costs of the adjudication.

The issues before the Court were:

(i) What is the scope of an adjudicator's "duty to consider" under the Act?

(ii) Under the Act, does an adjudicator fall into jurisdictional error if he or she fails to investigate the "true merits" of each sum claimed or the "true construction" of the contract?

(iii) Where the adjudicator's award of a particular sum was affected by error, did the primary judge err in using the power in s 32A(2) of the Act to sever and set aside only the portion of that sum reflecting the dispute between the parties, rather than setting aside the affected sum in full, including what both parties agreed was payable?

(iv) Did the primary judge err in finding that the power in s 32A(1) or (2) of the Act is to set aside the decision of the adjudicator, and not the reasons for that decision?

(v) Did the primary judge err in failing to find jurisdictional error in the adjudicator's determination that no liquidated damages were payable for either the York St or Elizabeth Bay development?

(vi) Did the primary judge err in failing to find that no fees are payable to an adjudicator whose determination is affected by jurisdictional error?

(vii) On the cross-appeal, did the primary judge err in finding jurisdictional error in the adjudicator's determination that A-Civil was not time-barred from part of its claim by cl 36.6 of the York St contract?

(viii) On the cross-appeal, did the primary judge err in failing to find that an adjudicator's decision on apportioning costs cannot be affected by error and is therefore beyond review?

The Court (Payne JA, Ward ACJ and Basten AJA agreeing) held, dismissing the appeal and allowing the cross-appeal:

On issue (i)

(1) Section 22(2) of the Act lists the "only" matters the adjudicator is "to consider". Consideration is a private mental process. Some of that process may be revealed in the adjudicator's written decision, but failure to refer to a matter does not necessarily show the adjudicator failed to consider it: [51], [62]-[68].

(2) It is an impermissible gloss on the language of the Act for a party challenging a determination to assert the mental process undertaken by the adjudicator was not "active", "intellectual" or "genuine". What is required is identification of a basis to conclude that consideration did not occur: [54]-[62], [175].

Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497; [2022] HCA 17 applied; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352; [2017] FCAFC 107 referred to

(3) Under s 22(2), the adjudicator must "consider" only those submissions that are "duly made", not submissions improperly made, or submissions that are irrelevant: [52]-[53].

(4) Only in a rare case will it be possible to infer that an adjudicator has failed to consider a matter within s 22(2). For example, failure to refer to a submission on a centrally important matter, clearly articulated and based on uncontested facts, may demonstrate a failure to consider that matter: [69], [81]-[82].

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd (2018) 98 NSWLR 712; [2018] NSWCA 276 cited

On issue (ii)

(5) An adjudicator is under no obligation to investigate the "true merits" of the payment claim advanced by a party. The adjudicator's task is to decide the dispute between the parties, on the limited matters the Act requires the adjudicator to consider and the limited material the Act allows the parties to submit for determination: [76]-[77], [79].

Joye Group Pty Ltd v Cemco Projects Pty Ltd [2021] NSWCA 211 at [12] applied

(6) In particular, s 20(2B) limits the respondent in an adjudication to resisting payment only on those grounds already included in their payment schedule: [76]-[77]. If a respondent gives no reason for resisting payment, it is not an error to award the payment claimed without further investigation as there is no relevant dispute for the adjudicator to consider: [82]. The same applies if the adjudicator rejects a respondent's reasons for resisting payment: [75]. Dicta of Hodgson JA in this Court and first instance cases that suggest or hold otherwise are, to that extent, incorrect and should no longer be followed: [73]-[75], [83]-[86].

Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228 at [50]-[53] considered; *Pacific General Securities Ltd v Soliman & Sons* (2006) 196 FLR 388; [2006] NSWSC 13; *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423; *Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd* [2018] NSWSC 491 overruled

On issue (iii)

(7) It is implicit that a judge exercising the power in s 32A(2) must identify which parts of an adjudicator's determination are to be confirmed, just as the parts to be severed and set aside as affected by jurisdictional error must be identified: [94].

(8) The adjudicator's task is to decide the parties' dispute, not investigate the "true merits" of the claim: [101]-[102]. If the parties' dispute concerned only part of a claimed payment and if the respondent did not deny that the rest of that payment was due, then any jurisdictional error by the adjudicator affected only the disputed component of the payment: [101]-[102].

(9) Therefore, when applying s 32A(2) to a decision affected by jurisdictional error, the correct approach is to sever and set aside those parts of the decision concerning whatever component of payment was in dispute. The decision should be confirmed insofar as it also awarded components of payment that the respondent agreed or did not dispute were payable: [96]-[98], [104].

On issue (iv)

(10) The "decision" referred to be set aside or confirmed under s 32A(1) or (2) is the adjudicator's decision about the amount of the progress payment to be paid, the date upon which it becomes due and payable, and the rate of interest. Section 32A does not require that the adjudicator's reasons be set aside: [111]-[112].

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd (2020) 4 QR 410; [2020] QSC 133 cited

(11) If an adjudication determination is set aside under s 32A, the reasons for the decision will be those of the Court read, to the extent necessary, with the adjudicator's reasons: [112].

On issue (v)

(12) On the York Street liquidated damages claim, the adjudicator was under no obligation to consider reasons Ceerose gave for resisting payment where those reasons were not in its payment schedule: [150]. The adjudicator was correct in reaching the conclusions he did: [150]-[153].

(13) On the Elizabeth Bay liquidated damages claim, the primary judge was correct that the adjudicator's reasons showed he considered Ceerose's submission about the effect of a contractual marking: [163].

On issue (vi)

(14) An adjudication determination affected by legal error is not necessarily void for all purposes. The fact that the adjudication decision was made, even if invalidly, remains a fact, which can create legal consequences: [129]-[133].

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liq) (2019) 99 NSWLR 317; [2019] NSWCA 11 applied; *New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 cited

(15) One of the consequences of performing an adjudication is the obligation to pay costs of the adjudication imposed by s 29(1)-(3) of the Act. The adjudicator's right to be paid is based on a fact. The adjudicator is entitled to be paid for adjudicating an adjudication application whether or not the adjudication was invalid: [132], [134]-[139].

Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399 distinguished

On issue (vii)

(16) The primary judge erred in finding that the adjudicator did not consider Ceerose's submission about the purported "time bar" in cl 36.6: [175]-[179]. The adjudicator was not required to wade through the voluminous material presented to him by Ceerose to try and find a basis for Ceerose's contention which was not a substantial, clearly articulated argument relying upon established facts presented by Ceerose in its payment schedule: [179]-[180].

On issue (viii)

(17) The primary judge was correct to find that an adjudicator's decision on apportioning costs, including his fees and expenses, could in principle be affected by jurisdictional error: [187].

(18) However, on York St, following A-Civil's success on its cross-appeal, the remaining jurisdictional errors produced a 5-6% reduction in A-Civil's monetary success. It could not be inferred from that variation of success that the adjudicator, acting reasonably, would have altered the apportionment of costs: [188].

(19) On Elizabeth St, the only jurisdictional error produced a 1% reduction in A-Civil's monetary success. It could not be inferred from that variation of success that the adjudicator, acting reasonably, would have altered the apportionment of costs: [190].

JUDGMENT

1 **WARD ACJ**: I agree with Payne JA.

2 **PAYNE JA**: The appellant/cross-respondent, Ceerose Pty Ltd (Ceerose) is a building contractor. The respondent/cross-appellant, A-Civil Aust Pty Ltd (A-Civil), was a subcontractor of Ceerose in relation to a development in York Street, Sydney ("York Street") and a separate development in Greenknowe Avenue, Elizabeth Bay ("Elizabeth Bay"). The present dispute concerns two adjudication determinations made under the *Building and Construction Industry*

Security of Payment Act 1999 (NSW) ("Security of Payment Act") in relation to the York Street and Elizabeth Bay developments.

Contractual and procedural background

3 The contract between the parties in relation to York Street was entered into on about 6 October 2021. On 30 May 2022, A-Civil served Ceerose with a payment claim under the Security of Payment Act. The payment claim was disputed by Ceerose. On 14 June 2022, Ceerose provided a payment schedule. On 28 June 2022, A-Civil filed an adjudication application. On 7 July 2022, Ceerose filed an adjudication response.

4 The second respondent, Mr Tuhtan, was appointed as adjudicator of the York Street dispute. On 2 August 2022, Mr Tuhtan issued a Determination that Ceerose pay A-Civil $2,045,453.97. Proceedings were commenced in the Technology and Construction List of the Court seeking to set aside the Determination for jurisdictional error. Interlocutory and final injunctions were sought seeking to prevent A-Civil from taking any steps to enforce the Determination, pending resolution of contractual proceedings contemplated by s 32 of the Security of Payment Act which have yet to be commenced. Pursuant to s 25(4) of the Security of Payment Act, as a statutory condition of commencing the challenge to the validity of the Determination, Ceerose paid $2,045,453.97 into court.

5 The contract between the parties in relation to Elizabeth Bay was entered into on about 2 December 2021. On 25 May 2022 A-Civil served Ceerose with a payment claim under the Security of Payment Act. The payment claim was disputed by Ceerose. On 2 June 2022, Ceerose provided a payment schedule. On 17 June 2022, A-Civil filed an adjudication application. On 21 June 2022, Ceerose filed an adjudication response.

6 The second respondent, Mr Tuhtan, was appointed as adjudicator. On about 11 July 2022, Mr Tuhtan issued a Determination that Ceerose pay A-Civil $349,324.36. Proceedings were commenced in the Technology and Construction List of the Court seeking to set aside the Determination for jurisdictional error. Interlocutory and final injunctions were sought seeking to prevent A-Civil from taking any steps to enforce the Determination, pending

resolution of proceedings contemplated by s 32 of the Security of Payment Act which have yet to be commenced. Pursuant to s 25(4) of the Security of Payment Act, as a statutory condition of commencing the challenge to the validity of the Determination, Ceerose paid $349,324.36 into court.

7 On 20 March 2023, Darke J found that each Determination was affected by jurisdictional error: *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWSC 239. On 20 April 2023, Darke J set aside each Determination, but only in part: *Ceerose Pty Ltd v A-Civil Aust Pty Ltd (No 2)* [2023] NSWSC 401.

Security of Payment Act

8 The Security of Payment Act was enacted in 1999 and has been adopted with variations in other Australian jurisdictions (although not all). The legislation has given rise to numerous questions of construction and many authorities have explained the legislative scheme: *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The New South Wales legislation has been amended on several occasions, notably by the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW), the *Building and Construction Industry Security of Payment Amendment Act 2013* (NSW), and the *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW).

9 The High Court in *Southern Han* at [4] and again in *Shade Systems* at [39] quoted the explanation of the original design of the Security of Payment Act given by the responsible minister when introducing amending legislation in 2002:

> The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.

10 The Minister went on to say that cash flow was the "lifeblood of the construction industry" and that the government was "determined that, pending

final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act": New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 2002 at 6542. Section 3(1) of the Security of Payment Act states that the object of the legislation is:

> …to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work…

11 As will become apparent, an allegation that jurisdictional error affects an adjudication decision under the Security of Payment Act must be viewed through the lens of the scheme of closely identified rights and obligations of a claimant and a recipient of a payment claim under the Act.

12 Section 3(3) of the Act provides as follows:

> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
>
> (a) the making of a payment claim by the person claiming payment, and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable, and
>
> (c) the referral of any disputed claim to an adjudicator for determination, and
>
> (d) the payment of the progress payment so determined.

13 Section 4(1) defines "progress payment" to mean:

> a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement)—
>
> (a) the final payment for construction work carried out … under a construction contract, or
>
> (b) a single or one-off payment for carrying out construction work … under a construction contract, or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment').

14 Section 5(1) defines "construction work" to mean any of various activities identified in the provision, such as the construction, alteration or extension, or demolition of buildings or structures.

15 Part 2 of the Security of Payment Act creates "Rights to progress payments". Section 8 provides as follows:

> A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.

16 The amount of a progress payment to which a person is entitled in respect of a construction contract is to be the amount calculated in accordance with the terms of the contract (s 9(a)).

17 Section 11(1) provides that, subject to s 11 and any other law, a progress payment is to be made in accordance with the applicable terms of the contract. "Due date" in relation to a progress payment is defined in s 4(1) to mean the due date for the progress payment as referred to in s 11.

18 The procedure referred to in s 3(3) of the Security of Payment Act is set out in Part 3 ("Procedure for recovering progress payments"). Section 13(1) provides that:

> A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

19 The payment claim must indicate, among other things, "the amount of the progress payment that the claimant claims to be due (the ***claimed amount***)" (s 13(2)(b)). A payment claim may be served (relevantly) only within the period determined in accordance with the contract (s 13(4)(a)). Service by a claimant on the respondent of a payment claim for a claimed amount is therefore the trigger for the procedure set out in Part 3: *Southern Han* at [14].

20 Section 14 deals with the requirements of a payment schedule as follows:

> **14 Payment schedules**
>
> (1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) A payment schedule—
>
> (a) must identify the payment claim to which it relates, and
>
> (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***).
>
> (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.
>
> (4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

21 Section 14(3) specifies an important requirement of a payment schedule. The person upon whom a payment claim is served, being in the best position to know the details of the progress of the building work, is required (if the scheduled amount is less than the amount of the claim) to indicate why the scheduled amount is less than the claim and, if the recipient is withholding payment of the full amount of the claim for any reason, must set out the recipient's reasons for withholding payment.

22 Section 15 creates immediate statutory consequences for a recipient of a payment claim who does not provide a payment schedule and who fails to pay the claimed amount on or before the due date, including that the amount of the payment claim is recoverable as a debt in a court of competent jurisdiction.

23 Section 16 prescribes the consequences where a respondent provides a payment schedule but does not pay the scheduled amount. Section 16 provides as follows:

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 the payment claim is served,

whichever time expires earlier, and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and

(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 payment 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(1)(a) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

…

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

24 Importantly, so far as the present case is concerned, the recipient of a payment claim must pay the scheduled amount, and, if that party fails to pay within the prescribed period, the section provides consequences including recovery of the scheduled amount as a debt in any court of competent jurisdiction and the making of an adjudication application.

25 Division 2 of Part 3 is headed "Adjudication of disputes". This heading is of some importance to this appeal. The heading is a matter able to be taken into account in construction of the Act: *Interpretation Act 1987* (NSW) s 35(1). Section 17 details how a claimant may make an "adjudication application". It relevantly provides:

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if—

(a) the respondent provides a payment schedule under Division 1 but—

(i) …, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) …

…

(3) An adjudication application—

(a) must be in writing, and

…

(d) in the case of an application under subsection (1)(a)(ii)—must be made within 20 business days after the due date for payment

…

26 The expression "adjudication application" is defined in s 4(1) to mean "an application referred to in section 17".

27 Section 20 permits a respondent to lodge an "adjudication response" to a claimant's adjudication application. Importantly in the present case, section 20(2B) provides:

> The respondent 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.

28 Complaints about a denial of procedural fairness by an adjudicator failing to seek further submissions about matters not raised in in a payment schedule must be considered in the context of the statutory limit upon the scope of the dispute referred for adjudication.

29 Section 22 is a critical provision which relevantly 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.
>
> (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.

(3) 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), and

(c) be served by the adjudicator on the claimant and the respondent.

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 10, determined—

(a) the value of any construction work carried out under a construction contract, or

(b) the value of any related goods and services supplied under a construction contract,

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work (or the goods and services) has changed since the previous determination.

…

30 Section 22(1), in some decisions I will address, has been understood as requiring an adjudicator to investigate the "merits" of a payment claim and the value of the work the subject of that claim. In the usual case, failure to investigate the "merits" of a payment claim going beyond the scope of the matters identified as the subject matter of the adjudication is not jurisdictional error. I will return to this issue below.

31 It is now well settled that whether a submission referred to in s 22(2)(c) or (d) has been "duly made" is a matter within the jurisdiction of an adjudicator and error in identifying a submission as having been "duly made" is not jurisdictional: *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [57]; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd*

[2009] NSWCA 157 at [65]; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [24]-[26]. It may be accepted that, despite the apparently emphatic language ("consider the following matters only") in s 22(2), an adjudicator may in some circumstances take into account other matters: *The Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142 at [33]-[36] per Hodgson JA (Bryson JA and Brownie AJA agreeing). This does not mean, however, that a failure to do so will amount to jurisdictional error.

32 Section 23(2) provides that if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date. The "relevant date" is five business days after the adjudicator's determination is served on the respondent, unless the adjudicator determines a later date (s 23(1)).

33 Section 24 prescribes the consequences of the respondent not paying the adjudicated amount:

> (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may—
>
> (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and
>
> (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work … under the construction contract.

34 Section 25 provides as follows:

> **25 Filing of adjudication certificate as judgment debt**
>
> (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
>
> (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
>
> (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
>
> (4) If the respondent commences proceedings to have the judgment set aside, the respondent—
>
> (a) is not, in those proceedings, entitled—
>
> (i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

35 Section 27(1) states that a claimant may suspend the carrying out of construction work under a construction contract if at least two business days have passed since the claimant has given notice of intention to do so, for example pursuant to s 24(1)(b).

36 Section 32 preserves the rights of the parties under the construction contract:

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

37 As I will explain, s 32 was relied upon in the present case to support a stay of payment out to A-Civil of the amount of the payment claim paid into court on the basis that Ceerose's rights under the construction contract may be prejudiced by that payment.

Jurisdictional error

38 Jurisdictional error has been described as "a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given

force and effect by the statute pursuant to which the decision-maker purported to make it": *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [24] per Kiefel CJ, Gageler and Keane JJ. Put simply, it involves a decision-maker exceeding the authority to decide conferred on them, or failing to exercise that authority when required to do so.

39 A wrongful denial of, or failure to exercise, jurisdiction can be jurisdictional error. Constructive failure to exercise jurisdiction arises where the decision-maker purports to have exercised the jurisdiction but in substance has not undertaken or completed the task of doing so because of failure to address some essential matter. An example is a statutory precondition to the exercise of the power which it was necessary for the decision-maker to be satisfied of before the power is enlivened.

40 Jurisdictional error in failing to address some essential matter can overlap with other types of jurisdictional error. One reason for the overlap is that the term "jurisdictional error" is to a significant extent a label or conclusion. It is not possible neatly to map out the metes and bounds of the notion of jurisdictional error: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at [64], [66], [71]-[73].

41 Jurisdictional error, in the sense of a constructive failure to exercise jurisdiction, was discussed in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088. Gummow and Callinan JJ, with whom Hayne J agreed, held that for an administrative decision-maker "[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts" was both a constructive failure to exercise jurisdiction and a failure to accord natural justice: at [23]-[25]. Kirby J similarly found a constructive failure to exercise jurisdiction in that case where the decision-maker's mistake "amounts to a basic misunderstanding of the case brought by an applicant": at [88].

42 The following observations relate to the claim that the adjudicator failed to accord the applicant procedural fairness. That language was used to encompass two quite different situations, namely (i) where the adjudicator addressed some point which, it was submitted, had not been raised by the

parties, and (ii) where the adjudicator failed to consider a matter which he was obliged to consider. For present purposes, it is convenient to put the first formulation to one side: while it raises a familiar concept of procedural unfairness, it does not require explanation. The second formulation is problematic.

Procedural fairness and the duty to consider

43 Conventionally, procedural fairness has two limbs, namely the bias rule and the "hearing rule". The bias rule is not presently relevant. The "hearing rule" does not necessarily require a hearing, but rather requires that the decision-maker afford a party an opportunity to address material likely to affect adversely that party's interests or expectations. A breach of that duty is not concerned with the manner in which the decision-maker has processed the material and should, in principle be addressed separately.

44 A more extended view of procedural fairness, incorporating obligations as to how the decision-maker is to process material, has been derived from the statement in the joint reasons of Gummow and Callinan JJ in *Dranichnikov*[1] that the Tribunal's failure to "respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice". "Natural justice" is often equated with procedural fairness. The term natural justice was used in *Dranichnikov* because, at that time, the Federal Court had no statutory power to review for breaches of natural justice,[2] which was why Mr Dranichnikov had commenced proceedings in the High Court seeking review under s 75(v) of the *Constitution*.

45 The joint reasons proceeded, having noted the absence of statutory review, to suggest that the failure to respond to a substantial, clearly articulated argument could be "either characterised as a failure to accord natural justice or as that, and more, which we consider it to be, including a constructive failure to exercise jurisdiction".[3] The discussion which followed demonstrated that the Tribunal had failed to address the questions it was required to answer in the circumstances of the case.

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[1] (2003) 77 ALJR 1088; [2003] HCA 26 at [24] (Hayne J agreeing at [95]) and [88] (Kirby J).
[2] Migration Act 1958 (Cth), s 476(2)(a).
[3] Dranichnikov at [25].

46 The phrase "constructive failure to exercise jurisdiction" provides a generic description covering most if not all, forms of "jurisdictional error". In *Dranichnikov* it was used to identify a failure on the part of the Tribunal to address the central claim it was required to determine. Although the distinction may not matter in many cases, in principle there is a distinction between failing to address the claim and failing to consider material which must be considered in order to address the claim. A claim will seek the exercise of a specific power, such as the issue of a visa or the setting aside of a cancellation of a visa. In a particular case, that will require addressing a specific ground or grounds of eligibility relied on by the claimant. It was at that level that the Tribunal failed in *Dranichnikov.* However, the Tribunal might have addressed the correct question but failed to have regard to particular material which was said to support the claim and which the statute obliged the Tribunal to consider.

47 The distinction is significant in a functional sense, as may be illustrated by the circumstances in *Dranichnikov* itself. The protection visa the applicant sought was available if he could establish that he was persecuted as a member of a particular social group. The Tribunal recognised and addressed that question. However, it did so on the basis that the group nominated by the applicant was "businessmen in Russia". The Tribunal was not satisfied on the basis of material before it that such a group was subject to persecution. The Court, however, accepted that he had identified a narrower group, namely "of businessmen who publicly criticised and sought reform of the law enforcement authorities to compel them to take effective measures to prevent crime".[4] A majority of the Court concluded that the Tribunal had not addressed that claim.

48 One way to characterise the error is as a jurisdictional fact, which the Tribunal was required to identify correctly, and the existence of which was subject to review by the Court. However, that characterisation should not be over-generalised. The basis of an application requiring determination will often be unclear; the decision-maker must have authority to resolve such uncertainties. So much is recognised in the statement that error only arose because the applicant had presented a "substantial, clearly articulated argument relying

[4] Dranichnikov at [18].

upon established facts". In other circumstances, as explained by Kirby J, fact finding will be a matter for the Tribunal and not the Court.[5]

49 Translating this discussion to the present case, s 22 of the Security of Payment Act contains two separate mandates. First, s 22(1) identifies the matters which the adjudicator "is to determine"; secondly, s 22(2) identifies matters which the adjudicator "is to consider", a formulation which covers five matters which are the "only" matters to be considered.

50 Thus, the statute helpfully distinguishes between that which the adjudicator must determine and that which he or she must consider. Failure to determine the three matters set out in s 22(1), if required to do so to resolve a particular claim, would likely constitute jurisdictional error. Compliance with s 22(2) is less readily so characterised. Further, s 22(2) does not address the question of procedural fairness in the sense of the steps which the adjudicator must take to allow a party to address adverse material. Failure to comply with s 22(2) is not helpfully characterised as procedural unfairness, but rather as failure to comply with a mandatory statutory obligation, the scope of which will be identified on quite a different basis.

51 Because procedural fairness is concerned with the conduct of the adjudicator towards the parties, once it is established what fairness requires in a particular case, the question of compliance will be readily determined by the objective facts, being primarily the communications, or lack of them, between the adjudicator and the parties. By contrast, the question whether the adjudicator has considered a matter for the purposes of s 22(2) will involve an inquiry into the private processes of decision-making, and even the mental processes of the adjudicator. While those processes may be revealed by the reasons required to be given under s 22(3), those reasons will not necessarily demonstrate a negative proposition, namely a failure to consider a particular matter required to be considered simply because it is not referred to in the reasons.

[5] Dranichnikov at [86], [88].

Scope of duty to consider

52 A duty to "consider" material will itself operate differentially depending on the context. For example, s 22(2)(a) and (b) require that the adjudicator consider the provisions of the Act and the provisions of the construction contract. The obligation must be understood as referring to those provisions of the Act and of the contract which are engaged by the claim and the response to the claim. There can be no breach of the statutory obligation by failing to consider material which is irrelevant; further, the question of relevance will be a matter for the satisfaction of the adjudicator. Because the adjudicator can err on questions of law and fact, mistakes as to what may be relevant and what may fall within the obligation for consideration will only be reviewable where the error is of the kind which is apt to invalidate the determination.

53 All aspects of the payment claim and the payment schedule will require consideration so long as they have been "duly made", that is, made in accordance with the requirements of the Act, and, so far as relevant, the construction contract. On the one hand, if a challenge to a claim was not duly made, the adjudicator will not be required to address that factor. On the other hand, if a challenge is duly made, the merit of the challenge, both factual and legal, is a matter for the adjudicator.

54 The concept of consideration is not obscure. Nevertheless, the duty to "consider" has given rise to an extensive history of judicial exegesis. Phrases derived from earlier cases were adopted in submissions in the present case in a manner which tended to obscure the proper understanding of the obligation imposed on the adjudicator by s 22(2). They usually constitute glosses which specify the intensity of consideration.

55 One gloss relied on by the applicant was that consideration involves an "active intellectual process" of engagement with a particular document or matter. That phrase appears to have originated from the judgment of Black CJ in *Tickner v Chapman*:[6]

> "39 The meaning of "consider" used as a transitive verb referring to the consideration of something is given in the Oxford English Dictionary, 2nd ed. as "[t]o contemplate mentally, fix the mind upon; to think over, meditate or

[6] (1995) 57 FCR 451; [1995] FCAFC 1726.

> reflect on, bestow attentive thought upon, give heed to, take note of." Consideration of a document such as a representation or a submission (there is little, if any, difference between the two for these purposes) involves an active intellectual process directed at that representation or submission."

56 As with most dictionary definitions, there is a choice of phraseology on offer. Interestingly, the adoption of "active intellectual process", a phrase repeated in later judgments, is a riff upon the quoted terms. It assumes a high level of intensity, although the definition in the Dictionary permits varying levels. The adoption of any level is a choice made which may be justifiable in some statutory contexts but not others. Justification for such choices is rarely embarked upon: its use with respect to the obligation under s 22(2) will be discussed below. The High Court has warned about the use of labels or formulas such as "active intellectual process" in identifying jurisdictional error. In *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497; [2022] HCA 17, Kiefel CJ, Keane, Gordon and Steward JJ said this:

> "26 Labels like "active intellectual process" and "proper, genuine and realistic consideration" must be understood in their proper context. These formulas have the danger of creating "a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised". That is not the correct approach."

57 A particular risk with the claim that a decision marker has failed to engage in an active intellectual process is that the argument can readily shade into claims about arguments having been resolved incorrectly because misunderstood, or not really grappled with, which tends towards merits review.

58 A second gloss on the requirement to consider proposes that a decision-maker should give "proper, genuine and realistic consideration" to the matters required to be considered. That phrase apparently first appeared in the field of administrative decisions in 1987 in a migration appeal, *Khan v Minister for Immigration and Ethnic Affairs*.[7] It has been treated with caution in later cases. In *Minister for Immigration and Citizenship v SZJSS*[8] the High Court accepted that the phrase, taken out of context, was apt to encourage a slide into impermissible merit review. As the High Court further noted,[9] the phrase was used in *Khan* in construing an improper exercise of a power as "including a

[7] (1987) 14 ALD 291.
[8] (2010) 243 CLR 164; [2010] HCA 48 at [30].
[9] SZJSS at [26].

reference to an exercise of a discretionary power in accordance with a rule or policy, without regard to the merits of a particular case".

59 Seven years later, in *Carrascalao v Minister for Immigration and Border Protection*[10] the Full Court of the Federal Court identified the observations in *SZJSS* and continued:

> "33 … In *SZJSS*, the High Court did not indicate that it was inappropriate to use the expression in that particular context. Naturally, when doing so, the limits of the judicial review function still need strictly to be observed.
>
> 34 The danger of using that or similar expressions has been emphasised in many cases in other contexts. For example, when the expression has been used in conjunction with the ground of judicial review relating to the failure to take into account a mandatory relevant consideration, Courts have acknowledged that its use carries the risk of creating 'a kind of general warrant, involving language of indefinite and subjective application, in which procedural and substantive merits of any Tribunal decision can be scrutinised' (see *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83; 231 FCR 513 at [24] per Flick, Griffiths and Perry JJ, *Minister for Immigration and Multicultural Affairs v Anthonypillai* [2001] FCA 274; 106 FCR 426 at 442 per Heerey, Goldberg and Weinberg JJ and *Anderson v Director-General of the Department of Environment & Climate Change* [2008] NSWCA 337 at [51]-[58] per Tobias JA, with whom Spigelman CJ and Macfarlan JA agreed)."

60 The exercise in fact undertaken in *Carrascalao*, concerning the power of a Minister to grant or cancel a visa, was as follows:

> "35 That is not the context in which the judicial review applicants rely upon the expression here. Its use relates specifically to their contention that, in considering whether or not to exercise his power under s 501(3), the Minister was under a legal obligation to consider the merits of their particular cases and that such consideration had to be meaningful, in the sense of being 'proper, genuine and realistic'. As we will explain below, we consider that the evaluative judgment which the Court must undertake in assessing whether the Minister has properly considered the merits of the cases before him requires focus on the question of whether the applicants have established that the Minister did not engage in an active intellectual process in determining whether or not to exercise his power under s 501(3) of the *Act*."

61 It appears that both alternative expressions were adopted. The Court also noted, correctly, that it was for the applicant for judicial review to establish the negative, namely that the decision-maker had not engaged in a consideration of what was required to be considered.

[10] (2017) 252 FCR 352; [2017] FCAFC 107 (Griffiths, White and Bromwich JJ).

Scope of obligation to "consider" in s 22

62 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, as already noted, 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.

63 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.

64 Secondly, the scope of the reasons will inevitably reflect the practical circumstances under which the adjudicator is operating. Section 21(3)(a) of the Security of Payment Act requires the adjudicator to determine an adjudication application "as expeditiously as possible and, in any case … within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application". One of the matters which the adjudicator is to consider is the "adjudication response" filed by the respondent to the claim. The adjudication response may be lodged five business days after receiving a copy of the application, or two business days after receiving notice of the adjudicator's acceptance of the application, whichever is later: s 20(1). Thus, 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.

65 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 $1m, both in considering submissions and in preparing reasons.

66 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.

67 This is a situation in which the reasoning of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[11] 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.

68 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

[11] (1949) 78 CLR 353 at 360; [1949] HCA 26.

the factor at all. In those circumstances, a complaint of failure to consider will not be proven.

69 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.

Jurisdictional error found in the present case

70 In the York Street proceedings, the primary judge found the adjudicator fell into jurisdictional error when he:

(1) Accepted A-Civil's claim for $145,790.50 for performing "hard demolition" work on the ground that Ceerose had advanced no good reason to withhold payment. The primary judge found that, even though the adjudicator had rejected Ceerose's reasons for withholding payment, the statute required him to address the "merits" of A-Civil's claim before accepting that claim. His failure to do so was jurisdictional error;

(2) Accepted A-Civil's claim for $11,700 for "render removal", again on the ground that Ceerose failed to give a valid reason for withholding payment, and without determining the "merits" of A-Civil's claim;

(3) Accepted A-Civil's claim for $6,750 for brick "cutouts" on the ground that he rejected Ceerose's competing explanation of events and "preferred" A-Civil's, again without investigating the "merits" of A-Civil's claim;

(4) Accepted A-Civil's claim for $77,379 for additional "hard demolition" work, again because he rejected Ceerose's explanation and "preferred" A-Civil's, without investigating the "merits" of A-Civil's claim;

(5) Accepted A-Civil's claim for $687,214.19 for a contract variation (the work involved demolishing a wall) without considering Ceerose's duly made submission that the claim was time-barred; the Act requires adjudicators to consider all duly made submissions; ignoring a duly made submission amounted to jurisdictional error.

71 In the Elizabeth Bay proceedings, the primary judge found that the adjudicator erred when he:

(1) Rejected Ceerose's set-off claim for $3,740 in concrete saw cutting costs by interpreting cl 52 of the parties' contract in a way that neither

party contended, thereby substantially denying the measure of natural justice which the Act requires to be given.

72 The principles for identifying jurisdictional error in the context of the Security of Payment Act were set out by the primary judge. I am unable to agree with those principles, the ultimate source of which are dicta of Hodgson JA in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 at [50]-[53]. It is necessary to consider this passage in *Hargreaves* in a little detail as I have come to the view that the manner in which these dicta have been understood and applied in subsequent first instance decisions is inconsistent with the correct construction of s 22(1) and the scope of the obligation to "consider" matters provided for in s 22 of the Security of Payment Act explained above. The way in which the dicta in *Hargreaves* have been understood by later first instance cases is also inconsistent with authority in this Court.

73 At [51]-[53] of *Hargreaves*, Hodgson JA under a heading "Possible error of primary judge"[12] said this:

> "50 Before concluding, I wish to note what I believe may be an important error in the judgment of the primary judge, not bearing on the outcome of the case. In the second half of para.[51] of his judgment, the primary judge said this:
>
> > An adjudicator is bound to consider the provisions of the Act, the provisions to the construction contract, the payment claim and payment schedule and submissions made by the claimant and respondent respectively and the results of any inspection: s 22(2). It seems to follow from all this that, if the point that an amount claimed is not "for" construction work is not taken in the payment schedule, it cannot thereafter be relied upon by the respondent in the adjudication process. The adjudicator would be bound to determine the matter on the basis of the material to which she or he could properly have regard; and if the adjudicator decided that all the reasons advanced by the respondent were invalid, the adjudicator would determine the amount of the progress payment in favour of the claimant.
>
> 51 That passage could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim at the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.
>
> 52 The task of the adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that

[12] The primary judge was MacDougall J.

> requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and of the merits of the payment claim is limited to issues actually raised by submissions duly made: see *The Minister for Commerce v. Contrax Plumbing (NSW) Pty. Ltd* [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.
>
> 53 Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void."

74 This view attracted no support from the other two judges in *Hargreaves.* Ipp JA confined his agreement in that case to the reasons Hodgson JA gave between [39] and [45]. Basten JA wrote in dissent, disagreeing in terms with the dicta at [52].

75 For the following reasons I am unable to agree with Hodgson JA's dicta in [52] of *Hargreaves*. The essence of [52] of *Hargreaves* is that the "adjudicator's duty is to come to a view as to what is properly payable, *on what the adjudicator considers* to be the true construction of the contract and the Act and the true merits of the claim". There is a potential difficulty in this reasoning, at least in so far as it is being used as a test to identify jurisdictional error. The "true construction of the contract" and the "true merits" of the payment claim are, by reason of the structure of the Security of Payment Act I have set out above, matters where an error by an adjudicator will not be jurisdictional. As Basten JA explained at [66] of *Hargreaves* itself, in the light of the express restriction in s 20(2B) of the Act, there is merit in the conclusion that the adjudicator is not entitled to go beyond the terms of the adjudication response in rejecting part or all of the payment claim. Certainly, it is not a jurisdictional error for an adjudicator, having decided all the reasons advanced by the respondent were invalid, to then and without more, determine the amount of the progress payment in favour of the claimant based on the payment claim.

76 This is because, in addition to s 22(2), which provides a limit on what an adjudication is obliged to take into account, sub-section 14(3) requires that where a payment schedule indicates an amount of a payment which is less than the amount of the claim, the schedule *must* indicate why the amount is less and, if a respondent is withholding payment, *the reason* for that action. The recipient of the payment claim is obliged to explain the reason why the payment claim (or any part of it) is disputed. Where the payment schedule indicates an amount which is less than the amount claimed, the claimant may apply for adjudication of its payment claim: s 17(1)(a). Where such an application is made, the respondent may lodge a response to the claimant's adjudication application. That response may contain relevant submissions (s 20(2)(c)), but, as I have said, s 20(2B) provides:

> The respondent 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. (italics added)

77 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 this express restriction on the contents of the adjudication response, 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.

78 In addition, the views expressed by Hodgson JA in paragraph [52] are tentative and there is reason to doubt that his Honour intended to hold that it would always amount to jurisdictional error if an adjudicator failed to consider the "true merits of the claim". The tentative view expressed in paragraph [52] of *Hargreaves* is arguably inconsistent with the view expressed by Hodgson JA in

Climatech, where his Honour said at para [24] that the task of the adjudicator was in substance to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. His Honour's conclusion in *Climatech* better reflects the role of an adjudicator given by the statute and is inconsistent with the tentative view about "possible" error expressed in [52] of *Hargreaves*. To conclude that an adjudicator is permitted in some circumstances to consider matters outside those referred to in s 22(2), which was the conclusion in *Contrax,* at [33]-[36], does not convert that ability into a duty, the failure to perform which amounts to jurisdictional error.

79 *Hargreaves* at [52], at least as it has subsequently been applied in some first instance cases I will address below, is also inconsistent with subsequent unanimous authority in this Court. In *Joye Group Pty Ltd v Cemco Projects Pty Ltd* [2021] NSWCA 211, Basten JA (with whom Macfarlan JA and Emmett AJA agreed) said:

> "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*." (emphasis added)

80 This unanimous conclusion in *Joye*, which is consistent with my analysis of the statutory scheme and the jurisdictional obligations of an adjudicator, is inconsistent with the dicta in [52] of *Hargreaves*. If paragraph [52] of *Hargreaves* is correct (at least as it has subsequently been understood), the reasons given in a payment schedule would impose no constraint on the scope of an adjudication at all. The adjudicator would, in the absence of any reason advanced by the recipient of a claim why a payment should not be made, nonetheless be obliged to investigate and give written reasons for a conclusion about the "true merits of the claim", lest he or she fall into jurisdictional error.

81 In *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* (2018) 98 NSWLR 712; [2018] NSWCA 276, Basten JA (with whom Leeming and White JJA agreed) explained some of the principles involved in a claim that an adjudicator has failed to "grapple with" a mandatory consideration:

> "23 It is significant that, in the next section of the reasons in *Laing O'Rourke*, McDougall J addressed the language of s 22(2) and the obligation imposed on the adjudicator by the words 'is to consider' the identified matters. Where there is apparently credible and relevant material before the decision-maker, which appears to engage with a mandatory consideration, and there is no reference to that material in the reasons provided by the decision-maker, it may be inferred that no regard was had to it. That may allow for the inference that no regard at all was had to the mandatory consideration. That must be distinguished from the situation where, while there is no reference to that material, it cannot be inferred that the decision-maker must have referred to it, if it had been properly considered. It is well established that judges are not required to refer to all the evidence before the court; so it is true that a decision-maker is not required to refer to all the material supplied by one party before rejecting the party's claim.
>
> 24 Furthermore, saying that the decision-maker must 'grapple with' particular material reflects statements that the decision-maker must give 'proper, genuine and realistic consideration' to such material. As the High Court noted in *Minister for Immigration and Citizenship v SZJSS* [at][25] this language can invite a slide into impermissible merit review. Finally, a refusal to give any weight to particular material does not demonstrate that the decision-maker failed to have regard to a mandatory consideration [citing *SZJSS* at [33]-[36]]."

82 Section 22(1) does not create a free-standing 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 free-standing 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.

83 At paragraph [34], the primary judge also relied upon the first instance decision of Brereton J in *Pacific General Securities Ltd v Soliman & Sons* (2006) 196 FLR 388; [2006] NSWSC 13 where his Honour said this at [82]:

> "...the absence of [material put forward by the respondent] does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value."

84 This conclusion is inconsistent with the text, subject matter and purpose of the Security of Payment Act. It should not be followed. It is not a jurisdictional error for an adjudicator to fail to consider a matter outside the scope of the dispute presented by the parties as required by the statute. The absence of material, including a reason put forward by the respondent for not paying the payment claim, entitles an adjudicator to award the amount of the claim without "addressing its merits". The "dispute" which the Act has provided a mechanism for identifying and resolving is non-existent in such a case. A requirement that an adjudicator must determine "whether the construction work identified in the payment claim has been carried out", in circumstances where a recipient of a payment claim has not made any suggestion that it has not, despite the statutory requirements of s 14, subverts the statutory scheme for the swift payment of progress claims and speedy determination of disputes about those progress payments. The person best able to address the question of "whether the construction work identified in the payment claim has been carried out", namely the recipient of the payment claim, has not, in the example posited by Brereton J, suggested the work was not carried out, as it was required to do by the Act if it wished not to pay the claim. The statutory task of an adjudicator is to determine the claimant's entitlement within the framework of the dispute that was propounded by the parties. The conclusion in *Pacific General Securities* is incorrect and should not be followed.

85 In a number of first instance decisions, also cited by the primary judge in this case, paragraph [52] of *Hargreaves*, as understood in *Pacific General Securities* was also relied upon[13]. In *Laing O'Rourke Australia Construction Pty Ltd v Monford Group Pty Ltd* [2018] NSWSC 491, Stevenson J said this:

[13] Several Queensland and Victorian decisions have followed Brereton J's approach in Pacific General Securities: Claude Neon Pty Ltd v Rhino Signmakers Pty Ltd [2010] VSC 619 at [14]; McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2013] QSC 293 at [8] per Mullins J (this aspect of the reasoning was not challenged on appeal: McNab Developments (Qld) Pty Ltd v MAK Construction Services Pty Ltd [2015] 1 Qd R 350; [2014] QCA 232 at [15]); Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd [2010] VSC 300 at [12] per Vickery J; SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631 at [77] per Vickery J.

> "1 An adjudicator making a determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") has a 'duty…to come to a view as to what is properly payable' on, relevantly, the 'true merits of the claim' (*Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385; [2005] NSWCA 228 at [52] (Hodgson JA) (Ipp and Basten JJA agreeing)).
>
> 2 The mere absence of material adduced on behalf of a respondent to an adjudication application does not, without more, mean that an adjudicator can simply award the amount of the claim without addressing its merits.
>
> 3 As Brereton J said in *Pacific General Securities Ltd v Soliman & Sons* (2006) 196 FLR 388; [2006] NSWSC 13 at [82]:
>
> > '…the absence of [material put forward by the respondent] does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.'"

86 This statement is not correct. First, the words quoted in [1] from *Hargreaves* are an excerpt and do not capture the whole of Hodgson JA's reasoning. In particular the words "on what the adjudicator considers" are omitted from the explanation. Secondly, Hodgson JA's tentative dicta about a possible error by the trial judge in *Hargreaves* were inconsistent with the statutory scheme and with subsequent authority. Thirdly, Ipp JA excluded this passage from his agreement, and Basten JA disagreed with it. Subsequent first instance decisions, like *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423 at [40], which in substance repeat the legal test identified in *Monford* and follow Brereton J in *Pacific General Securities* were equally wrong to follow Hodgson JA's obiter remarks at [50]-[53] of *Hargreaves* and should not be followed.

The appeal in this case

87 The principal subject matter of the appeal was the appellant's claim that the primary judge erred in the application of s 32A of the Security of Payment Act. The appeal also alleged that the primary judge should have found further jurisdictional errors in relation to liquidated damages and the adjudicator's costs. I have spent some time identifying the correct test for jurisdictional error in relation to the Security of Payment Act as s 32A, a relatively recent provision, applies when part of an adjudicator's determination is *affected* by jurisdictional error. It is thus necessary to examine the correct test for

jurisdictional error in relation to the Security of Payment Act in answering the question posed by s 32A.

Appeal Grounds 3, 5, 8 and 10 – Section 32A

88 Section 32A of the Security of Payment Act provides:

> **32A Finding of jurisdictional error in adjudicator's determination**
>
> (1) If, in any proceedings before the Supreme Court relating to any matter arising under a construction contract, the Court makes a finding that a jurisdictional error has occurred in relation to an adjudicator's determination under this Part, the Court may make an order setting aside the whole or any part of the determination.
>
> (2) Without limiting subsection (1), the Supreme Court may identify the part of the adjudicator's determination affected by jurisdictional error and set aside that part only, while confirming the part of the determination that is not affected by jurisdictional error.

89 The section was introduced into the Security of Payment Act by the *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW) with effect from 21 October 2019. In the course of the Second Reading Speech in the Legislative Council, Mr Scot MacDonald (on behalf of the Hon Sarah Mitchell) stated (New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 24 October 2018 at 62):

> "New powers will enable the Supreme Court to sever part of an adjudicator's determination affected by jurisdictional error and confirm the balance to be enforceable. In *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, the New South Wales Supreme Court held that jurisdictional error invalidates the whole of an adjudicator's determination. This is the case even where the error is confined to one part of the determination and does not affect the remaining part or parts. This outcome unfairly and unnecessarily deprives a party of an interim payment with adverse consequences for cash flow. It also serves to incentivise a party to challenge unfavourable determinations. The purpose of section 32A is to address this by making clear that decisions can be set aside in part and as such are theoretically severable where jurisdictional error has infected a part but not the whole of the decision."

90 It may be, on a correct understanding of jurisdictional error in the context of the Security of Payment Act, that the primary judge, in following *Hargreaves* at [52] and *Pacific General Securities,* incorrectly discerned jurisdictional error in the adjudication determination where none existed. As Mr Robertson SC for Ceerose pointed out, however, with the exception of the complaint made in the cross-appeal, to which I will return, no challenge was made by A-Civil to the findings of jurisdictional error made by the primary judge.

91 The appellant raised what were described as a "cluster" of issues about the primary judge's decision concerning s 32A in grounds 3(a)-(g) and 5 (concerning York Street) and 8 and 10 (concerning Elizabeth Bay). Those grounds are:

> "3 The primary judge erred in exercising the power in section 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) because:
>
> (a) his Honour acted on a wrong principle and/or mistook the facts because his Honour's decision was based on the erroneous premise that Ground 8 should be rejected;
>
> (b) his Honour acted on a wrong principle and/or took and irrelevant consideration into account because his Honour proceeded (at [31]-[33]) on the bases that:
>
> (i) an adjudicator's reasons do not form part of the determination, and there is no power to set aside any part of an adjudicator's reasons;
>
> (ii) the legal effect of a determination does not to any extent derive from the reasons for the determination;
>
> (iii) where an adjudication determination is set aside in part, the reasons for the determination will become the reasons of the Court read, to the extent necessary, with the adjudicator's reasons;
>
> (c) his Honour mistook the facts (at [39]-[44]) by concluding that the amount the Appellant proposed to pay in the payment schedule (or a higher amount) would have been awarded by the Adjudicator irrespective of the jurisdictional errors;
>
> (d) his Honour acted on a wrong principle and/or took into account irrelevant considerations (at [39]-[44]) by asking what the Adjudicator would have done but for the jurisdictional error, rather than inquiring into the extent to which the error affected the York Street Determination and/or parts of it;
>
> (e) his Honour mistook the facts and/or acted on a wrong principle and/or took into account irrelevant considerations (at [39]-[44]) by treating as determinative of the exercise of power under section 32A, in the context of the jurisdictional errors found, that the Appellant had proposed to pay certain amounts as indicated in the payment schedule;
>
> (f) his Honour acted on a wrong principle and/or otherwise erred (at [40]) in holding that the Appellant should not be heard to contend that the Adjudicator, without error, could have awarded a lesser amount than the 'undisputed' amount;
>
> (g) his Honour acted on a wrong principle and/or otherwise erred (at [40]-[44]) by determining that the 'undisputed' amounts of the claim should be awarded to the First Respondent or, alternatively, concluding that the York Street Determination, after exercise of the

power in section 32A, should contain a determination that the 'undisputed' amounts are payable.

…

5 The primary judge ought to have concluded that, on the proper and preferable exercise of the power in section 32A and otherwise, the orders described in paragraph 3 of the York Street "Orders Sought" below should issue.

….

8 The primary judge erred in exercising the power in section 32A of the SOP Act because:

(a) his Honour acted on a wrong principle and/or mistook the facts because his Honour's decision was based on the erroneous premise that Ground 5 should be rejected;

(b) his Honour acted on a wrong principle and/or took and irrelevant consideration into account because his Honour proceeded (at [31]-[33]) on the bases that

(iv) an adjudicator's reasons do not form part of the determination, and there is no power to set aside any part of an adjudicator's reasons;

(v) the legal effect of a determination does not to any extent derive from the reasons of the determination;

(vi) where an adjudication determination is set aside in part, the reasons for the determination will become the reasons of the Court read, to the extent necessary, with the adjudicator's reasons;

(c) his Honour acted on a wrong principle and/or took into account an irrelevant consideration (at [57]) by acting on the basis that the meaning of the Payment Schedule and Adjudication Response were matters for objective determination by the Court;

(d) his Honour acted on a wrong principle and/or took into account an irrelevant consideration (at [59]-[60]) by concluding that it was open to sever an amount claimed by a respondent to an adjudication as a set-off, and rejected by the adjudicator as a result of a jurisdictional error.

…

10 The primary judge ought to have concluded and the Court of Appeal should now conclude that, on the proper and preferable exercise of the power in section 32A and otherwise, the orders described in paragraph 6 of the Elizabeth Bay 'Orders Sought' below should have issued."

92 The primary judge described the dispute between the parties about the correct application of s 32A of the Security of Payment Act by reference to item 4 of the payment claim:

"17 Both parties seem to accept the proposition that the Adjudicated Amount may be regarded as the sum of a number of distinct parts, only some of which are affected by jurisdictional error. It further seems to be common ground that in those circumstances it is open to the Court to make orders under s 32A of the Act to set aside the Determination in part. The parties differ, however, as to

how the affected parts should be dealt with in the process of making such orders. The differing approaches may be illustrated by taking, as examples, items 4 and 6 in the payment claim.

18 Item 4 concerned demolition works. By its payment claim, the defendant sought an amount of $145,790.50 on the basis that the works were 85% complete. That is, an amount of $145,790.50 in addition to the amount previously claimed in respect of the item ($349,897.20). By its payment schedule, the plaintiff said that the works were only 65% complete so the claim should be only $29,158.10. That is, an amount of $29,158.10 in addition to the amount of $349,897.20 previously claimed. The amount in issue was thus $116,632.40. (The disputed amount is incorrectly stated in the table at paragraph 363 of the adjudicator's reasons as $116,632.60, but nothing of significance turns upon that.)

19 The adjudicator accepted the defendant's claim. He thereby arrived at an 'adjudicated amount' of $495,687.70 in respect of the item. That is, $349,897.20 plus $145,790.50.

20 Pausing here, the defendant submitted that in making orders under s 32A it would be appropriate to sever and set aside, as affected by jurisdictional error, the sum of $116,632.60 in respect of this item. That is, the amount in dispute between the parties that was found in favour of the defendant. (The amount is actually $116,632.40, and I will henceforth adopt that figure.) The plaintiff, on the other hand, submitted that in making orders under s 32A, it would be appropriate to sever and set aside, as affected by jurisdictional error, the 'adjudicated amount' found by the adjudicator (that is, $495,687.70)."

93 To be clear, before the primary judge and in this Court, Ceerose accepted that 65% of the contracted demolition works had occurred, for which Ceerose had already made progress payments of $349,897.20 to A-Civil. Nonetheless, Ceerose's submission was that the effect of the primary judge's finding that it was jurisdictional error for the adjudicator to find that 85% (and not 65%) of the contracted demolition works had been completed was that A-Civil's entire payment claim for demolition works, including in relation to the 65% that Ceerose accepted had been completed, must be set aside.

94 The primary judge identified the adjudicator's "determination", correctly, as follows:

"28 Where jurisdictional error is found in relation to an adjudicator's determination, s 32A(1) allows the Court to set aside the whole or any part of the determination. It is implicit in the notion of a power to set aside part of an adjudicator's determination that the part to be set aside (and the other part that is not set aside) are identified. They must be identified if they are to be the subject of an order of the Court. Section 32A(2), which does not limit s 32A(1), further allows the Court to set aside the part of an adjudicator's determination 'affected by jurisdictional error' while confirming the part of the determination that is 'not affected by jurisdictional error'. It is expressly provided that any part so set aside must be identified by the Court, and it is implicit that any part so confirmed will also be identified."

95 The primary judge was correct, in making orders under s 32A, to focus on the three matters referred to in s 22(1): the amount of the progress payment (if any) to be paid by the respondent to the claimant, the date on which such amount becomes payable and the rate of interest payable on any such amount.

96 The correct approach may be illustrated by an example. In relation to item 4, the primary judge determined that the adjudicator was faced with a dispute in which A-Civil claimed that the work in relation to item 4 was 85% complete whereas Ceerose claimed that it was only 65% complete. In finding in favour of A-Civil, the adjudicator allowed an additional amount of $145,790.50 over the opposition of Ceerose who said the additional payment should be only $29,158.10 (being the amount in excess of the $349,897.20 already paid by Ceerose to reach the figure payable for the 65% of the demolition work that Ceerose accepted had been completed).

97 Whether the amount of $116,632.40, in dollar terms being the difference between 85% and 65% of the demolition work, was payable represented the ambit of the dispute the adjudicator was called upon to determine in respect of item 4. The primary judge correctly found that the effect of the adjudicator's finding in favour of A-Civil could be removed by deleting the sum of $116,632.40 (incorrectly recorded by the adjudicator as $116,632.60).

98 Put another way, had the adjudicator not fallen into jurisdictional error, he would have awarded an additional amount of at least $29,158.10. This is because Ceerose in its payments schedule accepted that $29,158.10 (in addition to the $349,897.20 already paid) was payable as 65% of the demolition work had been completed.

99 The primary judge was correct (at [42]) in relation to item 4 that, if $495,687.70 were deleted instead of $116,632.40, Ceerose would be substantially better off than had the adjudicator determined the dispute without error.

100 The appellant's submissions are inconsistent with the decision of this Court in *Joye*. The scope of the dispute referred for adjudication is identified by the reasons given in a payment schedule which impose a constraint on the scope of an adjudication. Addressing claim 4, the scope of the dispute was whether 85% of the demolition work (as A-Civil claimed) or 65% of the demolition work

(as Ceerose's payment schedule claimed) was payable to A-Civil. The value of the work was not in dispute. If 65% completion was the correct conclusion, $29,158.10 was payable. If 85% completion was the correct conclusion, $145,790.50 was payable.

101 As I have explained, the adjudicator was not, in the absence of any reason advanced by the recipient of a claim why a payment should not be made, nonetheless obliged to investigate and give written reasons for a conclusion about the "true merits of the claim" (including parts of the claim already paid for), lest he or she fall into jurisdictional error.

102 To be clear, the adjudicator here was not obliged to determine whether the 65% of the demolition work Ceerose had accepted in its payment schedule had been completed or what the value of that work was. The effect of the Security of Payment Act was that, having taken the position in its payment schedule that 65% of the demolition work had been completed and the value of that work was $29,158.10 more than the amount already paid, Ceerose was not permitted to complain in judicial review proceedings that the adjudicator, without error, could have awarded a lesser amount.

103 I do not accept Ceerose's submission that the primary judge's approach involves any "rewriting" of the adjudicator's determination. His Honour's decision simply involves the deletion of what his Honour found was the amount of the adjudicator's award "affected by jurisdictional error", namely $116,632.40.

104 Nor do I accept that the approach of the primary judge gives rise to uncertainty as to the reasons for the reduced amount. In circumstances where the Court has found jurisdictional error in relation to the item, the reduced amount reflects the Court's assessment, pursuant to s 32A of the Act, as to parts of the adjudicator's determination that are affected, or are not affected, by the error.

105 No uncertainty is created as to what work is the subject of the reduced amount. At the risk of repetition, Ceerose accepted that 65% of the demolition had been completed and that the value of that work was $29,158.10 more than the amount already paid. The orders made by the primary judge give effect to

Ceerose's payment schedule, a complete vindication of the only matter within the scope of the dispute submitted for adjudication about item 4.

106 It follows that grounds 3(a)-(g) should be dismissed.

107 Turning to ground 5, the "orders sought" referred to in this ground were a lengthy series of declarations that jurisdictional error occurred in relation to numerous paragraphs of the reasons of the adjudicator. For example:

> "(a) declare that jurisdictional errors occurred in relation to the York Street Determination, with those jurisdictional errors occurring in relation to:
>
> (i) page 1, the "Adjudicated Amount";
>
> (ii) page 2, "Adjudicator's Fees and Expense";
>
> (iii) paragraph 1(a);
>
> (iv) paragraph 1(d);
>
> (v) paragraph 1(e);
>
> (vi) paragraphs 75-84 (32-34 Hard Demolition (Item 4));
>
> (vii) paragraphs 92-98 (32-34 Render removal to North, East & South (Item 6));
>
> (viii) paragraphs 108-113 (32-34 Cutout to South brick wall (Item 8));
>
> (ix) paragraphs 114-119 (36 Hard Demolition (Item 4));
>
> (x) paragraphs 214-239 (V06 Extra-over cost for the demolition of 36-38 York Street boundary wall);
>
> (xi) paragraphs 343-362 (liquidated damages);
>
> (xii) paragraph 363, "Adjudicated Amount" column of items 4, 6, 8, 15, V06, "Liquidated Damages", "Subtotal part of Contract Sum", "Subtotal Variations", "Adjusted value claimed completed", "This Claim excl. GST", "GST' and "This claim incl. GST";
>
> (xiii) paragraph 364;
>
> (xiv) paragraph 376."

108 Ceerose submitted that because s 22(3)(b) of the Security of Payment Act provides that the "determination" includes the reasons for the determination, therefore s 32A of the Security of Payment Act obliges the Court to identify the parts of the *reasons* which should be set aside.

109 This submission may be addressed shortly. A judicial review is not of reasons; it is a review of determinations or orders. Section 32A permits a Court to identify the part of the adjudicator's determination affected by jurisdictional error and set aside that part only.

110 The primary judge found that:

> "48 In summary, it seems to me that it is possible to identify parts of the adjudicator's determination that are affected by jurisdictional error, and parts of it that are not affected by jurisdictional error. The parts that are not affected by jurisdictional error are:
>
> (1) the Adjudicated Amount up to $1,070,649.27;
>
> (2) the due date for payment of the Adjudicated Amount, being 28 June 2022;
>
> (3) the rate of interest payable, being 6.85% p.a.; and
>
> (4) the formal parts of the Determination (that is, those parts that identify it as such, identify the parties to it, and identify the payment claim and payment schedule to which it relates).
>
> 49 The parts of the Determination that are affected by jurisdictional error are:
>
> (1) the Adjudicated Amount above $1,070,649.27; and
>
> (2) the apportionment of the adjudicator's fees and expenses.
>
> 50 In my opinion, it would be appropriate to order, pursuant to s 32A of the Act, that the parts of the Determination identified as affected by jurisdictional error be set aside, and that the parts of the Determination identified as not affected by jurisdictional error be confirmed."

111 About a similar Queensland provision (*Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 101(4)), Bond J said in *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* (2020) 4 QR 410; [2020] QSC 133 that the "decision" referred to is the decision about the amount of the progress payment, if any, to be paid by a respondent to a claimant, the date upon which it becomes due and payable, and the rate of interest. That statement was correct.

112 Like the primary judge, I do not agree that orders setting aside reasons assist in achieving certainty as to the reasons which would justify the adjudicated amount that exists following an exercise of power under s 32A. Ceerose argued that such certainty is necessary, for example, because the principles of issue estoppel apply to adjudication determinations. However, if an adjudication determination is set aside in part by the Court pursuant to s 32A, the reasons for the decision (which might give rise to an estoppel) will be those of the Court read, to the extent necessary, with the adjudicator's reasons. Ascertaining the basis of the decision, for the purposes of identifying any issue estoppel, would not be aided by orders setting aside part or parts of the adjudicator's reasons. They would remain the reasons of the adjudicator for the

determination which has been set aside in part by the Court. The adjudicators reasons are not set aside, in whole or in part, by an order under s 32A.

113 Ground 5 should be dismissed.

Elizabeth Bay Appeal

114 The appeal as it related to Elizabeth Bay raised essentially the same grounds as already addressed in relation to York Street and need be addressed only briefly. The primary judge concluded:

> "59 The Adjudicated Amount determined by the adjudicator is $349,324.36 incl. GST. $3,740 plus GST is $4,114. If that amount were subtracted from the Adjudicated Amount it would become $345,210.36. Had the concrete saw cutting costs item been determined by the adjudicator without error, the Adjudicated Amount could not have been any lower than $345,210.36. That is a minimum amount that would have been awarded in any event. In my view, it is an amount that ought be regarded, for the purposes of s 32A of the Act, as a part of the Adjudicated Amount that is not affected by jurisdictional error.
>
> 60 Again, I do not see that as involving any impermissible 'rewriting' of the Determination. It is merely the deletion from the Adjudicated Amount of a part of it ($4,114) that can be said to be affected by jurisdictional error. The part can be said to be 'affected' by jurisdictional error for the purposes of s 32A as it is the monetary expression of a claim that was rejected in a manner that involved jurisdictional error, and had the error not occurred, some or all of that part might have been upheld. Construing 'affected' in that fashion seems to me to be justified by the ordinary meaning of the word (which includes 'influenced'), and in keeping with the statutory purpose, as expressed in the Second Reading Speech, of avoiding an unfair result where, as here, jurisdictional error is confined to one part of a determination and does not affect the remaining part or parts."

115 The primary judge was correct. The only jurisdictional error found by the primary judge was in relation to the adjudicator's treatment of a concrete saw cutting costs item, the agreed value of which was $4,114. That was the only part of the adjudicator's determination "affected" by jurisdictional error.

116 Ceerose's argument that jurisdictional error in the award of a concrete saw cutting costs item of $4,114 invalidated the entire award of $345,210.36 would set at naught the clear parliamentary purpose in enacting s 32A, as expressed in the second reading speech, of avoiding an unfair result where, as here, jurisdictional error is confined to one (vanishingly small) part of a determination and does not affect the remaining part or parts.

117 For the same reasons as given in relation to York Street ground 3, ground 8 should be dismissed.

118 In relation to ground 10, for the same reasons as in relation to ground 5 of the York Street appeal, it is the adjudicator's decision which is set aside, in part, and not the reasons of the adjudicator.

119 I would dismiss grounds 8 and 10 of the notice of appeal.

Appeal Grounds 4 and 9 – Costs payable to an adjudicator

120 It is convenient to deal with Ceerose's grounds 4 (York Street) and 9 (Elizabeth Bay) which address the question of the adjudicator's costs together.

121 Section 29 entitles an adjudicator to be paid.

> **29 Adjudicator's fees**
>
> (1) An adjudicator is entitled to be paid for adjudicating an adjudication application—
>
> (a) such amount, by way of fees and expenses, as is agreed between the adjudicator and the parties to the adjudication, or
>
> (b) if no such amount is agreed, such amount, by way of fees and expenses, as is reasonable having regard to the work done and expenses incurred by the adjudicator.
>
> (2) The claimant and respondent are jointly and severally liable to pay the adjudicator's fees and expenses.
>
> (3) The claimant and respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in such proportions as the adjudicator may determine.
>
> (4) An adjudicator is not entitled to be paid any fees or expenses in connection with the adjudication of an adjudication application if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3).
>
> (5) Subsection (4) does not apply—
>
> (a) in circumstances in which an adjudicator refuses to communicate his or her decision on an adjudication application until his or her fees and expenses are paid, or
>
> (b) in such other circumstances as may be prescribed by the regulations for the purposes of this section.

122 The primary judge found:

> "47 The adjudicator determined that liability for his fees and expenses should be apportioned 20% to the defendant and 80% to the plaintiff. It is true that no specific challenge was made to that determination and, further, that it was not the subject of the findings of jurisdictional error made by the Court. However, I do not think that this determination can be regarded as unaffected by the jurisdictional errors found. The adjudicator did not give any reasons for his conclusion as to apportionment, but it can be safely inferred that the

> conclusion was based at least in part upon the adjudicator's assessment of the relative successes and failures of the parties on the various issues the subject of the adjudication. In circumstances where jurisdictional error was found in respect of five items, and the monetary effect of the errors is substantial, as reflected in the amount of the severance to be made from the Adjudicated Amount, I think that the determination concerning fees and expenses must be regarded as having been affected by jurisdictional error. Accordingly, I consider that this part of the Determination should be set aside. The result of that is that the parties would each be liable to contribute to the fees and expenses in equal proportions."

123 That is, the primary judge found that the determination of the adjudicator of fees payable was "affected by jurisdictional error" within the meaning of s 32A and instead ordered that the part of the determination concerning fees be set aside, with the result that the parties would both be liable to contribute to the fees and expenses in equal proportions.

124 Grounds 4 and 9 of Ceerose's notice of appeal provided:

> "4 His Honour erred:
>
> (a) in holding (at [47]) that the Appellant was liable to contribute to the Second Respondent's fees and expenses in equal proportions with the First Respondent; and
>
> (b) in failing to declare that the Appellant was not liable to pay any part of the Second Respondent's fees and expenses.
>
> …
>
> 9 His Honour erred:
>
> (a) in holding that the Appellant was liable to contribute to the Second Respondent's fees and expenses in equal proportions with the First Respondent; and
>
> (b) in failing to declare that the Appellant was not liable to pay any part of the Second Respondent's fee and expenses."

125 In relation to the adjudicator's fees, Ceerose submitted that the parties' obligation to pay fees derives from s 29(2) (which Ceerose called the basic obligation) and s 29(3) (which it called the proportionate liability). The parties' obligation to pay fees is a corollary of the adjudicator's entitlement to be paid fees. Ceerose submitted that if there is no entitlement to fees (under s 29(1)), there could be no obligation to pay them (under ss 29(2) and (3)). The entitlement given by s 29(1) is subject to an exception in s 29(4). An adjudicator is not entitled to be paid fees if the adjudicator "fails to make a decision" within the permitted time.

126 Ceerose submitted that an adjudicator fails to make a decision within the meaning of s 29(4) if the adjudicator's decision is vitiated by jurisdictional error. *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716; [2011] NSWCA 399 at [82]-[84], [104] was cited as authority for this proposition.

127 Ceerose submitted that where the Court exercises its power under s 32A to confirm part of the decision, the decision is prospectively validated in part. However, that prospective validation does not change the historical fact that the adjudicator failed to make a valid decision within the permitted time. In that event, Ceerose said, an adjudicator has *no entitlement* to be paid fees, and there is no correlative obligation to pay them.

128 Ceerose asserted that the ordinary practice in the security of payment context (which was followed here) is for the claimant to pay the adjudicator's fees as a condition of the communication of the determination: s 29(5)(a). Where that ordinary practice is followed, on Ceerose's approach, the claimant would not have been obliged to pay any fee to the adjudicator. Ceerose submitted that A-Civil might have a right of restitution, subject to the operation of the immunity in s 30. Ceerose asserted that it had no obligation to pay or contribute to any part of the adjudicator's fees.

Consideration of grounds 4 and 9

129 In *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* (2019) 99 NSWLR 317; [2019] NSWCA 11, Sackville AJA (with the agreement of four other members of the Court) said this:

> "165 Characterising a determination affected by jurisdictional error as invalid does not necessarily mean that the determination has no legal consequences. In *Chase Oyster Bar* Basten JA quoted a passage from a Federal Court judgment which was expressly approved by Gleeson CJ in *Minister for Immigration and Ethnic Affairs v Bhardwaj* as follows:
>
> > 'There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is

> to have effect even though it is invalid or that it will have effect until it is set aside.'
>
> Basten JA therefore contemplated that an adjudication determination affected by jurisdictional error, although liable to be set aside by the Supreme Court in its supervisory jurisdiction, can have consequences for the parties." (footnotes omitted)

130 McHugh JA in *GJ Coles Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525 observed as follows:

> "One of the basic doctrines of common law jurisprudence is the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependant on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine." (Emphasis in original.)

131 Sackville AJA in *Seymour White* said of this observation by McHugh JA:

> "175 Despite the apparently unqualified observations of McHugh J in *G J Coles*, a decision affected by jurisdictional error – even a failure to comply with a "mandatory" statutory precondition to the exercise of a power – is not necessarily devoid of legal consequences. In *New South Wales v Kable*, Gageler J speaking of an invalid law said:
>
> > 'Yet a purported but invalid law, like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a "nullity" in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself.'"

132 An adjudication determination affected by legal error is not necessarily void for all purposes. One of those purposes is the obligation to pay costs of the adjudication provided in s 29(1)-(3). The adjudicator's right to be paid is based on a fact: the adjudicator is "entitled to be paid for adjudicating an adjudication application".

133 To paraphrase Gageler J in *New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 at [52], the action so taken, adjudicating an adjudication

application, has consequences for the creation of legal rights and legal obligations, as set out in s 29, which consequences do not depend on the legal force of the adjudication decision itself.

134 The obligation of the parties to pay the "the adjudicator's fees and expenses" being the subject matter of s 29(1), either "jointly and severally" (s 29(2)), or "in such proportions as the adjudicator may determine" (s 29(3)) is based on the fact underlying s 29(1), that the adjudicator is "entitled to be paid for adjudicating an adjudication application". If that work is done, that remains a fact whether or not the decision is subsequently set aside for jurisdictional error.

135 In context, s 29(4) is not engaged in a case where an adjudicator's decision is subsequently struck down, in whole or in part, for jurisdictional error. Section 29(4) provides an exception to an adjudicator's entitlement to be paid "if he or she fails to make a decision on the application (otherwise than because the application is withdrawn or the dispute between the claimant and respondent is resolved) within the time allowed by section 21(3)" (10 business days from the trigger event(s) in the section unless extended by agreement). The fact that an adjudicator has adjudicated an adjudication application creates rights to payment which do not depend on the legal force of the adjudication decision itself.

136 Insofar as Ceerose relied on *Cardinal* at [82]-[84] and [105] for the contrary proposition, there is much force in the dissent of Basten JA in that case, as this Court explained in *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172 at [44] (Meagher, Leeming and Payne JJA). If it were necessary to decide here, I would find that the majority in *Cardinal* should no longer be followed and Basten JA's dissent is correct. As the Court said in *Parrwood*, Basten JA's construction is more consistent with the High Court's decision in *Hossain* at [24][14].

137 I do not need to go so far, however, as the statutory language and purpose of ss 26 and 29 of the Security of Payment Act here engaged are quite different. *Cardinal* concerned s 26 and the question of when the time for filing a new

[14] Cited at [38] above.

adjudication application commenced to run. It was directed at rights of the *parties* to make a new claim. Those rights were engaged where the adjudicator "fails to determine the application". Section 29, however, is addressed to the rights of a non-party, the adjudicator, to payment based on the factual premise that the adjudicator has conducted work he was asked by the parties to do. The s 29 payment obligation is predicated on the fact of that work being done, not upon production of what a court later finds is a "valid" adjudication.

138 It would be a curious result for the rights to payment of a non-party to the dispute, for work he or she has in fact conducted, to depend on whether a court subsequently discerns jurisdictional error in some part of that work. No authority was cited by Ceerose for the proposition that an adjudicator under the Security of Payment Act is not entitled to be paid if a determination is ultimately set aside for jurisdictional error in the Equity Division, by this Court or in the High Court. The correct construction of s 29 is that a consequence of a finding of jurisdictional error is *not* that the adjudicator is not entitled to be paid.

139 I would reject grounds 4 and 9 of the appeal. I will return to the question of the adjudicator's costs in addressing the cross-appeal.

Appeal Grounds 1-2 and 6-7 – Liquidated damages

140 Ceerose made two claims for liquidated damages which were rejected by the primary judge. The first related to the York Street development (grounds 1 and 2). The second related to the Elizabeth Bay development (Grounds 6 and 7).

York Street liquidated damages

141 In its payment schedule, the appellant claimed $720,000 in liquidated damages under cl 34.7 of the York Street contract with the respondent. The basis for this claim was that the respondent had failed to achieve "practical completion" of the work by the "date for practical completion". The payment schedule framed the claim for liquidated damages as follows:

> "232. The delay to the works under the Subcontract were caused solely due to the acts and omissions of A Civil. To assert any other position would be unfounded and baseless.
>
> 233. A Civil failed to, amongst other things, carry out the works in accordance with the Subcontract. A Civil's default under the Subcontract can be summarised as follows (the details of which are contained in Notice to show Cause issued by Ceerose on 12 April 2022): (a) Under Clause 31 – failure of

> Subcontractor to have adequate resources on site (b) Under Clause 31 – failure to comply with a direction of the Superintendent under clause 31 in respect to the adequacy of resources (c) Under Clause 32 – Subcontractor has departed from the construction program without reasonable cause in breach of clause 32 (d) Under Clause 34.1 – subcontractor has delayed the performance of the Works under Subcontract in breach of this clause and (e) Under Clause 34.1 – failure to comply with a direction by the subcontract superintendent under clause 34.1 with respect to a delay to the Works under Subcontract.
>
> 234. As the delay caused is solely attributable to A Civil, there is no entitlement under the Subcontract for A Civil to make a claim for an extension of time as such matters are not qualifying causes of delay' as defined under the Subcontract.
>
> 235. Even if A Civil was entitled to submit a claim for an extension of time (which is denied), A Civil did not make a claim for an extension of time to the under the Subcontract.
>
> 236. Accordingly, A Civil is now barred from making any claims for an extension of time under the Subcontract. In that regard, Ceerose refers to clause 34.3 of the Subcontract which has been extracted in part above.
>
> 237. In view of the above, in accordance with its rights under the Subcontract, Ceerose applies liquidated damages for each day between the 'date for practical completion' to the 'date of practical completion'. As 'practical completion' has not yet been achieved, the amount Ceerose is entitled to deduct (as at the date of this payment schedule, being 14 June 2022) for liquidated damages, is $720,000 which is calculated as follows: 45 x $16,000 per day – $720,000."

142 Paragraph [220] of the payment schedule provided: "due to the fanciful and speculative claim made by A-Civil, A-Civil has forced Ceerose to apply liquidated damages in accordance with Ceerose's contractual entitlement". Ceerose's claim for liquidated damages did not, in terms, present itself as a "reason for withholding the payment claimed" by A-Civil within the meaning of s 14(2). Ceerose submitted that it was entitled to liquidated damages as "a set-off" against the payment claim A-Civil made. I will assume, without deciding, that a "set-off" was theoretically available to Ceerose in the adjudication.

143 In its adjudication application, A-Civil responded to the claim for liquidated damages by contending relevant delays were caused by Ceerose, and that Ceerose had prevented A-Civil from carrying out works under the contract. A-Civil also contended that no entitlement to liquidated damages had arisen under cl 34.7 of the contract, or alternatively, any such entitlement had been lost by Ceerose's failures to grant extensions of time.

144 Ceerose's adjudication response repeated, in greater detail, the submissions it had made in its payment schedule. It maintained that A-Civil was responsible for the delays and argued A-Civil had not discharged its onus of proving that Ceerose was instead responsible. It also denied that A-Civil had properly sought the extensions of time it now wished to rely on.

145 In the adjudication response, Ceerose also made a different claim, namely that its entitlement to liquidated damages could be calculated at the date of A-Civil's purported termination of the contract, which was either 30 June or 1 July 2022. Ceerose claimed that, at that date, it was entitled to $992,000 in damages. Ceerose did not in written submissions address the limitations of s 20(2B) of the Security of Payment Act, namely that the adjudication response cannot address matters not raised in the payment schedule but accepted, in oral argument in this Court, that the adjudicator had correctly addressed the argument presented by Ceerose in its payments schedule in paragraph [347] of the adjudication determination. At [347] the adjudicator set out his understanding of the dispute:

> "347. The Claimant argues that the Respondent has no right to apply liquidated damages until the Date of Practical Completion has been achieved."

146 It was common ground in this Court that the Date of Practical Completion had not been achieved. The adjudicator then explained:

> "349 I accept the Claimant's arguments on this point and I do not accept the Respondent's arguments because the Respondent's right to claim liquidated damages only accrues at the time it is able to calculate liquidated damages in accordance with clause 34.7 of the contract, which is the date when;
>
> a. the date of practical completion is achieved;
>
> b. termination of the subcontract has occurred; or
>
> c. the Main Contractor has taken all WUS out of the hands of the Subcontractor.
>
> 350 Neither the Claimant nor the Respondent have claimed or provided any evidence showing that any of the above-mentioned events have occurred.
>
> 351 Accordingly, the Respondent has not yet accrued the right to set-off any liquidated damages because it cannot calculate the liquidated damages in accordance with cl.34.7 of the contract and there is nothing in the contract that otherwise entitles the Respondent to set-off liquidated damages.
>
> 352 I, therefore, do not accept that the Respondent is entitled to set-off any liquidated damages against the Claimant."

147 Ceerose's complaint to the primary judge, repeated in this Court, was that it had been denied procedural fairness by the adjudicator as, having set out the times at which Ceerose was able to calculate liquidated damages in accordance with cl 34.7 of the contract, and having identified "termination of the subcontract" as being a time from which liquidated damages could be calculated, the adjudicator was obliged to give Ceerose an opportunity to make further submissions about the termination of the contract.

148 The primary judge was unpersuaded by Ceerose's submission:

> "121 I do not accept that there has been any denial of procedural fairness in respect of the adjudicator's conclusion at paragraph 349 of the Determination. The adjudicator was there dealing with the competing arguments of the parties as to whether an entitlement to liquidated damages had arisen under cl 34.7 of the contract. The defendant had submitted that there was no such entitlement because the date of the practical completion had not yet arrived, and had not arrived when the payment schedule was made (on 14 June 2022). The plaintiff had submitted in paragraph 1 of its adjudication response that it was entitled to liquidated damages for each day up to and including the date of [practical] completion, but did not suggest that such date had occurred. The plaintiff, after referring to the contract having been terminated on either 30 June 2022 or 1 July 2022, also submitted that it was entitled to liquidated damages in the amount of $992,000 as at the date of termination (or $720,000 as at the date of the payment schedule).
>
> 122 However, it is my view that the submission concerning an entitlement to $992,000 cannot be regarded as a submission duly made in support of the payment schedule in circumstances where the payment schedule makes no such claim. The payment schedule made a claim, as at 14 June 2022, for liquidated damages in the amount of $720,000. That is to say, it was claimed in the payment schedule that, as at 14 June 2022, the plaintiff had an entitlement to liquidated damages in the amount of $720,000. The claim for $992,000 is a different claim that arises from events occurring after 14 June 2022, including the asserted termination of the contract. That being so, the adjudicator was not bound to consider the submission that rested in part upon the termination of the contract.
>
> 123 The adjudicator approached the cl 34.7 point on the basis that the critical question was whether the plaintiff's claimed entitlement to liquidated damages had accrued. As the claim had been made on 14 June 2022, and was calculated by reference to a period ending on that date, it is implicit that any entitlement would have had to accrue by that date. In these circumstances, the adjudicator's reasons should be read as being addressed to the question of whether the claimed entitlement had arisen by 14 June 2022.
>
> 124 In my opinion, the adjudicator appropriately addressed the question by reference to the submissions made by the parties, other than the submission that rested in part upon the termination of the contract. However, as I have said, the adjudicator was not bound to consider that submission as it was not one duly made in support of the payment schedule. There was no denial of procedural fairness involved in dealing with the matter in that fashion, and no failure to consider a submission as required by s 22(2)(d) of the Act."

149 On the York Street appeal, the appellant submitted that the adjudicator denied procedural fairness in three ways:

(1) No party contended that liquidated damages did not accrue under the subcontract until one of the three events specified by the adjudicator occurred.

(2) The adjudicator failed to consider the adjudication response, and in particular Ceerose's "substantial, clearly-articulated argument" that A-Civil had terminated the subcontract. Ceerose pointed to paragraph [30] of its adjudication response which said the contract had been terminated and attached a copy of the notice of termination.

(3) The adjudicator found that Ceerose was disentitled from claiming liquidated damages because it "prevented" A-Civil from completing the work by engaging another contractor, O'Sullivan, to work on the same site. Ceerose complained that neither party had sought this finding or provided evidence of when O'Sullivan commenced work.

Consideration of York Street liquidated damages

150 The adjudicator was under no obligation to consider Ceerose's submissions about the alleged termination of the contract where those submissions had not been made in the payment schedule: s 20(2B), Security of Payment Act. The availability of liquidated damages by reason of termination of the contract was outside the scope of the dispute presented for adjudication. The primary judge was correct so to conclude.

151 The adjudicator did conclude, correctly, that Ceerose failed in the only claim that was made in the payment schedule, as the date of practical completion had not been achieved.

152 Ceerose also complained about the passages in the adjudicator's reasons between [353]-[363] in which the adjudicator found that Ceerose prevented A-Civil from carrying out its work under the contract by engaging O'Sullivan and that, as a result, Ceerose did not accrue any entitlement to liquidated damages for that period and, therefore, its claim to set-off liquidated damages must fail.

153 The primary judge held about that complaint:

> "125 The adjudicator's conclusions expressed at paragraphs 351 and 352 were sufficient to dispose of the plaintiff's claim for liquidated damages adversely to the plaintiff. Accordingly, any denial of procedural fairness in relation to the conclusion that the engagement of O'Sullivan prevented the defendant from carrying out work could have made no difference to the outcome of this claim." (footnotes omitted)

154 The primary judge was correct in these conclusions. It is clear that the finding that engagement of O'Sullivan prevented the defendant from carrying out work could have made no difference to the outcome of this claim. No practical injustice has been shown: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37]-[38]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7; *SDCV v Director-General of Security* [2022] HCA 32; 96 ALJR 1002.

155 If it were necessary to do so, I would also uphold ground 1 of A-Civil's notice of contention. For the reasons given at [51]-[69] above, there was no obligation on the adjudicator expressly to identify each argument and expressly state whether he was accepting or rejecting it. As I have said, 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). Whilst 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. This is not such a case.

156 I would dismiss grounds 1 and 2 of the notice of appeal

Elizabeth Bay liquidated damages

157 There was also a claim in liquidated damages for the Elizabeth Bay development, again as a set-off against A-Civil's payment claim. These damages Ceerose calculated at $195,500, on the basis of a 23-day delay. In its payment schedule, it said the "practical date of completion" was 22 March 2022.

158 In its adjudication application, A-Civil submitted that the date for practical completion was in fact 25 May 2022 and that completion was achieved on 14 April 2022. In its adjudication response, Ceerose responded that although the contract specified 25 May 2022 as the date for completion, that date was subsequently changed to a date 12 weeks after the site was established, which it said was 9 March 2022. As evidence for this change, Ceerose relied on Marking H to the contract, which was raised for the first time in the adjudication response; the marking was not mentioned in the payment schedule.

159 The adjudicator found no entitlement to liquidated damages, reasoning as follows:

> "118 The Respondent did not provide any evidence that the date for practical completion had been changed from 25 May 2023 to 9 March 2022.
>
> 119 Accordingly, I prefer the Claimant's assertion that the date for practical completion was, as was set out in Item 11(a) of Part A of the Annexure, being 25 May 2023.
>
> 120 Given that there is no dispute about whether the Claimant has achieved practical completion, I decide that the Claimant achieved practical completion on 14 April 2022. This based on the Respondent's claimed adjusted date for practical completion of 22 March 2022 (per extension of time claim determination No.004 dated 12 April 2022) plus 23 calendar days, being the date of practical completion (per part 3b of the annexure to the payment schedule #06).
>
> 121 As the Claimant achieved practical completion before the date for practical completion, the Respondent is not entitled to claim any liquidated damages pursuant to clause 34.7 of the Contract.
>
> 122 Accordingly, I do not accept the Respondent's set-off relating to liquidated damages."

160 Before the primary judge, Ceerose submitted that the adjudicator failed to consider its submission and evidence, in particular Marking H, that the date for practical completion was earlier than 25 May 2022.

161 On appeal, Ceerose in substance repeated its arguments below. It argued the primary judge failed to construe the adjudicator's reasons correctly. In particular, Ceerose pointed to paragraph [118], where the adjudicator found there was "no evidence" of a change in completion date. This, it argued, was different from a conclusion that the evidence did not support the alleged change. The language at [118], Ceerose submitted, showed that the adjudicator had not considered the evidence in Marking H.

Consideration of Elizabeth Bay liquidated damages

162 The primary judge made findings about the Marking H issue at [177] as follows:

> "I am unable to accept the plaintiff's submissions. It is clear from the adjudicator's reasons that he appreciated the nature of the dispute, including the central argument concerning the date for practical completion. The reasons strongly suggest that the adjudicator considered the submissions that were contained in the adjudication response. It is also clear that the adjudicator considered the provisions of the contract in relation to that issue, although I acknowledge that the adjudicator makes no reference to Marking H. However, the text of Marking H (apart from the heading) is set out in the adjudication response at paragraph 61, and I think it is likely that the

> adjudicator read that as part of his consideration of the submissions. Moreover, I do not agree that the statement made in paragraph 118 of the Determination must be incorrect. When one has regard to the terms of Marking H, which are concerned with time for completion of demolition works, and say nothing about the date for practical completion, it would not be inaccurate to conclude that it provided no evidence of a change to that date. The adjudicator's reasoning on this point might have been expressed better or more clearly, but any such deficiency does not amount to jurisdictional error."

163 The primary judge was correct to conclude that the adjudicator's reasons demonstrated that he considered Ceerose's submissions. As I have said at [51] above, while the processes of decision making may be revealed by the reasons required to be given under s 22(3), those reasons will not necessarily demonstrate a negative proposition, namely a failure to consider a particular matter required to be considered, simply because it is not referred to in the reasons. The primary judge was correct to conclude that the present was such a case in circumstances where the thing allegedly not taken into account, Marking H, was set out in full elsewhere in the adjudicator's reasons.

164 The primary judge was correct to conclude that Marking H was concerned with the time for completion of demolition works and said nothing about the date for practical completion. It was not inaccurate for the adjudicator to conclude that there was no evidence of a change in completion date. Nor, if the adjudicator had erred in this respect, would it have been a reviewable error.

165 Finally, if it were necessary to do so, I would also uphold ground 4 of the Notice of Contention. The adjudicator was under no obligation to consider the submission about Marking H. Neither Marking H nor the purported change of the completion date to 9 March 2022 was raised in Ceerose's payment schedule. Accordingly, by reason of s 20(2B), Ceerose was unable to make the submissions now relied upon in its adjudication response. Even if Ceerose's contentions about what was taken into account were correct, the adjudicator would not fall into jurisdictional error by failing to consider matters not contained in Ceerose's payment schedule.

166 I would dismiss grounds 6 and 7 of the notice of appeal.

Cross-appeal by A-Civil

Clause 36.6 of the contract – York Street

167 Although addressed in 8 grounds, A-Civil advanced in its cross-appeal a challenge to only one of the findings of jurisdictional error made by the primary judge, relating to cl 36.6 of the York Street contract.

168 A-Civil's payment claim included the amount of $687,214.19 for "variation 6" to the stipulated work, which concerned the demolition of a wall. A number of documents were attached to the payment claim in support of the variation, including Attachment A03 which contained a calculation of the total wall area involved (917.77m2) and a calculation of the total additional cost of demolition based on specified rates for hand demolition.

169 In the payment schedule, Ceerose objected to this claim on the ground that, *inter alia*, A-Civil was time-barred from making the variation claim by cl 36.6 of the contract:

> "129 Further and in the alternative, even if Ceerose directed the purported variation (and this is denied), A Civil is time barred from making the purported claim. Clause 36.6 states in part that A Civil must submit its claim in connection with any work the subject of a variation in the progress claim next following execution of that work (whether partly or wholly executed). Clause 36.4 states that A Civil acknowledges that if it does not comply strictly with the requirements of clause 36, it shall not be entitled to make a Claim."

170 Ceerose in substance repeated this argument in its adjudication response:

> "119 Clause 36.6 of the Subcontract states in part, that a variation must be submitted within the month of execution of the work. The works the subject of this claim commenced [in March 2022] however the Claimant did not issue a claim until May 2022."

171 Clause 36.6 of the subcontract provided:

> "Despite anything in this contract to the contrary, the *Subcontractor* must submit its claim in connection with any work the subject of a *variation* in the progress claim next following the execution of that work (whether partially or wholly executed). In the event that the *Subcontractor* does not claim the value of that work no later than the progress claim next following the progress claim abovementioned, the *Subcontract Superintendent* may determine the value of any such work and such determination will be final and binding as between the parties."

172 The primary judge found:

> "90 … I am unable to conclude that the plaintiff's time bar argument was disposed of by the reasoning contained in paragraphs 228 and 229 of the

> Determination. Those paragraphs (read with paragraph 218) can be seen to deal with the argument that there was no entitlement to the variation because there was no written direction for the variation under cl 36.1 of the contract. However, even when read with other parts of the Determination, they do not seem to touch upon the separate question of whether the defendant submitted its variation claim within the period allowed under cl 36.6 of the contract. Paragraphs 148-9, 179-80 and 210-11 do not assist the defendant's argument because they concern a different argument in relation to the administration of the contract by the superintendent. Whilst statements are made to the effect that the plaintiff could not 'in some cases' insist upon strict compliance with the terms of the contract in relation to notification and making of claims, the adjudicator does not state that this would prevent the plaintiff from relying upon cl 36.6 to defeat this variation claim.
>
> 91 Although the reasons for a determination under the Act do not necessarily have to refer to all of the submissions made in support of a payment claim or payment schedule, the absence of any reference to a submission may permit an inference to be drawn that the adjudicator did not give any consideration to it (see *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* (supra) at [23] per Basten JA; *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* [2017] FCA 1377 at [43] per Griffiths J). Whether such an inference can or should be drawn depends of course upon the particular circumstances of the case at hand. Here, the Determination contains a general statement in paragraph 53 to the effect that the adjudicator has only had regard to the matters set forth in s 22(2) of the Act, including submissions properly made in support of the payment schedule. However, I do not think that statement warrants a conclusion that, despite the lack of any reference to it, the adjudicator considered the plaintiff's time bar argument in dealing with Variation 6 (see *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* (supra) at [48]). Rather, it seems to me that the inference should be drawn in the circumstances that the adjudicator failed to consider that argument. The argument was one of only a few arguments raised that challenged the defendant's contractual entitlement to claim the variation. It can fairly be regarded as one of the main arguments raised. The other main arguments of that character (namely, the cl 36.1 argument and the scope of the contract argument) can be seen from the reasons to have been dealt with by the adjudicator. If the adjudicator had given any consideration to the time bar argument, it is likely that this would also have found expression in the reasons. I note that even the argument based on cl 2.8.5 of the Scope of Works (which seems to go only to quantum rather than entitlement to claim) was referred to in the reasons.
>
> 92 In addition, it is my view that had the time bar argument been considered by the adjudicator, there is a reasonable possibility that it could have led him to reach a different conclusion. Put another way, the failure to consider the argument cannot be dismissed as immaterial."

173 A-Civil submitted that the primary judge erred in concluding, by inference, that the adjudicator had failed to consider a mandatory matter pursuant to s 22(2)(d) of the Security of Payment Act. It was submitted that the primary judge had engaged in impermissible merits review.

174 Ceerose's submissions about the appropriate legal test should be set out here, as they contain references to many of the decisions that I have explained at [82]-[86] above should no longer be followed:

> "Pausing here, having received these submissions, the duties of the Adjudicator were well-established. The Adjudicator was obliged to consider the submission as to cl 36.6: s 22(2)(d). The duty to consider the submission required, in respect of cl 36.6, 'a process of evaluation, sufficient to warrant the description' of the matters being taken into consideration: *Cockram Construction Pty Ltd v Fulton Hogan Construction Pty Ltd* (2018) 97 NSWLR 773 at [41]; see also *MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd* [2020] NSWSC 1147 at [57]; *Acciona Infrastructure Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423 at [35]. What is required is an 'active intellectual process' directed to the submission: *MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd* [2020] NSWSC 1147 at [57]; *Total Lifestyle Windows Pty Ltd v Aniko Constructions Pty Ltd* [2021] QSC 231 at [51]-[57]; see also *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 at [31]ff."

Consideration of cl 36.6 cross-claim

175 Without repeating all that I have said at [52]-[69] above, Ceerose's approach of demanding an "active intellectual process" on the part of an adjudicator is apt to mislead. As the High Court explained in *M1/2021*, "active intellectual process" is a phrase providing a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any decision-maker's decision can be scrutinised. As the High Court concluded, that is not the correct approach.[15]

176 The observations made at [62]-[69] above about taking matters into account referred to in s 22(2)(d) of the Security of Payment Act are particularly apposite here. As I have said, for those 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). This was not a case where the inference should have been drawn that the adjudicator failed to consider the argument raised by cl 36.6.

177 As Basten JA remarked (Leeming and White JJA agreeing) in *Goodwin*:

> "23 …Where there is apparently credible and relevant material before the decision-maker, which appears to engage with a mandatory consideration, and there is no reference to that material in the reasons provided by the decision-maker, it may be inferred that no regard was had to it. That may allow for the

[15] See at [56] above.

> inference that no regard at all was had to the mandatory consideration. That must be distinguished from the situation where, while there is no reference to the material, it cannot be inferred that the decision-maker must have referred to it, if it had been properly considered. It is well established that judges are not required to refer to all the evidence before the court; so it is true that a decision-maker is not required to refer to all the material supplied by one party before rejecting the party's claim."

178 This was not a case where it could be inferred that the decision-maker must have referred to the argument in his reasons, if it had been properly considered. This claim related to variation 6. The adjudicator did address Ceerose's cl 36.6 argument at greater length when dealing with other variations[16].

179 The primary judge's conclusion that cl 36.6 was not considered during the variation 6 claim is unsound. It is quite unrealistic in the context of the time sensitive and document heavy adjudication process required under the Security of Payment Act to require an adjudicator, lest he or she commit jurisdictional error, to treat minutely with repetitive arguments or repetitively reject what is essentially the same contention. The primary judge erred in concluding that Ceerose had shown that its cl 36.6 argument was not taken into account by the adjudicator in addressing the variation 6 claim.

180 Properly understood, cl 36.6 does not impose a "time bar". A subcontractor is not disentitled from making a variation claim if they do not do so in the progress claim immediately following the execution of the "variation" work. Rather, the clause is permissive; if a subcontractor does include the variation in the next progress claim, it allows the subcontract superintendent to determine the value of variation work. The payment schedule and adjudication response did not characterise cl 36.6 in that way or provide the adjudicator with any assistance about proof of any of the component parts of the requirements of cl 36.6. At [169] above what Ceerose said in its payment schedule about cl 36.6 is set out. Ceerose did not annexe to the payment claim relevant documents or cross-refer to those documents in any meaningful way to explain how it was that cl 36.6 imposed any constraint on A-Civil's payment claim at all. For example, Ceerose did not seek to annexe or identify what it asserted was "the progress claim next following execution of that work (whether partly or wholly executed)"

[16] Adjudicator's reasons at [131], [149], [162], [180], [193], [211], [228]-[229], [248], [304], and [305].

within the meaning of cl 36.6. Ceerose relied instead on assertion. The adjudicator was not required to wade through the voluminous material presented to him by Ceerose to try and find a basis for Ceerose's contention which was not a substantial, clearly articulated argument relying upon established facts presented by Ceerose in its payment schedule. Much less was it jurisdictional error for the adjudicator to fail to engage in a search for material to support Ceerose's claim.

181 If it were necessary to do so, I would also conclude that paragraphs [228] and [229] of the adjudicator's determination addressed the substance of the requirements of Ceerose's cl 36.6 argument. The adjudicator said:

> "228 I am satisfied that the Respondent was notified both by its consulting engineer and by the Claimant on 10 February and 24 February 2022 that the conditions encountered were not those that the Respondent had declared existed by way of its drawings, with which the Claimant had to comply.
>
> 229 I am further satisfied that the Claimant notified the Respondent that the revised construction methodology instructed by its consulting engineer on 10 February 2022 involved hand demolition rather than demolition using a 5 tonne excavator and was significantly more labour intensive and the Claimant confirmed it intended to claim payment for the additional work due to the Respondent's consultant's instruction to change the method of demolition."

182 Whilst cl 36.6 was not specifically mentioned in these passages, the substance of Ceerose's case before the adjudicator was that A-Civil had failed properly to notify Ceerose of the variation claim in time. The adjudication determination addressed that complaint and determined the point at which Ceerose was "notified" about the conditions that made the demolition necessary and the demolition itself. That demolition was the subject of variation 6. The conclusion reached by the adjudicator may not be correct. That, however, does not mean that he fell into jurisdictional error because he failed to address a mandatory consideration.

183 I would allow grounds 1-8 of the cross-appeal. The appropriate relief is that Ceerose be ordered to pay to A-Civil $687,214.19, the amount affected by the relevant order made by the primary judge. I reject Ceerose's submission that $687,214.19 should be paid into court, pending the outcome of Ceerose's application for a stay pending proceedings contemplated by s 32 of the Security of Payment Act. As I will explain, that stay application has now been

determined and orders will be made in the Equity Division giving effect to Ball J's reasons following delivery of this judgment.

Adjudicator's Costs – York Street

184 As I have said, in the York Street determination the adjudicator apportioned his fees and expenses as payable 80% by Ceerose and 20% by A-Civil. On the basis that he had found error in relation to discrete five aspects of the York Street determination, his Honour held that the adjudicator's determination of fees and costs was affected by those jurisdictional errors and, pursuant to s 32A of the Security of Payment Act, set aside that part of the determination, with the consequence that each party would be responsible for 50% of the costs of the adjudication by reason of s 29(3) of the Security of Payment Act.

185 The primary judge concluded:

> "47 The adjudicator determined that liability for his fees and expenses should be apportioned 20% to the defendant and 80% to the plaintiff. It is true that no specific challenge was made to that determination and, further, that it was not the subject of the findings of jurisdictional error made by the Court. However, I do not think that this determination can be regarded as unaffected by the jurisdictional errors found. The adjudicator did not give any reasons for his conclusion as to apportionment, but it can be safely inferred that the conclusion was based at least in part upon the adjudicator's assessment of the relative successes and failures of the parties on the various issues the subject of the adjudication. In circumstances where jurisdictional error was found in respect of five items, and the monetary effect of the errors is substantial, as reflected in the amount of the severance to be made from the Adjudicated Amount, I think that the determination concerning fees and expenses must be regarded as having been affected by jurisdictional error. Accordingly, I consider that this part of the Determination should be set aside. The result of that is that the parties would each be liable to contribute to the fees and expenses in equal proportions."

186 This finding was the subject of A-Civil's cross-appeal.

187 I reject A-Civil's submission that a decision on apportionment, in principle, cannot be categorised as having been "affected by" an established jurisdictional error and therefore "is beyond review". It was open to the primary judge to find that s 32A of the Security of Payment Act applied to this part of the adjudicator's determination. However, whether the adjudicator's order that Ceerose pay 80% of the adjudicator's fees and expenses was equally "affected" by the four jurisdictional errors the primary judge found and that A-Civil did not contest in this Court requires further consideration. Success for A-

Civil on grounds 1-8 of its cross-appeal had a significant monetary effect on the position between the parties but A-Civil did not seek to disturb the findings of jurisdictional error made by the primary judge in any other respect.

188 The effect of A-Civil's success with respect to grounds 1-8 on the cross-appeal is that the payment claim of $3,556,467 will be reduced by only a further $198,972 (between 5% and 6%) beyond the reductions made by the adjudicator. It is not possible to infer that the adjudicator, acting reasonably, would have reduced the apportionment of costs because of that variation in the degree of the claimant's success, even if measured solely in monetary terms, which was not required as a matter of law and may not have been the sole basis on which the original apportionment was made. Accordingly, the order of the primary judge setting aside the adjudicator's determination of responsibility for payment of his fees and expenses should itself be set aside, so that the adjudicator's determination in that respect will stand.

Adjudicator's Costs – Elizabeth Bay

189 In the Elizabeth Bay determination, the adjudicator apportioned his fees and expenses to be payable in full by Ceerose. As the primary judge found jurisdictional error in relation to the Elizabeth Bay determination, his Honour held that the adjudicator's determination of fees and costs was affected by jurisdictional error and, pursuant to s 32A of the Security of Payment Act, set aside that part of the determination, with the intention that each party would be responsible for 50% of the costs of the adjudication by reason of s 29(3) of the Security of Payment Act.

190 The primary judge concluded:

> "64 The adjudicator determined that the liability for his fees and expenses should fall entirely upon the plaintiff. As was the case with the York Street site Determination, the adjudicator did not give any reasons for his conclusion. Again, however, it can be safely inferred that the conclusion was based at least in part upon the adjudicator's assessment of the relative successes and failures of the parties on the various issues the subject of the adjudication. An examination of the adjudicator's reasons (including the table at paragraph 156) reveals that the defendant was the successful party on each item that remained in dispute (that is all items, other than item 13, which became the subject of agreement). The monetary value of the item where jurisdictional error was found is very small, only slightly greater than 1% of the Adjudicated Amount found by the adjudicator. Had the item been determined without there being a denial of natural justice, it is conceivable that the plaintiff would have

> been successful. In those circumstances, and even allowing that further submissions may have been required in respect of the item, it seems unlikely that such a modest victory for the plaintiff would have caused the adjudicator to make a different determination concerning liability for his fees and expenses. Nevertheless, I agree with the plaintiff's submission that there is a realistic possibility that the determination would have been different in the absence of jurisdictional error, so the determination should be regarded as affected by jurisdictional error for the purposes of s 32A of the Act. This part of the Determination should thus be set aside. The result of that is that the parties would each be liable to contribute to the fees and expenses in equal proportions."

191 I am unable to agree with the primary judge that there was any realistic possibility that, in the absence of jurisdictional error about an item having a value of $3,740 in concrete saw cutting costs, only slightly greater than 1% of the Adjudicated Amount, the adjudicator's fees and costs determination would have been different. Put another way, the determination under s 29(3) was not affected by jurisdictional error in any material way.

192 I would allow the cross-appeal and set aside order 1(b) in the Elizabeth Bay proceedings.

Payment out of funds paid into court

193 In relation to the York Street determination, pursuant to s 25(4) of the Security of Payment Act, as a statutory condition of commencing the challenge to the validity of the Determination, $2,045,453.97 was paid into Court by Ceerose. On 5 May 2023, as a result of the findings made by the primary judge, Stevenson J ordered that $1,001,203.05 of this amount be paid out to Ceerose forthwith.

194 In relation to the Elizabeth Bay determination, pursuant to s 25(4) of the Security of Payment Act, as a statutory condition of commencing the challenge to the validity of the Determination, $349,324.36 was paid into court by Ceerose. On 5 May 2023, as a result of the findings made by the primary judge, Stevenson J ordered that $15,768.84 be paid out to Ceerose forthwith.

195 A question arises about the payment out of the remanding funds paid into Court.

196 At the conclusion of an application for judicial review of an adjudication determination made under the Security of Payment Act, the correct course is that orders be made for payment out of court of funds paid into court as a

condition of commencing the judicial review application. Sometimes a stay is sought pending appeal to this Court or, pending determination of a case contemplated by s 32 of the Security of Payment Act. The principles which apply to each type of stay were outlined in *A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144.

197 This case has proceeded in an unusual way. It was pleaded in Ceerose's Commercial List Statement that a stay should be granted in aid of Ceerose's rights in proceedings contemplated by s 32 of the Security of Payment Act. Such proceedings had not then been commenced and, at the time this appeal was heard, had not yet been commenced. The primary judge did not address the stay but rather adjourned the application. The application for a stay was set down for a two-day hearing. That hearing was vacated by reason of the interlocutory appeal referred to at [197] above. The stay application was eventually heard on 14 August 2023 and judgment delivered by Ball J on 24 August 2023: *Ceerose Pty Limited v A-Civil Aust Pty Ltd (No 5)* [2023] NSWSC 1012. Ball J determined that he would refuse the stay pending completion of proceedings contemplated by s 32 of the Security of Payment Act but deferred making orders pending the determination of this Court.

198 This litigation is a cogent demonstration of why the course here adopted in seeking a stay in aid of yet-to-be commenced proceedings contemplated by s 32 of the Security of Payment Act is inimical to the objects of the Act. It is unacceptable that in relation to a system designed to protect the cashflow of building contractors that, almost 16 months after the payment claim was made, the funds to which A-Civil was held by the adjudicator and by a judge of the Court to be entitled remain with the Court.

199 This Court will ordinarily make orders for payment out of funds in court after the judicial review of an adjudication is complete. There is no reason not to make those orders for payment out to A-Civil in the present case. The original reason suggested for not making such an order, the existence of the application for a stay pending completion of proceedings contemplated by s 32 of the Security of Payment Act, no longer applies following the recent decision of Ball J. There is, however, a possible issue of timing as Ball J has not yet made orders.

Accordingly, to permit orders to be made in the Equity Division, the orders for payment out to A-Civil of the funds in court will be effective 7 days after delivery of this judgment.

Conclusion and proposed orders

200 For the foregoing reasons I propose the following orders:

201 In the York Street proceedings:

(1) Appeal dismissed.

(2) Appellant to pay the respondent's costs of the appeal.

(3) Cross-appeal allowed.

(4) Set aside orders 1(a) and (b) and 2(a) of the Court below made on 20 April 2023.

(5) In their place:

(a) order pursuant to s 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) that the adjudication determination dated 2 August 2022 (ABCDRS NSW 454), being affected by jurisdictional error, be set aside in the amount over and above $1,757,863.46;

(b) order pursuant to s 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) that the adjudication determination dated 2 August 2022 (ABCDRS NSW 454), not being affected by jurisdictional error, be confirmed as the Adjudicated Amount of $1,757,863.46.

(6) Order that the appellant pay to the respondent the amount of $718,284.08, together with all interest earned thereon until paid out of court on or about 5 May 2023, together with interest from the date of payment out of court, until the date of payment to the respondent.

(7) Order that 7 days after the making of this order, the remaining funds paid into Court, including any interest accrued thereon, be paid out to the respondent.

(8) The cross-respondent to pay the cross-appellant's costs of the cross-appeal.

202 In the Elizabeth Bay Proceedings:

(1) Appeal dismissed.

(2) Appellant to pay the respondent's costs of the appeal.

(3) Cross-appeal allowed.

(4) Set aside order 1(b) of the Court below made on 20 April 2023.

(5) Order that the appellant pay the respondent the amount of $11,650.56, together with all interest earned thereon until paid out of court on about 5 May 2023, together with interest from the date of payment out of court, until the date of payment to the respondent.

(6) Order that 7 days after the making of this order, the remaining funds paid into Court, including any interest accrued thereon, be paid out to the respondent.

(7) The cross-respondent to pay the cross-appellant's costs of the cross-appeal.

203 **BASTEN AJA**: I agree with Payne JA.

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