

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
PRACTICE COURT

No. 703 of 2013

MAXSTRA CONSTRUCTIONS PTY LTD  
(ACN 144 590 438)

Plaintiff

v

ACTIVE CRANE HIRE PTY LTD  
(ACN 097 401 342)

First defendant

- and -

PHILLIP DAVENPORT

Second defendant

- and -

ADJUDICATE TODAY PTY LTD  
(ACN 109 605 021)

Third defendant

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JUDGE: McMillan J  
WHERE HELD: Melbourne  
DATE OF HEARING: 28 February 2013  
DATE OF JUDGMENT: 26 April 2013  
CASE MAY BE CITED AS: Maxstra Constructions Pty Ltd v Active Crane Hire Pty Ltd  
MEDIUM NEUTRAL CITATION: [2017] VSC 177

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ADMINISTRATIVE LAW - Application for adjudication determination - Jurisdiction of adjudicator - Time limit - Whether failure to discharge functions under the *Act - Building and Construction Industry Security of Payment Act 2002* ss 15, 18, 50

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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J. P. Foster	Moores Legal
For the First Defendant	Mr S. J. Minahan	Roe Mackenzie Lawyers

HER HONOUR:

**Introduction**

1 In this proceeding, the plaintiff, Maxstra Constructions Pty Ltd ('Maxstra') seeks, inter alia, injunctions and orders against the first defendant, Active Crane Hire Pty Ltd ('ACH'), the second defendant, Phillip Davenport ('the adjudicator') and the third defendant, Adjudicate Today Pty Ltd ('Adjudicate Today') in relation to an adjudication determination of a payment claim made by ACH under the *Building and Construction Industry Security of Payment Act 2002* ('the Act').

2 On 5 February 2013, the adjudicator adjudicated that Maxstra owed ACH the sum of \$41 008 for crane installation and hire and that Maxstra was to pay the adjudicator's fees in respect of the adjudication.

3 Specifically, Maxstra now seeks to have the adjudication determination declared void.<sup>1</sup> It seeks an order quashing the determination for jurisdictional error and restraining ACH from applying for an adjudication certificate; entering judgment on the adjudication determination; enforcing the adjudication determination; or otherwise seeking recovery of the adjudicated amount. Maxstra also seeks to restrain Adjudicate Today, as the authorised nominating authority, from providing an adjudication certificate in respect of the adjudication determination.

4 The proceeding was listed for hearing in the Practice Court on 18 February 2013. On that day, orders were made granting interlocutory injunctive relief sought by Maxstra; providing for the filing of further particulars of the grounds relied upon by Maxstra; and adjourning the further hearing to 28 February 2013.

5 When the application was heard on 28 February, Maxstra stated that it was no longer pursuing the ground that the adjudicator failed to act in good faith in exercising his powers under the *Act*, as sought in its originating motion.

6 The adjudicator and Adjudicate Today informed Maxstra that they did not intend to be represented at the hearing, that they would not take an active role in the

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<sup>1</sup> See below paragraph [5].

proceeding and that they would abide by the decision of the Court, save as to costs. Maxstra informed the adjudicator and Adjudicate Today that it would not seek costs against either of them in this proceeding.

### **Factual Background**

7 In late 2012, ACH supplied and erected a crane for Maxstra. On 29 November 2012, ACH rendered an invoice for \$27 500 for the installation of the crane to Maxstra and, on 31 December 2012, ACH rendered a second invoice for \$13 508 for hire charges to Maxstra. Each invoice was endorsed as a payment claim under the *Act*.<sup>2</sup>

8 On 24 January 2013, ACH made demand of Maxstra for payment of the invoices.

9 Pursuant to s 15 of the *Act*, on 24 January 2013, Maxstra served a payment schedule on ACH disputing the claim and asserting that it was entitled to a credit of '\$(10,830.12.00) [sic] including GST total (Credit)'. The invoiced amount was disputed by Maxstra on the grounds that:

There were a number of days where the crane was being installed, commissioned and/or failed to operate properly thus daily crane hire cannot be charged for these days. There are also back charges related to downtime of crane on a number of days. Refer attached reconciliation as at 21/12/12 and relevant Maxstra emails and Contractor Invoices related to back charges.

10 In the payment schedule, Maxstra set out the payment claim as 'Invoice No. 00026114 and 00026053 totalling \$41,008.00 including GST total'. The schedule and accompanying documentation stated that Maxstra had received the payment claims of ACH on '14<sup>th</sup> January 2013 (by mail)'.  
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11 Pursuant to s 18 of the *Act*, on 25 January 2013, ACH initiated the adjudication process and applied to Adjudicate Today for adjudication.

12 On 31 January 2013, Adjudicate Today informed Maxstra that the adjudicator had accepted the appointment to adjudicate and drew its attention to particular sections of the *Act* relating to entitlements and time frames for lodging an adjudication response.

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<sup>2</sup> References to 'the payment claim' (singular) are to these two invoices in conjunction.

13 On 4 February 2013, Maxstra filed its adjudication response stating that the adjudicator did not have jurisdiction to determine the adjudication application for the following reasons:

- a) The adjudication application could not be brought pursuant to s 18(1)(a) of the *Act* because Maxstra did not provide a payment schedule within 10 business days after service of the payment claim as provided under s 15(4) of the *Act*. Maxstra contended that the adjudication application stated that the first claim was posted on 30 November 2012 and the second claim was lodged on 17 December 2012. Relying on the deeming provisions contained in s 50(2) of the *Act*, Maxstra contended that the first claim is taken to have been served on 4 December 2012 and the second claim is taken to have been served on 19 December 2012. '[W]ithin 10 business days after the payment claim is served' means that the payment schedule must have been served at the latest on or before 7 January 2013. As it was served on 24 January 2013, the application could not be brought pursuant to s 18(1)(a) of the *Act*.
- b) The adjudication application could not be brought pursuant to s 18(1)(b) of the *Act* because ACH had not complied with s 18(2) of the *Act*. Section 18(2)(a) required ACH to notify Maxstra of its intention to apply for adjudication of the payment claim within 10 days following the due date for payment.

14 The adjudicator determined that Maxstra 'has not satisfied me that I have no jurisdiction'.<sup>3</sup> He made an adjudication determination in favour of ACH for the full amount of the claim. The adjudicator found that Maxstra did not contend that ACH did not provide the crane hire and installation in accordance with the construction contract or that the amount claimed was not calculated in accordance with the construction contract. He was satisfied that ACH was entitled to payment of the claimed amount. He also rejected Maxstra's claim that it was entitled to a credit of \$10 830.12 from ACH.

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<sup>3</sup> Adjudication Determination, Exhibit AM-5 to the Affidavit of Alexander McKellar sworn 13 February 2013, [10].

### Applicable Principles

- 15 The *Act* applies to commercial construction in Victoria. It is modelled on the New South Wales *Building and Construction Industry Security of Payment Act 1999*. The object of the legislation is to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes'.<sup>4</sup> It is variously described as a 'pay now, argue later' scheme because, whilst it provides an adjudication process with rights of recovery and suspension of work and services accruing to contractors if adjudicated liabilities go unsatisfied, it preserves a party's ultimate position and contractual rights to litigate any disputed claim or payment.<sup>5</sup>
- 16 The relevant authorities in Victoria on issues arising under the *Act*, including on quashing or declaring adjudications void, are all decisions of Vickery J: *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* ('*Hickory*');<sup>6</sup> *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*;<sup>7</sup> *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd*<sup>8</sup> and *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd*.<sup>9</sup>
- 17 In *Hickory*, Vickery J set out the objects of the *Act* as follows:

This regime promotes the object of the *Act*, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.

...

The *Act* also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality.<sup>10</sup>

- 18 Vickery J described the process for recovering progress payments in *Hickory* as

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<sup>4</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, 120, quoting Beech J in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* (2009) 25 BCL 313, 330, who referred to similar Western Australian legislation.

<sup>5</sup> See *Building and Construction Industry Security of Payment Act 2002* s 47.

<sup>6</sup> 26 VR 112, 119–26.

<sup>7</sup> (2009) 26 VR 172.

<sup>8</sup> (2010) 30 VR 141.

<sup>9</sup> [2012] VSC 235 (7 June 2012).

<sup>10</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, 121.

follows:

Pursuant to s 14(1) of the Act, a person referred to in s 9(1) who is or who claims to be entitled to a progress payment ... may serve a payment claim ('payment claim') on the person who, under the construction contract, is or may be liable to make the payment. The requirements for a payment claim are set out in s 14(2) as follows:

(2) A payment claim –

- (a) must be in the relevant prescribed form (if any); and
- (b) must contain the prescribed information (if any); and
- (c) must identify the construction work or related goods and services to which the progress payment relates; and
- (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
- (e) must state that it is made under this Act.

There has not, to date, been any prescription of the form under para (a) or of the information under para (b).

The requirements of s 14 of the Act should not be approached in an overly technical manner. ...

The person on whom a payment claim is served may respond by providing a 'payment schedule' pursuant to s 15(1) to the claimant. Principally, the payment schedule must identify the payment claim to which it relates and indicate the amount of the payment (if any) which the respondent proposes to make ('the scheduled amount'): s 15(2). If the scheduled amount is less than the claimed amount, the schedule must indicate why it is less and the reasons (if any) for withholding payment: s 15(3). The payment schedule must be served on the claimant within the time required by the construction contract, or within 10 business days after the payment claim is served (whichever is earlier), otherwise the respondent becomes liable to pay the claimed amount to the claimant on the due date for the relevant progress payment: s 15(4).

Accordingly, there are three possible outcomes of this process under the Act, in its current amended form. First, if the respondent does not provide a payment schedule within due time, whether intentionally (because he disputes the claim) or unintentionally, he becomes liable to pay the claimed amount: s 16, and may, at the option of the claimant, be subject to an adjudication application: s 18(1)(b). Second, if the respondent does provide a payment schedule and the scheduled amount is the same as the claimed amount, he becomes liable under the Act to pay the amount claimed: s 17. The third possible outcome ... occurs if the respondent provides a payment schedule but the scheduled amount is less than the claimed amount, the claimant may apply within 10 business days after the claimant has received the payment schedule to have the dispute adjudicated by an appointed

adjudicator ('an adjudication application'): s 18(1)(a)(i) and (3)(c).<sup>11</sup>

- 19 In the same case, Vickery J described the adjudication of disputes provisions under Division 2 of the *Act* thus:

Division 2 of the Act is devoted to the adjudication of disputes. A hallmark of the division is the limited nature of specified procedural requirements. This provides a high degree of flexibility in the management of adjudications conducted under the Act. Procedures may be appropriately shaped to the dispute at hand, consistently with the requirements of the Act and natural justice. The contemporary adage 'let the forum fit the fuss' is given ample scope.<sup>12</sup>

...

As Finkelstein J observed in *Protectavale Pty Ltd v K2K Pty Ltd*, the payment claim and payment schedule define the issues in dispute between the parties which the adjudicator is to resolve, and limit the points which may be the subject of submissions to the adjudicator: *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd*; *Multiplex Constructions Pty Ltd v Luikens*.

This is confirmed by s 23(2) of the Act, which states that in reaching a decision the adjudicator is to consider only the provisions of the Act, and to subject the construction contract, the payment claim, the claimant's submissions (including relevant documentation) that have been 'duly made by the claimant in support of the claim', the payment schedule, the respondent's submissions (including relevant documentation) that have been 'duly made by the respondent in support of the schedule', and what the adjudicator sees on any inspection to the Act.<sup>13</sup>

- 20 In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*, Vickery J dealt with the issue of an adjudicator's capacity to determine facts going to his or her jurisdiction under the *Act* as follows:

With the exception of the case where the basic and essential requirements of the Act for a valid determination are not satisfied, or where the purported determination is not a bona fide attempt to exercise the power granted under the Act, if the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.

For these reasons, in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an adjudicator the capacity

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<sup>11</sup> Ibid 123–4 (citations omitted).

<sup>12</sup> Ibid 122.

<sup>13</sup> Ibid 124 (citations omitted).

to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on adjudicators jurisdiction to make an incorrect decision in relation to such jurisdictional facts which will not be overturned by certiorari.<sup>14</sup>

### **Entitlement of ACH to Make Adjudication Application**

21 Maxstra contends that ACH has no entitlement to make the adjudication application under s 18 of the *Act*. The first submission relates to s 18(1)(a) of the *Act* and the second relates to ss 18(1)(b) and (2) of the *Act*.

22 Sections 18(1) and (2) of the *Act* provide as follows:

#### **18 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) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; 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) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless –
  - (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
  - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

#### **Maxstra's Submissions – s 18(1)(a) of the *Act***

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<sup>14</sup> (2009) 26 VR 172, 203.

23 Maxstra submitted that the adjudication application made by ACH could not be brought pursuant to s 18(1)(a) of the *Act* because it (Maxstra) lodged its payment schedule outside the 10 day time frame stipulated under s 15(4)(b)(ii) of the *Act*. That section provides that, where a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule within 10 business days after the payment claim is served, the respondent becomes liable to pay the claimed amount to the claimant.

24 Specifically, Maxstra submits that:

- a) the adjudication application lodged by ACH states that the first claim was posted on 30 November 2012 and the second claim was lodged on 17 December 2012;
- b) under s 50(2)(a) of the *Act*, service is deemed, in the case of posting, to be made two business days after the day on which the notice or document was posted;
- c) accordingly, the first claim is taken to have been served on 4 December 2012 and the second claim is taken to have been served on 19 December 2012;
- d) Maxstra served its payment schedule on 24 January 2013; and
- e) based on those dates, the payment schedule lodged by Maxstra is not within the 10 day time frame under s 15(4)(b)(ii) of the *Act*.

**Maxstra's Submissions – ss 18(1)(b) and 18(2) of the *Act***

25 Section 18(2) of the *Act* provides that an adjudication application cannot be brought pursuant to s 18(1)(b) unless the claimant has notified the respondent of its intention to apply for adjudication within 10 business days after the due date for payment. Since ACH did not notify Maxstra of its intention to apply for adjudication, it cannot bring its application pursuant to s 18(1)(b).

**ACH's Submissions – s 18 of the *Act***

26 In response to the submissions relating to s 18 of the *Act*, ACH submitted that Maxstra's submissions are misconceived, on the grounds that:

- a) the payment schedule was in time and, therefore, valid;
- b) even if the payment schedule had not been in time, the service of the payment schedule within the narrow time limit allowed by the *Act* is not a basic and essential precondition to jurisdiction; and
- c) the adjudicator considered the facts regarding service going to jurisdiction, which were matters properly for him.

### **Findings – Entitlement of ACH to Make Adjudication Application**

#### ***Section 18(1)(a) of the Act***

- 27 In my view, the submissions made by Maxstra in support of its argument relating to s 18(1)(a) of the *Act* are opportunistic and misconceived.
- 28 The facts relating to service and the question of jurisdiction considered were carefully considered by the adjudicator and stated in his reasons.<sup>15</sup> Maxstra's submissions rely on dates for the payment claims, being 30 November and 17 December 2012, as set out by ACH in its adjudication application dated 25 January 2013.
- 29 Prior to the date of the adjudication application, Maxstra, in its payment schedule dated 24 January 2013, accepted that the dates of the payment claims were 29 November and 31 December 2012 respectively and that the invoices were received by them on 14 January 2013 by mail.
- 30 Maxstra filed its payment schedule on 24 January 2013 with the title 'This is a payment schedule under the Building and Construction Security of Payment Act 2002' thereby informing the adjudicator and ACH that the document was a payment schedule under the *Act*. In such circumstances, in my view, Maxstra has proceeded on the basis that the response is and was intended to constitute its payment schedule.

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<sup>15</sup> Adjudication Determination, Exhibit AM-5 to the Affidavit of Alexander McKellar sworn 13 February 2013, [1]-[3], [5].

31 By filing its payment schedule on 24 January 2013, Maxstra proceeded with the adjudication process on the basis that the relevant date for service of the payment claims was 14 January 2013. This in within the relevant 10 day time frame required by s 15(4)(b)(ii) of the *Act*.

32 In those circumstances, it is unnecessary and, indeed, inappropriate for Maxstra to rely on the deeming provisions for service under s 50(2)(a) of the *Act*. By filing its payment schedule within time, in my view, Maxstra has submitted to the jurisdiction of the adjudicator.

33 Although Maxstra made submissions to the adjudicator that he did not have jurisdiction, submissions were also made by Maxstra that the adjudicator had the discretion to determine the costs of the adjudication. Such a submission is consistent with the adjudicator's having jurisdiction and was a matter referred to by the adjudicator in his reasons.

34 It is also clear from the decision of the adjudicator that he found that he did have jurisdiction, as he was entitled to do. At paragraph [10] of his determination, the adjudicator stated that Maxstra 'has not satisfied me that I have no jurisdiction' and proceeded with his reasons for being satisfied that ACH was entitled to the payment of the full amount claimed by it.

35 In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*, Vickery J considered that the intention of the legislation was to confer upon the adjudicator the power to determine certain facts that go to his or her jurisdiction and that that determination would not be open to certiorari, save where the purported determination is not a bona fide exercise of the power or where a basic and essential requirement of the *Act* is not satisfied.<sup>16</sup>

36 Although the adjudicator was of the opinion that the *Act* did not allow an adjudicator to determine his own jurisdiction,<sup>17</sup> he was allowed to determine facts

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<sup>16</sup> (2009) 26 VR 172, 203.

<sup>17</sup> Adjudication Determination, Exhibit AM-5 to the Affidavit of Alexander McKellar sworn 13 February 2013, [6].

that went to his jurisdiction, and he in fact did. Specifically, it was within the adjudicator's power to determine whether the payment schedule served by Maxstra was in time. It was found that the payment claim was served on 14 January 2013 and that the payment schedule was served on 24 January 2013.<sup>18</sup> It was therefore found that the payment schedule was served in time. In my opinion, the adjudicator's determination on the matter of service was a bona fide exercise of his power under the *Act*.

37 In my opinion, the requirement of timely service under the *Act* is for the benefit of both parties and is not a basic and essential precondition to the adjudicator's having jurisdiction under the *Act*. Therefore, even if I had found that the payment schedule had in fact not been served in time, the adjudicator's determination that it had been served in time would not be overturned.

38 Finally, the rules as to the service of the payment schedule were forwarded by the adjudicator to ACH and these are for the benefit of both parties involved in the adjudication process under the *Act*. Maxstra determined that it would file a response in the form prescribed by the *Act* and it did state in its response the date of 14 January 2013 as the date of service of the payment claims. Challenging the determination by relying on its own conduct is, in my view, opportunistic on the part of Maxstra.

#### ***Sections 18(1)(b) and 18(2) of the Act***

39 In view of my findings that Maxstra did provide a payment schedule, this submission must fail. It is apparent from the reasons given above that, until Maxstra made its written submissions dated 4 February 2013, Maxstra was proceeding on the basis that a payment schedule had been provided by it. It is misconceived and opportunistic for Maxstra then to contend that s 18(2) prevents ACH from bringing an application pursuant to s 18(1)(b).

40 Accordingly, both grounds relied on by Maxstra under s 18 of the *Act* should be

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<sup>18</sup> Ibid [2]-[3].

dismissed.

### **Failure of Adjudicator to Discharge Functions under the Act**

- 41 Maxstra contends that the adjudicator failed to discharge his functions under the *Act* in failing to address the claim of ACH on its merits and simply rejecting Maxstra's contentions as to jurisdiction.

### **Maxtra's Submissions**

- 42 In support of its submissions, Maxstra relies on the decision of Vickery J in *Asian Pacific Building Corp Pty Ltd v Aircon Duct Fabrication Pty Ltd*, where he stated:

A failure to conduct an adjudication of a payment claim, which requires as a minimum a determination as to whether the construction work the subject of the claim has been performed and its value (or whether the goods and services have been supplied and their value) is a failure to comply with a basic and essential requirement of the Act.

The absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim without addressing its merits, namely, as a minimum, determining whether the construction work identified in the payment claim has been carried out, and what is its value.

Accordingly, there will [not] be a valid adjudication of a payment claim, within the meaning of the Act, if all the adjudicator does is reject the respondent's contentions. As Brereton J said in *Pacific General*:

... By allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the [claim] has been performed and without valuing it – would bespeak of a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity.

In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* Hodgson JA, in explaining *Firedam Civil Engineering Pty Ltd v KJP Constructions Pty Ltd* said:

Further, it appears that in *Firedam* the adjudicator, having decided the respondent's submissions should be disregarded, simply adopted the amount specified by the claimant in the payment claim. If so, that would be a failure to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the consideration[s] in s 22(2).

Thus, putting the matter in terms of jurisdiction, the authority to validly adjudicate a payment claim is an authority which only may be exercised if the basic and essential functions required by the Act are undertaken by an adjudicator, namely and as a minimum, determining whether the construction work identified in the payment claim has been carried out, and what is its value (or determining whether the goods and services identified

in the payment claim have been supplied and their value).<sup>19</sup>

43 Specifically, Maxstra contends that the adjudicator failed to exercise the 'basic and essential functions required by the Act' because he failed to determine whether the construction work identified in the claim had been performed by ACH; whether the goods and services had been supplied; and, if so, what the value of those goods and services was.

44 Accordingly, if all the adjudicator did was reject the contentions of Maxstra as to jurisdiction, there has not been a valid adjudication of a payment claim within the meaning of the *Act*.

#### **ACH's Submissions**

45 ACH submitted that the grounds relied on by Maxstra are misconceived and do not provide any basis for certiorari or injunctive relief, on the grounds that:

- a) Maxstra did not advance any submission disputing or challenging whether the work had been done or its value in its adjudication response. Having determined the jurisdiction point, the adjudicator was within power to consider the facts underlying the claims and find them to be uncontroverted;
- b) the payment claims were supported by independent evidence;
- c) errors in fact in an adjudication are not per se a basis for setting aside the adjudication; and
- d) Maxstra may still ultimately dispute and recover the payment adjudicated to be owing if it pays it.

#### **Findings – Failure of Adjudicator to Discharge Functions under the *Act***

46 In its submissions attached to its adjudication response, Maxstra addressed the issue of jurisdiction and the costs of the adjudication. It did not address the matters it relied on in disputing the payment claims, as to either whether the work had been

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<sup>19</sup> (2011) 27 BCL 102, 105–6 (citations omitted).

done or the value of the work, nor did it make any submissions in support of its alleged counterclaim. Specifically, the adjudicator found that Maxstra did 'not pursue any of the reasons given in the payment schedule for withholding payment and does not take issue with the submissions of [ACH]'.<sup>20</sup>

47 In his reasons for determination, the adjudicator stated that '[i]n the adjudication response [Maxstra] has not contended that [ACH] did not provide the crane hire [and installation] in accordance with the construction contract or that the amount claimed was not calculated in accordance with the construction contract'. He was satisfied that ACH was entitled to payment of the claimed amount.<sup>21</sup>

48 In making such a finding, the adjudicator has determined on the evidence before him that the crane had been provided and installed and that the amounts in the payment claim were in accordance with the construction contract. The payment claims were supported by independent evidence of the value of the work, which evidence was included in the adjudication application. The documentation included independent evidence assessing the installation work and the commissioning of the crane and its use by ACH.

49 In my view, the adjudicator has addressed ACH's claim on its merits and, in doing so, has determined that the construction work set out in the payment claims was performed by ACH; that the goods and services had been supplied; and he has determined the value of the goods and services. No submissions were placed before him to the contrary. In my view, the conclusion reached by the adjudicator demonstrates that he has undertaken the basic and essential functions required by the *Act*.

50 For these reasons, it is misconceived and wrong to conclude that the adjudicator has simply rejected the contentions of Maxstra in his determination.

51 Accordingly, this ground relied on by Maxstra should be dismissed.

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<sup>20</sup> Adjudication Determination, Exhibit AM-5 to the Affidavit of Alexander McKellar sworn 13 February 2013, [4].

<sup>21</sup> Ibid [10].

**Conclusion**

52 For the above reasons, the relief sought in paragraphs [4]-[7] of the summons filed by Maxstra on 13 February 2013 is refused. I will hear the parties as to the form of the orders and costs of the application.

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