Analysis of 2018 SOP cases in NSW, Victoria & South Australia

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NSW

AUSTRALIA AVENUE DEVELOPMENTS P/L V ICON Co (NSW) P/l [2018] NSWSC 1578; ICON Co (NSW) P/L v AUSTRALIAN AVENUE DEVELOPMENTS P/L [2018] NSWCA 339

The Claimant/Builder made a payment claim for $3.66 M on the Owner/Developer. The Superintendent (as the Owner's agent), assessed the claim and issued a combined progress certificate and payment schedule for $1.16M and the Builder then referred its payment claim to adjudication which resulted in the adjudicator determining an adjudication amount of $2.64M.

The Owner challenged the adjudicator's determination arguing that:

(a) The payment claim was invalid because the supporting statement did not contain a declaration in the appropriate form as it predated the payment claim. The Owner argued that the adjudicator's conclusion that the reference date on the payment claim covered the same period as the supporting statement was misplaced and that accordingly the service of the payment claim was invalid; and
(b) The Superintendent's combined progress certificate/payment schedule disputed the amount claimed in the payment claim by reason of the previous deductions that had been made in the contract works price. The Owner argued that the allowances that the adjudicator had made in respect to these items fell outside the payment claim that was the subject of the adjudication and that therefore the adjudicator had exceeded her jurisdiction.

On the issue of the supporting statement that had predated the payment claim, Parker J held that section 13(7) and 13(9) of the Act should not be interpreted as imposing an obligation of ensuring that the supporting statement is up to date at the date of the service of the payment claim. His Honour stated that s.13(9) only requires that the declaration must refer to the work the subject of the payment claim and state that all of the subcontractors have, at the date of declaration, been paid:

> *"As counsel for the contractor accepted, a consequence of the contractor's argument would be, that if the payment claim and supporting declaration were to be made up and signed on a particular date, then a delay of even one day thereafter in serving the payment claim would result in non-compliance with the Act…*
> *I see no reason to think that Parliament would have intended such a draconian consequence … Subject to any provision in the construction contract, the contractor has up to twelve months after the end of the construction work to which the payment claim relates to lodge the claim: s13(4). It seems extraordinary to think that the contractor might wait for eleven months after the reference date, make up the claim and supporting declaration, and then fail to comply with the Act by delaying the service of the documents once signed, by twenty-four hours".* [25] – [26].

In respect to the Owner's argument relating to the scope of the payment claim, Parker J held that the adjudicator's jurisdiction was confined to only those items and amounts set out in the payment claim and, by considering the back-charge items, the adjudicator had exceeded her jurisdiction. His Honour

said that even though the payment schedule had included a breakdown of the contractual variations, this was no more than a reconciliation of the figures in the project progress certificate that had set out the breakdown of the prior contractual claims and payments and had therefore nothing to do with the scheduled amount:

> *"… The Adjudicator was wrong to say that the five back charge items were referred to in the payment schedule. They were (through the variation breakdown document) referred to in the progress certificate, but not in the payment schedule. In any event, the question was whether they were included in the payment claim and, for reasons I have given, they were not ….It would have been open to the contractor to raise a challenge to the back-charge items in the progress claim. But it is clear from the form of the progress claim that the contractor did not actually do so"* (per Parker J at [63]).

On appeal the NSW Supreme Court of Appeal set aside the decision of Parker J and held that just as it was within the adjudicator's power to form an opinion as to the meaning of the contract, so also does the adjudicator have the power to consider the scope of the payment claim.

Basten JA endorsed the following passage of Giles JA in *Downer Construction (Australia) Pty Ltd* v *Energy Australia* [2007] NSWCA 49.

> *"In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination …*
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> *There is good reason for leaving determination of the scope and nature of the payment claim to the adjudicator, apart from the purpose of the Act earlier mentioned. The scope and nature of the payment claim will often be, and in the present case was, open to be elucidated and evaluated with the benefit of the adjudicator's specialised knowledge"*
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> *"Accordingly, I am unable to agree with the trial judge's conclusion that the adjudicator failed to determine (the claimant's) payment claim, but instead determined a different claim. The adjudicator determined the payment claim, and the court should not by judicial review engage with the questions decided by him in doing so.*
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> *Nor do I consider that the determination was void because the adjudicator failed to attempt to understand the basis of the claimed or failed bona fide to exercise his power. With respect to the trail judge, to say that "the outcome of [the adjudicator's] determination "indicates failure to consider the matters to which s22(2) refers does not pay heed to the exposure of the adjudicator's opinion of the correct outcome as the determinant of bona fides"*
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> ([88]-[90]).

Accordingly, Basten JA (with Meagher and Leeming JJA agreeing) held that it was for the adjudicator to act upon his or her understanding of the payment claim. If the engagement of a statutory power depended on an identified state of affairs, then that state of affairs is a "*jurisdictional fact*" and the lawful exercise of that power may depend upon a finding of a court exercising judicial review as to whether or not the state of affairs existed. If however the engagement of a statutory power depends upon an opinion formed by a decision maker (in this case the adjudicator), then a review of the court may only be concerned with the existence and formation of the opinion.

In the present case the function conferred on the adjudicator under s22(1) of the Act was to determine "*the amount of the progress payment*" which is to be paid and s22(2) requires the adjudicator to consider the specific matters set out within that subsection.

> *"… Those matters include the provisions of the construction contract and the payment claim leads to the inference that the adjudicator is to act upon his or her understanding of the contractual obligations and the content of the payment claim. While the construction of a contract will usually involve questions of law, the Act implicitly confers on the adjudicator the power to form an opinion as to the meaning of the contract, for the purposes of the adjudication. The adjudication cannot be set aside because of an error of law in construing the contract appears on the face of the record. The same is true with respect to the scope of the payment claim".* ([16]).

Basten JA noted that whereas the present case involved a dispute as to how the payment claim and the payment schedule were to be understood it was <u>not</u> appropriate for the court to engage in an analysis of the manner in which the adjudicator dealt with the claim in the adjudication. Basten JA considered the adjudicator's reasoning and concluded that the adjudicator had made no error but, in any event, this was a matter for the adjudicator to consider. Further, and even if the adjudicator had made an error in construing the payment claim, this would not constitute a jurisdictional error:

> *"This was not a case in which it could be said that the adjudicator awarded more than the amount claimed; … Rather it was a dispute as to the proper construction of the payment claim having regard to the contractual provisions. The statute required that the adjudicator "is to consider" the provisions of the construction contract and the payment claim. <u>However, an error in construing the contract or in understanding the payment claim does not constitute jurisdictional error and therefore cannot form the basis upon which the adjudication can be quashed."</u>* (emphasis added)

SEYMOUR WHYTE CONSTRUCTIONS P/L v OSTWALD BROS P/L in liq) v SEYMOUR WHYTE CONSTRUCTIONS P/L [2018] NSWSC 412; [2019] NSWCA 11

The decisions of Stevenson J at first instance and of the NSW Supreme Court of Appeal deal with the issue of whether an insolvent contractor can avail itself of the benefits of the Security of Payment legislation.

Seymour Whyte Constructions ("SWC") as head contractor and Ostwald Bros (Ostwald) as subcontractor, entered into a subcontract in respect to various roadworks on the Pacific Highway. Ostwald served a payment claim on SWC and SWC responded with a payment schedule for a significant lesser amount. SWC then terminated the contract, and, on the following day, the directors of Ostwald resolved to appoint administrators. Ostwald subsequently referred its payment claim to adjudication in respect of the difference between the claimed amount and the scheduled amount. The adjudicator determined that the amount due to Ostwald was significantly greater that the scheduled amount, but, shortly afterwards, Ostwald's administrators reported to creditors that it was insolvent which in turn led to the creditors resolving that Ostwald should be wound up. SWC then commenced proceedings seeking a declaration that the adjudication determination was void and a stay of any judgement arising from the filing of an adjudication certificate.

Stevenson J considered that in the circumstances, the contract should be rectified so as to reflect the parties' intention and so provide that SWC had 30 days from the end of the month in which Ostwald served a payment claim to make payment. His Honour then considered that the key issue as to whether the Act should continue to apply in circumstances of where a claimant has been wound-up. His Honour thought that this in turn raised the following three questions:

(a) Can Ostwald be considered to be a "*claimant*" for the purposes of Part 3 of the Act;

(b) If Ostwald continues to be a "*claimant*", should the statutory process for enforcing an adjudication determination as a judgement under ss24 and 25 be stayed in the light of the mandatory "set off" procedure under s553C of the Corporations Act; and

(c) Is there is constitutional inconsistency between the NSW Act and the *Corporations Act*? (in other words, is the filing of an adjudication certificate as a judgement debt inconsistent with the s553C set-off procedure?)

On the first question, Stevenson J considered the decision of the Victorian Supreme Court of *Appeal in Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA217 which held that, under the Victorian Act, the proper interpretation of the term "claimant" did not extend to insolvent contractors. His Honour noted that he was obliged to follow the Victorian Court of Appeal's decision, unless he were to conclude that the decision was "*plainly wrong*" (refer to *Australian Securities Commission v Malborough Gold Miles Ltd* (1993) 177 CLR 485, [1993] ACA at [492] and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at ([135]).

In analysing the Victorian Court of Appeal's decision Stephenson J noted that the meaning of "*claimant*" given in *Façade Treatment* turned on whether a person had not only undertaken construction work, but continues to perform such work. However, His Honour could find nothing in the relevant provisions of the Victorian Act (viz: s9 and 14) nor the NSW Act (viz: s8 and 13) that would *"compel the conclusions that a person … somehow loses that status by reason of [a company] being*

wound up or [if a person] becoming bankrupt" (refer to [150]). His Honour noted that in arriving at its decision the Victorian Court of Appeal did not refer to the definition of *"claimant*" but rather relied on s1 of its Act which states that the purpose of the legislation is to provide entitlement to persons *"who carry out construction work":*

> *"In my opinion, which I advance without intending any disrespect, is that the Victorian Court of Appeal erred in its consideration of the text of the statute. Its failure to have regard to the definition of "claimant" in s4 of the Victorian Act led it to conclude that "claimant' was defined in Vic s14/NSW s.13, which in turn led it to conclude that its interpretation of the word "undertaken" in Vic s9/NSW s8 was determinative of the question of who was a claimant.*
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> *I do not agree with the Victorian Court of Appeal's interpretation of "undertaken". That is perhaps, a matter about which minds might differ and not, itself, a reason to conclude the Court was "plainly wrong". But the Court's failure to consider the definition of "claimant" in Vic s4, and its consequent misunderstanding of the definition of "claimant" leads me to conclude that it was "plainly wrong" and that I should not follow it.*
>
> *Accordingly, my conclusion is that Ostwald remains a "claimant" notwithstanding that it has been wound up. The Act, by its terms, continues to apply to Ostwald, notwithstanding that it is in liquidation and notwithstanding the matters to which the Court in Facade referred and which I have set out … above*. ([155-157]).

In relation to the second question, Stevenson J went on to state that even though Ostwald remained free to exercise its rights as a claimant and make a payment claim (and refer such claim to adjudication), it did not follow that it was also able to exercise the rights otherwise available to a claimant under the Act, such as moving for judgement. This is because of the provision of s 553C of the Corporations Act which provides:

> *"Insolvent companies – mutual credit and set-off*
>
> *(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:*
>
> *(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and*
>
> *(b) the sum due from the one party is to be set off against any sum due from the other party; and*
>
> *(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.*
>
> (2) *A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent".*
> (emphasis added)

His Honour agreed with that part of the Victorian Court of Appeal's decision in *Façade* that stated that the effect of liquidation upon a corporation is that s553C is automatically attracted to any mutual dealings between the parties:

"Its (i.e. 553C) effect is to substitute for the parties' rights under the contract and for such rights as Ostwald retains by reason of the adjudication determination, the right to have an account taken under s553C and:

(a) In the case of Ostwald, to recover from Seymour Whyte any amount found following the taking of such accounts to be due by Seymour Whyte to it; and

(b) In the case of Seymour Whyte, to be able to prove in the winding up of Ostwald for any amount found to be due by Ostwald to it.

Adopting the language of the Victorian Court of Appeal to the case here:

"*Cross claims and defences are protected, where relevant, as mutual dealings under s553C. Without the protection afforded by s553C [a judgement obtained by Ostwald under s 25 of the NSW Act] would mean that [Ostwald] would receive from [Seymour Whyte] the full amount of the sum owed under the relevant payment claims, whereas [Seymour Whyte] would be left to prove in the liquidation of [Ostwald] in respect of its counterclaim."*

[These are rights of the parties that are, in terms, preserved by s 32(1)(c) of the Act which provides that nothing in Part 3 of the Act 'affects any rights that a party to a construction contract]…may have apart from this Act in respect to anything done or omitted to be done under the contract.

In these circumstances, I see no option but to stay any judgement that Ostwald obtains by reason of filing an adjudication certificate following the adjudication determination until the parties' rights are finally determined by the account that must now be taken under s553C"

([165] to [168])

In relation to the third question, Stevenson J found (given the conclusions he had arrived at in relation to the first two questions) it unnecessary to decide on the issue of whether the Act is inconsistent with s553C of the *Corporations Act* for the purposes of s109 of the Constitution.

Stevenson J's decision went on appeal.

NSW Court of Appeal considered whether that part of Stevenson J's decision that found that the construction contract should be rectified so as to alter the dates on which SWC was required to make progress payments (which would have the effect that Ostwald's adjudication application had been made on time) was correct and if not (the effect of which was that the adjudicator's determination was invalid), then whether Ostwald could seek to recover the scheduled amount in summary proceedings as a debt due to it under s 16(2)(a)(i) of the Act.

On this issue the NSW Court of Appeal held that Stevenson J had erred, but, even though the adjudicator's determination was invalid, Ostwald was nonetheless entitled to seek recovery of the claimed amount under s 16(2)(a)(ii) of the Act. The NSW Court of Appeal held that the making of an invalid adjudication application did not preclude Ostwald from pursuing the summary statutory alternative available to it.

Importantly, the NSW Court of Appeal endorsed Stevenson J's conclusion that an entitlement to a progress payment under s 8(1) of the Act does not depend on the claimant actually continuing to perform work under the contract. Accordingly, and notwithstanding the winding up of Ostwald, Ostwald was entitled to pursue its claim for the scheduled amount. The NSW Court of Appeal declined to follow the Victorian Court of Appeal's decision in *Façade* and agreed with Stevenson J's view that the *Façade* decision was *"plainly wrong"*. Sackville AJA, who delivered the leading judgement, held that the language of s8 (1) of the NSW Act, read in the light of the High Court analysis in *Southern Han* v Lewence [2016[CLR 340, indicates that the payment in an amount assessed under Part 3 of the Act on satisfaction of the following two conditions:

(i) The person has undertaken to carry out construction work under a construction contract; and
(ii) The reference date under a construction contract has arisen.

In the words of Sackville JA:

> *"The progress payment to which a person is entitled as and from the reference date is a payment for work done, or work undertaken to be done where some element of advance payment has been agreed under the contract. In short, a progress payment is an amount that a contract requires to be paid as part of the total contract price of construction work.*
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> *There is nothing in the language of s 8(1) to support an implication that the entitlement to a progress payment cannot arise unless the builder or subcontractor continues to carry out construction work under the contract. This is a reference to a contractual undertaking, not to the physical performance of the work. The analysis of the High Court in Southern Han is entirely consistent with the construction of s 8(1).*
>
> *The statutory entitlement to a progress payment does not arise until a reference date has arrived. That date is determined by the terms of the contract as that date on which a claim for progress payment may be made in relation to work carried out under the contract… A reference date can arise regardless of whether the claimant is actually continuing to carry out construction work under the contract on that particular date (although it may be necessary, in conformity with Southern Han for the contract, or at least the contractual entitlement to be paid, to remain in force).*
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> *There is nothing in the language of s 13 of the (Act) which implies that a person can only serve a payment claim at a time when that person is actually carrying out construction work under the contract. As Southern Han expressly recognises, a claim may be made even after the contract has expired, for example, in relation to a final payment."*
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> ([228]- [231])

Insofar as *Façade* rested on the implications to be derived from the *"fundamental purpose"* of the Act of maintaining cash flow and that cash flow problems cease to be a concern when a company enters into liquidation, Sackville AJA thought that such a view overlooks the express power conferred on a liquidator under s 447 (1) (a) of the *Corporations Act* to:

> "*carry on the business of a company so far as is, in the opinion of the liquidator, required for the beneficial disposal of winding up of that business."*

His Honour thought that it is possible for a construction company in liquidation to need a progress payment for much the same cash flow reasons as a company *"teetering on the edge of insolvency".*

On the issue of whether the entitlement of a claimant under the SOP Act to recover as a debt due:

(i) the amount of its payment claim (when the respondent did not provide a payment schedule);
(ii) the scheduled amount (where the respondent did provide a payment schedule); or
(iii) the unpaid amount under an adjudication certificate

free of defences or cross claims by the respondent, and whether such entitlements are inconsistent with s 109 of the *Constitution* (Cth) by reason of s 553C of the *Corporations Act*, the NSW Court of Appeal did not make a finding because this issue had been abandoned as a ground of appeal. Leeming JA did however express the view that the conclusion that the Victoria Supreme Court of Appeal had reached in *Façade* should not apply in NSW because unlike the case of the Victorian Security of Payment legislation) the NSW Act preceded the commencement of the *Corporations Act.* Leeming JA thought that the "roll-back" provisions in the *Corporation Act* (refer to s5G) which provide that any State legislation which coexisted with the *Corporations Act* before 2001 would continue to operate after the commencement of the *Corporations Act*.

Impact of s32B of the NSW Amendments?

It should be noted that the impact of this decision may be problematical given the provisions of s32B of the 2018 amendments to the NSW Act (the commencement date has however not yet been proclaimed). Section 32B states:

(i) A corporation in liquidation cannot serve a payment claim or take action to enforce a payment claim or an adjudication determination; and
(ii) If a corporation has made an adjudication application that is not finally determined immediately before the day on which it commenced in liquidation, the application is taken to have been withdrawn on that day.

Central Projects Pty Ltd v Davidson [2018] NSWSC 523

The head contractor (Central Projects) entered into a construction contract with a developer (Davidson). On 5 January 2018, the contractor served a payment claim together with a number of supporting documents, including an attachment entitled "*Supporting Statement by Head Contractor*", but this document contained a number of deficiencies and errors, including:

(i) Inserting the name of the developer instead of a subcontractor at item 1, which was intended to identify the contract with a relevant subcontractor if only one subcontractor performed the work that was the subject of the payment claim; and

(ii) Failing to list, in the accompanying schedule, several of the subcontractors who had supplied goods to the contractor during the period that was the subject of the payment claim.

The developer did not provide a payment schedule by way of response to the payment claim and thus the contractor elected to commence proceedings under s 15 of the Act, seeking judgement for the claimed amount.

Ball J held that notwithstanding various errors and inaccuracies, the "Supporting Statement" that the contractor had included with its payment claim was a supporting statement within the meaning of s13(9) of the Act. His Honour held that for a supporting statement to be valid it must be in the prescribed form and contain a declaration as required under s13(9) of the Act. His Honour considered that if it be implicit in s 13(7) that a supporting statement must be accurate and complete then s 13(8) (which imposes a penalty for knowing that the statement is false or misleading) *"would have no work to do, or at least make little sense"* (at[28]). In any event, Ball J thought that there was nothing in s 13(9) that requires a supporting statement to list all the subcontractors. Accordingly, his Honour held that the supporting statement was a valid Supporting Statement. Insofar as the developer argued that, for the purposes of s 80 of the *Interpretations Act 1987 (NSW)*, the Supporting Statement was not in the prescribed form because it did not contain all the information that was required, Ball J expressed the view that s 80 of the *Interpretations Act* concerns itself with the form of the prescribed form and not the accuracy of the contents.

His Honour then went on to make the following observation:

> *"It is apparent that the prescribed form contemplates that the supporting statement will list all subcontractors, including (in a separate section of the attachment) those who have not been paid as a result of a dispute. It is also apparent that the declaration that forms part of the form is a declaration in respect of all subcontractors, not just those listed in the supporting statement, since that is what the definition of "supporting statement" in s 13(9) of the (Act) requires. Consequently, a supporting statement will be false or misleading in a material particular if it omits one or more subcontractors from the list of subcontractors and that that omission is material. It will also be false and misleading if, contrary to the declaration, not all the subcontractors had been paid (apart from those in respect to whom a dispute exists) and the amount owed to an unpaid subcontractor is material. In either case, if a head contractor knows that the supporting statement is false or misleading, the head contractor will commit an offence by serving the statement…"*(at [33]).

Significantly however, his Honour did not think that the policy considerations underpinning ss 13(7),(8) and(9) would be advanced by concluding that an inadvertent failure to identify all subcontractors should result in the head contractor being deprived of the benefits of the Act:

> *"It should not be inferred that that is what the legislation intended when the alternative interpretation does not deprive the provisions of the effectiveness in protecting subcontractors"* ([34]).

On its face, the decision of Ball J appears to be at odds with the view that McDougall J had expressed in *Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602. This issue is further considered in the analysis of McDougall J's decision in *Greenwood Futures* (see below).

Greenwood Futures v DSD Builders [2018] NSWSC 1407

The decision of Ball J in *Central Projects Pty Ltd v Davidson* (see above) appears to be inconsistent with the view that McDougall J had expressed in *Kitchen Xchange v Formacon Building Services* [2014]NSWSC 1602 where, at [34 to [51], McDougall J stated that a payment claim that is not accompanied by the *"requisite statement"* constitutes ineffective service:

> *"To paraphrase what I said of s13(5) in Woollam and Son at [49], to hold that s13(7) did not intend to invalidate service of a payment claim unaccompanied by the requisite statement would set at nought the prohibition. It would permit a claimant to engage the operation of Part 3 of the Act without troubling to comply with the specific and "mandatory" requirement for doing so.*
>
> *…*
>
> *In the present case, if the service was ineffective because it was not authorised by subsection (7) and thus should not be taken to have been proper service, there would be jurisdictional error for this also"*
>
> ([47] and [51])

In *Kyle Removals Pty Ltd v Dynabuild Project Services Pty Ltd* [2016]NSWSC 334 and *Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd*[2016] NSWSC 371, Meagher JA agreed with the reasoning and conclusion that McDougall J had arrived at in *Kitchen Xchange* and, accordingly, by relying on the reasoning of Allsop P in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, that service contrary to s13(7) was not service within the meaning of s14(4) of the Act.

In *Greenwood Futures* , McDougall J had occasion to consider Ball J's decision in *Central Projects* where counsel for one of the parties that his Honour should follow the conclusion he had reached in *Kitchen Xchange* because this decision had been followed by Meagher JA in *Kyle Bay* and *Duffy Kennedy*, whereas counsel for the other party invited his Honour to reconsider the issue and reverse his conclusion on the basis that the view he had expressed in *Kitchen Xchange* was "*plainly wrong*".

McDougall J declined to arrive at the view that the conclusion he had expressed in respect of s13(7) was "plainly wrong". Whilst his Honour thought that the reasons that Ball J had given in Central Projects for disagreeing with the conclusions set out in *Kitchen Xchange* were "*powerful*", the fact remained that Meagher JA "*had followed my view in two separate decisions, and in one of them has expressly indicated concurrence with my reasoning and conclusion (means that) I do not think that it can be said that my view of s13(7) is "plainly wrong"* (at [49]).

There are therefore two quite separate lines of thoughts that have been expressed by the NSW Supreme Court on this issue and although the weight of first instance authority is with the view expressed by McDougall J in *Kitchen Xchange.* Nonetheless this matter may need to be finally determined by the NSW Court of Appeal at some time in the near future.

Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894

The use of colourful language within an adjudicator's determination may result in the courts setting aside such decision on the ground of denial of natural justice.

In the above case the head contractor argued that various of the adjudicator's adverse findings, about which it was not given the opportunity to be heard, were material and that if it had been given the opportunity to make submissions or adduce evidence then it might have caused the adjudicator to have arrived at a different view. The head contractor also argued that in the circumstances of the case, it was reasonable to apprehend that the impugned findings affected the way the adjudicator dealt with the matte and that the determination should be quashed.

Specifically, the adjudicator stated in his determination the following:

> *"As for the alleged defect claims, I am largely persuaded by paragraph 16 of the submission in support of the Adjudication Application. It seems to me that the Respondent has merely plucked numbers out of the air in an attempt to substantiate a position that it is not liable to make further payment.*
>
> *On my reading of what has occurred here, the Respondent made fairly regular payments during the period where the Claimant was consistently on site, but once the Claimant had completed the bulk of its work, the Respondent was content to hold on to payments for its own cash flow purposes. The Respondent then had to entice the Claimant to then return to the site to complete some defects by making some further payments. After that work was done and the sale of various units settled, the Respondent suddenly has expressed concern about the extent of work to be completed. However, the central flaw with such contention is that if the units were in the poor state suggested by the Respondent, it would be very surprising if the purchasers would have completed settlement of the units had extensive defects been present."*

There were essentially three impugned findings in the above quote:

(i) That the Respondent *"plucked numbers out of the air in an attempt to substantiate a position that it is not liable to make further payment"*

(ii) Once the Claimant had completed the bulk of the work, the Respondent was *"content to hold on to payments for its own cash flow purposes"*; and

(iii) The Respondent then *"enticed (the Claimant) to return to the site to complete some defects by making some further payments"*

Stevenson J, in dismissing the Respondent's application, construed the above wording, (notwithstanding its *"colourful language"*) as reflecting the adjudicator's acceptance of the Claimant's submissions. His Honour rejected the Respondent's argument that the adjudicator's words as attributing an improper motive to the Respondent and a finding that it had acted in bad faith, dishonestly, or recklessly indifferent to the truth.

This case thus demonstrates the degree of latitude that the courts are prepared to give to the language adopted by an adjudicator in the making of his/her determination. Nonetheless, there may be circumstances where the courts could construe the language contained in an adjudicator's

determination as conveying a more "*sinister*" nature, thus resulting in the quashing of the adjudicator's determination. It is therefore prudent for adjudicators to ensure that an adjudication determination avoids the use of "*colourful*" language.

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWSC 1229

The parties entered into a head contract on 10 July 2017. On 19 March 2018, the Owner purported to terminate the contract. On 30 April 2018, the Head Contractor served a payment claim on the Owner. On 14 May 2018, the Owner served a payment schedule for a scheduled amount of $nil., stating that the Head Contractor owed the it a substantial amount for rectification of defective works and damages. The Head Contractor lodged an adjudication application, but the Owner failed to lodge an adjudication response within the prescribed time period. The adjudicator proceeded with the matter on the basis that the relevant dispute was constituted by the payment claim and the payment schedule and determined an adjudicated amount of $265,000.

The Owner applied to the courts seeking to quash the adjudicator's determination on the basis that it was invalid because:

(a) it related to a payment claim which did not include a supporting statement referred to in s 13(9) of the Act; and
(b) the adjudicator did not exercise her statutory duty or did not perform it in good faith because she did not value the construction work and reach conclusions on the question of defects, as required by s 10(1)(b)(iv) of the Act.

On the issue relating to the supporting statement, the document that the Head Contractor provided stated that it was the head contractor and that it had subcontracted all of its work to only one subcontractor. The document also included a statement that:

> *"all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute)"*

No copy of the attachment had however been included and accordingly the Owner argued that the absence of any attachments meant that there was no identification of whether any amounts were owing.

In rejecting the Owner's argument, McDougall J said that when one looks at the requisite form set out in Schedule 1 to the Regulations made under the Act "*it is quite clear that two alternatives are provided. The first alternative applies where there is only one relevant subcontract. The second applies where there are multiple subcontracts…In the present case… there was only one subcontract. The supporting statement said so. It identified the name of the subcontractor. It said no money was owing. That, it seems to me, is all that was required as a matter of form."* (at[14]-[15]). In regard to the failure to include an attachment, McDougall J held that *"when one looks at the supporting statement as a whole, it is clear that nothing was said to be owing. That is because any amounts that were owing were to be identified by means of an attachment. In the absence of the attachment, it seems to me to follow necessarily that no amounts were (so far as the certificate goes) said to be owing"* (at [16]). His Honour thought that this seemed a common-sense approach to what was essentially a practical matter.

On the issue relating to the valuation of the claimed construction work it was common ground that the contract made no express provision in relation to this matter and that, in such circumstances, the adjudicator was required in performing her statutory function to have regard to the matters set out in s 10(1)(b). In this regard, his Honour said:

> *"the obligation to "[have] regard to' something requires, I think, that the specific considerations be given weight as fundamental elements in the determination; that they be considered as the focal points by reference to which the relevant decision is to be made. See Zhang v Canterbury City Council at [71]-[73] (Spigelman CJ, with whom Meagher and Beazley JJA agreeing).*
>
> *…*
>
> *It is to be noted…to [have] regard to something is effectively equivalent to the requirement to 'consider' something. It seems to follow from this that the obligations to have regard to specific matters in s 10, and to consider specified matters in s 22 (2) , effectively involve a similar degree of intellectual application; they require the same intellectual exercise.*
>
> *…*
>
> *…In Laing O'Rourke Australia Construction Pty Ltd v H & M Engineering & Construction Pty Ltd, I said at [34] that the obligation to exercise the statutory function in good faith "requires at least that adjudicators should turn their minds to, grapple with and form a view on all matters they are required to "consider".*
>
> *([21]-[22],[25])*

McDougall J noted the detailed analysis of Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust)* Pty Ltd [2015]VSC 680 of what the Act requires an adjudicator to carry out when making an adjudication determination (at [101]) of Vickery J's judgement) and in particular the making of findings as to the whether the construction work had been performed and its value. McDougall J said:

> *"That task requires the adjudicator to assess fairly and weigh the whole of the evidence, including by drawing the necessary inferences from it, and arrive at a rational conclusion"*

His Honour however thought that the various functions that Vickery J had expressed in *SSC Plenty* should not necessarily be applied *"serially or mechanically".*

In any even,t his Honour expressed the view that whilst it was clear that the adjudicator was well aware of the Owner's claim for defective work and made no precise finding on the topic (and even though *"it would have been helpful for the adjudicator to have expressed clear views in clear terms as to what she found and why")*, it was nonetheless clear that the adjudicator proceeded on the basis that it was for the Owner to satisfy her of any offsetting claim and that she drew inferences from the Owner's failure to adduce supporting evidence. Accordingly, McDougall J found that when reading the relevant part of the adjudicator's determination that she had adequately dealt with the dispute before her and stated that she was not satisfied that there was defective work because of the absence of evidence provided by the Owner. His Honour emphasised that the adjudicator was not simply rubber stamping the amount of the claim.

Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd [2018] NSWCA 276

McDougall J's decision went on appeal with the key issue before the NSW Court of Appeal relating to whether the adjudicator's determination was invalid for want of good faith.

In dismissing the appeal, the Court of Appeal held:

(i) The obligation on adjudicators to act in good faith should not be conflated with the obligation to *"grapple with"* and form a view on all the matters they are required to consider because such language would *"invite a slide into impermissible merit review";*

(ii) Notwithstanding that *"bad faith*" cannot be comprehensively defined, in the context of adjudication determinations made under the Act, it, at the very least, requires something equivalent to *"wilful blindness"* or *"conscious maladministration"*. The Court of Appeal endorsed the view that the Federal Court had expressed in *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN (*2002) FCAFC 431 at [8]:

> *There is no such thing as deemed or constructive bad faith. It is the ultimate decision …which must be shown to have been taken in bad faith. Illogical factual findings or procedural blunders along the way will usually not be sufficient to base findings of bad faith. Such defects can be equally explicable as a result of obtuseness, overwork, forgetfulness, irritability or other human failings not inconsistent with an honest attempt to discharge the decision maker's duty…"*

(iii) The function of an adjudicator is to have regard to the matters, and only the matters, set out in s 22(2) of the Act. Insofar as the Owner suggested that the adjudicator failed to comply with that subsection, the proper ground for review was failure to take into account a mandatory consideration. The adjudicator had plainly addressed herself to the relevant mandatory considerations and applied s 10(1) on her understanding of the contract:

> *"…There can be no obligation on any decision maker to make a" precise finding" on a topic where there is no evidence to support such a finding, or the evidence is insufficient to satisfy the decision maker that such a finding should be made. Indeed, the finding that there is "no clear evidence" is itself a sufficient finding" ([41])*

In regard to the matters that Vickery J had listed in *SSC Plenty* that an adjudicator was required to consider in the making of an adjudication determination, the Court of Appeal said (at [29]) that the qualification by McDougall J had expressed that an adjudicator should not be required to apply *"serially or mechanically"* was correct, *"at least in this (i.e. NSW) jurisdiction":*

> *The function of an adjudicator is to have regard to the matters, and only the matters, set out in s 22(2). They do not include judicial glosses on statute. Nor are such glosses helpful to judges undertaking the function of judicial review. Finally, if the real question is whether the adjudicator failed to have regards to some matter expressly identified in s 22(2), that should be the ground of review. No question of good faith will normally arise in such circumstances'"*

ICON CO (NSW) Pty Ltd v AMA GLASS FACADES Pty Ltd [2019] NSWSC 250

This is a case where two adjudicators have, in three successive determinations under one building contract, expressed different and inconsistent views as to the proper construction of the terms of the contract. The first determination was made by Adjudicator No 1 on 2 March 2018 in respect to a number of variations; the second determination related to a set of different variations by Adjudicator No. 2 on 13 August 2018; and the third determination in respect of the same variations that Adjudicator No. 2 had made in the second determination was made by Adjudicator No. 1 on 23 January 2019.

In the first adjudication, Adjudicator No. 1 determined that:

(a) On the proper interpretation of the relevant clause relating to variations, the subcontractor was entitled to the variations by reason of the Superintendent's directions, notwithstanding the fact that such directions were not in writing nor confirmed in writing;
(b) As to liquidated damages the head contractor was not entitled to set off an amount of liquidated damages because, on a proper construction of the contract, the works had not reached practical completion;
(c) The adjudicated amount of $1.9M .

In the second adjudication, which raised *"indistinguishable issues"*, Adjudicator No. 2 (nominated by a different ANA) determined contrary to Adjudicator No. 1 findings, that:

(a) Nothing should be allowed to the claimed variations because the relevant variation directions were not in writing nor confirmed in writing and that no issue estoppel or *res judicata* arises in respect of the claim as the claim was not the subject of any previous determination by Adjudicator No 1;
(b) The head contractor was entitled to a specified amount of liquidated damages; the had adjudicated amount was $nil.

The subcontractor did not challenge the determination of Adjudicator No. 2) but served a fresh payment claim which was indistinguishable from the claim that was considered by adjudicator No. 2.

In the third adjudication, the subcontractor lodged its application with the initial ANA who nominated Adjudicator NO 1. Adjudicator No. 1 then determined, contrary to the adjudication determination of Adjudicator No. 2, that:

(a) The subcontractor was not barred by reason of the absence of the written confirmation to the variation instructions from claiming the variations that were the subject of the second adjudication determination;
(b) The head contractor was not entitled to set off liquidated damages against the subcontractor; and
(c) The adjudicated amount was some $600K.

The head contractor applied for a declaration that the third adjudication determination made by Adjudicator No. 1 is void, or an order quashing that determination on the grounds that:

(a) Bringing the claim and the adjudication application that led to the third adjudication determination, was an abuse of process; and
(b) Adjudicator No. 1 did not have jurisdiction to reopen the matters the subject of the second adjudication.

The subcontractor sought leave seeking a declaration that the second adjudication determination by Adjudicator No. 2 was void, on the basis that an issue estoppel arose from the first adjudication determination which prevented the head contractor reagitating before Adjudicator No. 2 the contractual issues that had been considered in the first adjudication.

Needless to say, Stevenson J was unimpressed with the "*spectacle"* before him which he regarded as an *"unsatisfactory situation".*

> *"This highly unsatisfactory situation has been caused by two things.*
>
> *The first is (Adjudicator No.2's) decision to express different opinions as to the construction of the contract to those expressed by (Adjudicator No.1).*
>
> *Irrespective of whether (Adjudicator No.1's) construction was correct or her opinions were "fundamental" to her determination in the sense of being the sole basis of her findings it was not appropriate for an adjudicator to, in effect, dissent from earlier adjudicative expressions of opinion in relation to the same provisions of the same contract between the Same parties in adjudications arising from the same project.*
>
> *It was also subversive of the intended operation of the Act, which is to establish a "coherent, expeditious and self-contained scheme" (Court of Appeal's decision in Shade Systems Pty Ltd v Probuild) and to achieve the result that "each party knows precisely where they stand at any point of time" (Chase Oyster Bar v Hamo Industries) and "designed to act quickly" (Probuild Constructions v Shade Construction – the High Court). That intended operation of the Act is illustrated by s22(4) which provides that where an adjudicator determines the value of any construction work carried out under a construction contract …, subsequent adjudicators must adopt the same value, unless it can be shown that the value has changed.*
>
> AMA submitted that s22(4) is *"not an exhaustive statement of the matters determined by an earlier adjudication that are binding on a subsequent adjudicator and that the Act manifests an intention to preclude re-agitation of the same issues"* I agree.
>
> *The second is the AMA's response to the (Adjudicator No.2's) Determination. AMA did not, until now, seek to challenge the (Adjudicator No. 2) Determination in the usual way. Rather, on 26 October 2018, within the three-month time limit in UCPR rule 59.10 for the commencement of proceedings for judicial review of (the second Adjudication Determination) AMA served on Icon a payment claim relevantly identical to that the subject of the (second Adjudication determination). AMA then, in its adjudication application, put the same argument that it now seeks to put in these proceedings, namely that Icon was estopped from contending before (Adjudicator No.2) that the conclusion expressed in the (First Adjudication) as to the proper construction of the Contract was incorrect.*
>
> *This course was adopted in the face of judicial depreciation of the practice of the repetitious use of the adjudication process (the subject of what Allsop P had expressed in Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009} NSWCA 69 at [2]"* ([05]-[21]).

His Honour quashed the Third Adjudication Determination made by Adjudicator No.2 on the ground that the Second Adjudication determination was valid because of the subcontractor's failure to make an application to challenge Adjudicator No. 2's decision within the 3 month period set out under UCPR rule 59.10 and that his Honour declined to grant AMA with an extension of time because of its *"decision inappropriately to challenge the (second Adjudication Determination) by resubmitting the payment claim, rather than apply for declaratory or prerogative relief (which) has caused prejudice to*

Icon in that Icon has now had to resist AMA's application to (Adjudicator No.1) as well as bring these proceedings to quash the consequent determination". Thus, as the Adjudicator No. 2 Determination was not invalid, the value that that adjudicator had determined in respect of those variations were binding on subsequent adjudications by reason of s22(4) of the Act.

CASTLE CONSTRUCTIONS PTY LTD v N & R YOUNIS PLUMBING PTY LTD [2019] NSWSC 225

The claimant subcontractor had entered into a construction contract with the builder respondent. Under the contract, the claimant was required to complete the works by May 2018, but a dispute arose when the works were not completed by that date.

On 3 October 2018, the builder's solicitors wrote to the claimant stating that the works had not been completed and, as the claimant's personnel had left the site, the builder had construed the claimant's conduct as a repudiation of the contract, which the builder had accepted by terminating the contract.

The claimant responded on 17 October 2018, contending that the purported repudiation was invalid and that the contract remained on foot and advising that the claimant remained ready, willing and able to carry out its obligations under the contract.

The parties then entered into negotiations which resulted in the execution of a Term Sheet under which:

(i) Each party withdrew their letters of 3 and 17 October 2018;
(ii) The builder deposited an amount of $150,000 into its solicitor's trust account;
(iii) At the completion of the subcontract works, the claimant would make a payment claim under the Act;
(iv) If the builder accepted the amount claimed then the claimed amount would be released to the claimant. If however the amount was not accepted, the builder would issue a payment schedule and, if the claimant accepted the amount, payment for that amount would then be made from the trust account. If the scheduled amount was not accepted, the claimant would then refer its payment claim to adjudication and whatever amount the adjudicator determined was to be paid to the Claimant from the monies to be released from the trust account.

Shortly after execution of the Term Sheet, the claimant returned on-site, but the parties soon fell into dispute. The builder's solicitors wrote to the subcontractor's solicitors referring to many alleged items of incomplete work and terminating the agreement summarised in the Term Sheet and directing the claimant not to return to the site.

The subcontractor's solicitors responded stating that the subcontract works had been completed and shortly afterwards the claimant served a payment claim which included an invoice referred to as a "final claim". The payment claim did not however state what the relevant reference date was.

The builder replied by was of a payment schedule stating, *inter alia*, that there was no available reference date.

On the 20th November 2018, the claimant referred its payment claim to adjudication. In its adjudication application, the claimant relied on the provisions within the contract which provided the payment claims can be made *"by the 28th day of the month"*. The Claimant argued that as it had not made a payment claim since 25 September 2018, at least two reference dates had accrued since serving its previous claim then.

The Adjudicator determined that as the contract provides that a payment claim can be served by the 28th day of the month *"this indicates that a payment claim is able to be served prior to such a date, and that any works claimed are to be calculated to the reference date of the 28th day of the said month".*

The adjudicator went on to say that if he was wrong in relation to the application of the contractual reference date, then the default provisions of the act would apply such that the reference date of 31 October 2018 would also be able to be utilised by the claimant.

Accordingly, the adjudicator determined that the claimant was entitled to the amount claimed. The respondent challenged the adjudicator's determination.

Parker J referred to various recent cases, including:

- *All Season Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289;
- *Primeline (NSW) Pty Ltd v BAEC Contracting Pty Ltd* [2018] NSWSC 372;
- *Greenwood Futures v DSD Builders* [2018] NSWSC 1407;
- *McNab NQ Pty Ltd v Walkrete Pty Ltd* [2013] QSC 128 (de Jersey CT);
- *Watkins Contracting Pty Ltd v Hyatt Ground Engineering Pty Ltd* [2018] QSC 65;
- *The Trustee for Allway Unit Trust t/as Westside Mechanical Contracting Pty Ltd v R & D Air Conditioning Pty Ltd* [2018] SASC 46;
- *Abergeldie Contractors Pty Ltd v Fairfield City Council [*2017] NSWCA 113; and
- *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction* [2018] HCA 4.

Parker J concluded that, based on the above cases, the existence or otherwise of a reference date is a jurisdictional fact. In quashing the adjudicator's determination, his Honour rejected the adjudicator's finding that the reference date was 28 November 2018 because:

(a) Even if the contract provision could be construed such that the payment claim took effect from 28 November 2018, the claim itself was lodged on 20 November 2018. Thus, based on the decision of the NSW Court of Appeal in *All Season Air*, the payment claim was invalid (see also Doyle J's decision of the South Australia Supreme Court in *Westside Mechanical* dealt with further below*)*;

(b) Under the Term Sheet the parties had agreed that a further payment claim would be made only once the work had been completed and this had the effect of amending the contract by substituting the requirement that a claim could only be made, not on the 28th day, but only once the works had been completed.

Further, and in so far as the adjudicator relied on the default provision of the Act on which to ground the reference date of 31 October 2018, such a conclusion was incorrect because under the Term Sheet the parties had in fact agreed on a reference date (viz: the date once the work had been completed). On this issue and the circumstances of when s 8(1)(b) of the Act applies, His Honour relied on *Patrick Stevedore v McConnell Dowell Constructors* [2014] NSWSC 1413.

Parker J then went on to state:

> *"There is another potential difficulty with the 31 October date. Had that been the relevant reference date, then the entitlement for the purposes of the application was to a progress claim for work done up to that date. It seems clear enough that, as at that date on no view had the work been completed. Yet the claim sought to recover the whole of the amount due under the contract for the work. In other words, had 31 October been available, it would have been open for the adjudicator to make a determination in favour of the contractor based on the work undertaken up to that point, but that is not the way in which the adjudicator proceeded …*
>
> *On the view I have taken, neither 28 November nor 31 October was available as a reference date to support the payment claim. It would have been open for the contractor to contend*

that the work had been completed and, if that was so, then on the view I take of the contract, the date of completion would have been the reference date. It appears from the (letter of the Claimant's solicitors of 12 November) that the contractor's position was that the work had been completed by the time the contractor left the site.

Had the case been put forward on that basis by the Contractor, a question might have arisen about the date of completion, not being a fixed calendar date, satisfied the requirement of s 8 (1) (a). Arguably, it would have. The Act expressly recognises an entitlement to "milestone" progress payments. The making of a progress claim on completion of works in such circumstances was recognised as a possibility by White JA in <u>All Season Air</u> and by Doyle J in <u>Westside</u>. (Also) the High Court in <u>Southern Han</u> spoke of a date under s 8 (1)(a) being fixed <u>by operation</u> of one or more express provisions of the contract …
…
For these reasons, I consider that even if the contract was still subsisting on 20 November (when the payment claim was served), the adjudicator made a jurisdictional error in concluding that there was an available reference date to support the claim.

If I am wrong in thinking that the adjudicator's cannot be supported by reference date of 31 October, then the question of termination becomes irrelevant since the purported termination did not take effect until after that date. The question would only be relevant if the Adjudicator's could be supported of the reference date of 20 or 28 November. In that event, it would be necessary to consider whether there had been a valid termination of the contract before 20 November which would prevent that date from being used".
([82] – [87]).

Fulton Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264; Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd [2018] NSWCA 107

Fulton Hogan, entered into a subcontract with Cockram whereby Cockram were to carry out construction work. Cockram served a payment claim on Fulton Hogan and, in reply, Fulton Hogan served a payment schedule stating that the amount it proposed to pay was significantly less than the amount claimed.

The key reason for the difference between the claimed amount and the scheduled amount related to Fulton Hogan's off-setting claim for liquidated damages. In its adjudication application Cockram argued that it was not liable for liquidated damages because it was entitled to an extension of time (EOT) under the subcontract.

The subcontract contained a number of condition precedents for a party to be entitled to an EOT- specifically, Cockram had to demonstrate that Fulton Hogan had received an equivalent EOT under the relevant clause of its head contract.

In her determination, the adjudicator, when dealing with whether the relevant clause of the subcontract had been satisfied, said:

> *"…I do not consider that this is a legitimate condition precedent as it relies on a contract relationship… to which the Claimant is not a party. Further, there is no information to suggest that Fulton Hogan even sought an EOT from the Principal…"*

Cockram referred its payment claim to adjudication and the adjudicator awarded Cockram an amount of $8.3 Million. Fulton Hogan applied for judicial review, arguing that the adjudicator failed to give adequate reasons and that accordingly, determination should be quashed.

Fulton Hogan argued that the adjudicator had failed to give reasons for a critical element of her decision (i.e. as to why she refused to apply the relevant provision of the subcontract) and that this meant that she had failed to meet the requirements of s 22(3)(b) of the Act. Cockram argued that the relevant provision of the subcontract was void because it contravened the pay when paid provision in s 12 of the Act. However, the problem was that the adjudicator did not state that this was the reason for her conclusion-she merely stated that the relevant clause in the subcontract was "*not legitimate or workable".* Cockram argued that what the adjudicator had in mind was s 12 (2) (c) of the Act.

Ball J found that it was mere speculation that the adjudicator intended to rely on s 12 in finding that the relevant provision in the subcontract did not apply and accordingly set aside the determination because of the adjudicator's failure to provide adequate reasons where reasons are required by statute, viz: s 22(3)(b).

On appeal, the NSW Court of appeal held that adjudicator's determination was valid because:

(i) S 22(3)(b) of the Act only requires that the adjudicator's determination to *"include the reasons for the determination",* and not that the reasons so included be adequate according to any objective criterion;

(ii) As per the High Court in *Probuild (*per Gaegler J*)*- the adjudicator's ultimate function is to "*determine the amount and timing of a progress payment"* and that an adjudicator's obligation under s 22 (2) requires "*a process of evaluation,*

> *sufficient to warrant the description*" as consideration in the particular context, and not mere formalistic matters. The process that the adjudicator adopted could be sufficiently described as a "consideration" of the matters set out in s 22(a) (e).

The Court of Appeal noted that adjudicators need not be lawyers and so the language employed in determinations should not "*be viewed through the prisms of legal concepts*" and that what is required is an *"explanation for the outcome"* not a written account of the subjective process by which the determination was reached.

This case therefore shows, at least in NSW, that the threshold for adjudicator's reasons, following the High Court's decision in *Probuild*, has been set very low.

VICTORIA

PHHH Investments No2 Pty Ltd v United Commercial Projects Pty Ltd [2018] VSC 15

On 15 June 2017, the claimant served a payment claim on the respondent. On 29 June 2017, the respondent served a payment schedule on the claimant stating that the amount it proposed to pay in respect of the payment claim was $nil. The claimant referred its payment claim to adjudication and, on 17 July 2017, the adjudicator accepted appointment.

On 25 July 2015, the claimant sent a letter to the adjudicator requesting that the adjudicator ask it to make further submissions and stating that if the adjudicator required *"further time to accommodate the submissions (then) the claimant is happy to agree to a reasonable request for same"*

On 26 July 2017, the adjudicator issued a notice to the parties requesting further submissions pursuant to s 22(5) and also seeking an extension of time under s 22(4) for the making of his determination to 7 August 2017. Neither party however received this correspondence.

On 27 July 2017, the adjudicator sent a second notice under s 22(5) requesting further submissions from the respondent in response to the submissions that the claimant had sent on 26 July 2017 and, on 1 August 2017, the respondent provided its further submissions.

On 7 August 2017, the parties were advised that the adjudicator had made his determination and this was subsequently released after the claimant paid all of the adjudicator's fees.

The respondent initiated proceedings to quash the determination on the basis that the adjudicator had committed jurisdictional error by issuing the determination outside the time period prescribed under the legislation.

Reardon J held that the claimant had not agreed to extend the adjudicators time. The language used in the claimant's letter of 25 July 2017 indicated an intention to agree to a reasonable request by the adjudicator to an extension of time, <u>not</u> an outright agreement without a request, especially if the request was not reasonable and without an agreed extension the adjudicator should have made his determination by 31 July 2017. His Honour did not accept the proposition that the Claimant's letter of 25 July 2017 constituted an "*implied agreement".* Nonetheless, even though the determination had been made outside the time period prescribed under the Act, this did not mean that it was invalid.

The take out from this case is that an adjudicator should always ensure that he/she has obtained a clear agreement from the claimant in respect to any request to extend his/her time for the making of a determination.

VALEO CONSTRUCTION v PNAS [2018] VSC 243

The parties entered into a contract relating for the construction of a 5-storey apartment building. Under the contract, the claimant was entitled to make progress claims on the 30th day of each month.

A progress claim of $2.2M was lodged by the claimant on 15 February 2018. The payment claim was revised on 1 March 2018, when the amount claimed was marginally increased.

On 6 March 2018, the Claimant sent an email to the respondent stating that it had withdrawn the first payment claim and that it relied on the second payment claim that it had served on the respondent on 1 March 2018.

On 22 March 2018, the respondent served a payment schedule on the claimant. The claimant asserted that because the payment schedule had been served more than 10 business days after the second payment claim, the respondent was, by reason of s16 of the Act, liable to the full amount claimed. At the hearing the respondent disputed the validity of the second payment claim, relying on the provisions of s14(8) of the Act.

Digby J held that the second payment claim was invalid as it contravened s14(8) of the Act. His Honour was clearly troubled as to the potential prejudice to the respondent from a position that was unclear as to what claim was then current and what claim had been withdrawn.

> *"In my view as a practical observation, it could be problematic … unless the earlier payment claim served is clearly abandoned or withdrawn prior to or contemporaneously with the revised or amended or corrected subsequently served payment claim in respect of the same reference date"*.(at[63])

Digby J followed the NSW cases of *Southern Han* which supported the decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd.* His Honour considered the decision of Vickery J in *Amasya Enterprises Pty Ltd v Asta Developments* which upheld claims that were later supplemented by additional material. Digby J noted that the present case was distinguishable from the facts in *Amasya*. His Honour stated that *Amasya* did not involve a retrospective revision of the amount claimed whereas, in the present case, the claimant's email of 6 March 2018 was for a different amount (seeking to rectify what appeared to have been an omission from the first payment claim) and therefore constituted another payment claim in respect of the same reference date and therefore contravened s14(8) of the Act.

IAN STREET DEVELOPER v ARROW INTERNATIONAL [2018] VSC 14 and [2018] VSCA294

This case deals with the question of whether an adjudicator's decision made outside the prescribed period, is invalid.

Section 22(4) of the Act requires that:

> *"an adjudicator is to determine an adjudication application as expeditiously as possible, and in any case –*
>
> *(a) Within 10 business days after the date on which the acceptance by an adjudicator of the application takes effect in accordance with section 22 (2); or*
>
> *(b) Within any further time not exceeding 15 business days after that date, to which the claimant agrees."*

On 7 October 2016, the Victorian Building Authority (VBA) obtained clarification from the Victorian Government Solicitor's Office regarding this provision and specifically on the maximum amount of time available to an adjudicator to determine an adjudication application. The VBA distributed the Government Solicitor's advice to the ANA's and the ANA's circulated this advice to all adjudicators on their panels.

Paragraph 3, under the heading "*Summary of Advice"*, stated that:

> *"The maximum period of time for an adjudicator to determine an application under s22(4) is 215 business days after the date on which the acceptance of the application by the adjudicator takes effect in accordance with s20(2)"*

However, in *Ian Street*, Reardon J determined that the maximum extension under s.22(4) of the Act is a further 5 days and accordingly determined that the adjudicator had failed to make a determination within the time period prescribed under the Act. Nonetheless, his Honour held that the adjudicator's determination was valid.

The effect of Reardon J's decision, from the perspective of an adjudicator is that if a determination has been made outside the prescribed time period within which a determination was required to be made the adjudicator has no entitlement to be paid for his/her fees, irrespective of whether the determination has been set aside or not.

When the matter went on appeal, the Victorian Court of Appeal held (unanimously) that the interpretation of s22(4) as given by Reardon J was correct:

> *"In this case the words of the provision are clear. I respectfully agree with the judge's analysis … There can be no doubt, in my view, that the phrase that date" in sub-para (b) is a reference back to "the date" referred to in sub-para (a). The word "that" is plainly enough a reference back to something already mentioned and the phase "that date" is plainly enough a reference back to something earlier described as a "date".*

(per Maxwell P at [85])

The take out from this case is that adjudicators may only seek a maximum of 5 business days extension in order to determine an adjudication determination, with a total time period of 15 business days from the date of the adjudicator's acceptance.

Vanguard Development Group v Promax Building Developments [2018] VSC 386

The respondent engaged the claimant to construct a number of apartments and, under the terms of the contract, the claimant could make a "final claim" when:

- All the defect liability periods have ended;
- All defects are rectified, and incomplete works finished; and
- All the works have been completed in accordance with the contract.

On 15 December 2017 (being the last day that the claimant performed work on site), the claimant issued a payment claim (December Payment Claim). The respondent issued a payment schedule proposing to pay $nil. The claimant referred its payment claim to adjudication where it obtained an adjudication determination which required the respondent to pay it an amount of $230,000 (First Adjudication).

On 27 February 2018, the contract was terminated but, on 8 March 2018, the claimant served a payment claim, described as a *"claim for final payment"* in the amount of $340,000 (March Payment Claim). The respondent replied by way of a payment schedule stating that the amount it proposed to pay was $nil. The claimant then referred its March Payment Claim to adjudication (Second Adjudication).

In the Second Adjudication, the adjudicator relied on the relevant clause in the contract relating to final payment and found that there was a valid reference date for the payment claim, or, in the alternative, that a reference date existed by reason of s9(2)(d) of the Act. The adjudicator awarded an amount of $210,000. In arriving at his determination, the adjudicator stated that issue estoppel and s 23(4) of the Act precluded him from considering defects that existed at the time of the First Adjudication that were said to have been subsequently identified.

Her Honour Kennedy J quashed the Second Adjudication determination due jurisdictional errors committed by the adjudicator.

Firstly, her Honour held that there was no valid reference date for the making of the Second Payment Claim. Insofar as the adjudicator had in his alternative reasons relied on s 9(2)(d) of the Act, this provision is only applicable for the making of a final payment <u>if</u> the contract makes <u>no</u> express provision with respect to the matter. Accordingly, s 9(2)(a) applied and this meant that the reference date was to be determined "*by or in accordance with the terms of the contract*". This therefore involved a consideration of the meaning of when a final payment claim could be made as set out in the contract. Her Honour thought that a reasonable business person would understand that the phrase "*final claim for payment*" is provided by the specific circumstances set out in the contract *" is consistent with the ordinary meaning of that concept which involves a final balancing of accounts, or simply the last day of the payment claims to discharge the principal from further obligations to pay money under the contract. Generally, such a claim may only properly be made when everything required of the contractor under the construction contract has been fulfilled. Finality will also be indicated when the totality of the work is complete once rectification of the defects and other outstanding matters have been addressed"* (at[100]). Thus, given that the contract had set out the specific circumstances when a payment claim may be made and that these circumstances had not been satisfied it cannot be said that the payment claim constituted a final payment claim and that therefore the reference date for the making of such a claim had not arisen.

Further, her Honour held that s 23(4) of the Act required the adjudicator to direct himself to the question of the "*value of the works*". Where the adjudicator had been expressly invited by the respondent to consider the defects, the adjudicator was required to ask himself whether he was satisfied that the "value" of the works had altered by reason of the further alleged defects and the adjudicator's failure to do so constituted a jurisdictional error:

> *"…(in) valuing the works under s 11, the Adjudicator was to consider whether any of the work the subject of the relevant payment claim was in fact defective, as well as the estimated cost of rectifying any such work (refer to Maxtra). Even if s 23(4) applied, the Adjudicator was required to ask himself whether he was satisfied that the "value" of the works had altered by reason of the existence of the further alleged defects"*
> (at [141])

On this issue it was important to note that the respondent had included expert reports in its adjudication response which identified defective work with a value in excess of $660,000. Accordingly, her Honour stated that:

> *In circumstances where (the respondent) invited the Adjudicator to be satisfied that the value had changed, the Adjudicator did not have to be so satisfied, but he was bound to consider whether he was. No such consideration took place given he excluded from consideration any defects which existed at the time of the earlier adjudication, but which had only subsequently been identified.*
> *…*
> *Given that the Adjudicator failed to address the issue raised by s 23(4) and thereby ignored the relevant material, the error was also jurisdictional"*. (emphasis added)
> (at [144])

The take out form this case is twofold:

An adjudicator should:

(i) Look at the precise terms of the contract to determine whether a reference date arises for final payment following termination of the contract; and

(ii) An adjudicator must consider whether defects that were identified subsequent to the previous adjudication have altered the value of the works.

Green Suburban Pty Ltd v Vita Built Pty Ltd [2018] VSC 330

The claimant was engaged by the respondent to construct several townhouses. The contract provided that "the reference date" for submitting progress claims was the 24th day of the month.

On 14 February 2018, the respondent served a notice of default on the claimant, citing that the occurrence of an "*insolvency event*" (as that term was defined under the contract). The claimant accepted that the contract had been validly terminated and there was no issue that any work had been performed by the claimant after termination.

The contract provided that where termination had occurred due to an "*insolvency event*" the respondent would not be bound to make any further payment unless an obligation arose under clause 9. Clause 9 set out the procedure whereby following termination of the contract, the architect would calculate the amount owing by one party to the other and issue a certificate in respect of that amount.

On 3 April 2018 (i.e. almost 2 months after termination), the claimant served a payment claim on the respondent of $189,000. The respondent did not issue a payment schedule. The matter was referred to adjudication and the adjudicator found that the payment claim was supported by a reference date of 24 March 2018 and proceeded to make a determination awarding the claimant the full amount claimed.

The respondent issued court proceedings to set aside the adjudicators determination.

Kennedy J quashed the adjudication determination on the basis that the right to issue a progress payment claim of the 24th day of the month was suspended on termination and that no reference date could arise until the process under clause 9 had been completed. It was the issue of a certificate pursuant to clause 9 that gave rise to the payment obligation post-termination but, as no such certificate had been issued, there was no reference date upon which to ground the payment claim. Accordingly, as the claim was not supported by any reference date the adjudicator had no jurisdiction to make his determination.

This case is yet another example of the courts applying the reasoning of the High Court in *Southern Han*, viz: that the existence of a reference date is a precondition to the making of a valid payment claim. The take out for an adjudicator is the need to carefully consider the contract so as to be satisfied that the claimant has a right to issue a payment claim post termination. If the adjudicator makes a mistake in respect to this matter and proceeds with the making of an adjudication determination, then such determination will be quashed for lack of jurisdiction.

NUANCE GROUP v SHAPE AUSTRALIA [2018] VSC 362

The claimant served the payment claim on the respondent for an amount of $3.5M and the respondent provided a payment schedule indicating that the amount it proposed to pay was $nil. The claimant referred its payment claim to adjudication but reduced the amount it claimed to $2.2M.

The adjudicator determined that the claimant was to be paid an amount of $1.4M. The respondent made an application for a review adjudication and the review adjudicator made a review determination for an amount of $1.2M.

The respondent applied to the court seeking to quash the adjudication determination and the review determination on the basis that the original adjudicator had erred in making his determination.

Specifically, the respondent argued that the adjudicator had failed to determine the performance of the claimed construction work and its value. The respondent contended that rather than determining the performance of the claimed work and its value, the adjudicator commenced the assessment process by taking the amount claimed and then determining the adjudicated amount by simply deducting from that claimed amount the claims that the adjudicator considered to be excluded amounts. The respondent argued that the adjudicator fell into jurisdictional error by starting with the claimed amount and then determining whether the respondent had established a sufficient basis to withhold payments. The Respondent also argued that the adjudicator had failed to provide adequate reasons, contrary to s23(3). The Respondent contended that the reasons provided by the adjudicator did not enable the parties to determine how the adjudicated amount had been calculated. The respondent emphasised that the parties should not be required to speculate as to how the adjudicated amount had been arrived at.

Digby J quashed the adjudication determination on the basis that the adjudicator had failed to make the determination in accordance with the Act and that, by extension, the review determination was also quashed because it was based on an invalid adjudication determination. Section 23 of the Act requires the adjudicator to determine the progress claim to be paid, and that, at a minimum, requires a determination as to whether the construction work that is the subject of the claim has been performed and its value. Insofar as the adjudicator is required to provide reasons *"bare reasons which render the adjudicator's determination will suffice",* but that in the present case the adjudication determination *"failed to provide comprehensible reasons for the determination on the basis upon which it was decided that ($1.4M) was to adjudicated amount"*. (at[72]).

Digby J held that the adjudicator's process of working back from the claimant's total claimed amount and adjusting the claimed amount by deducting composite items of the claim in a way which cannot be comprehended on a fair and reasonable consideration but could only be inferred and reconstructed, was contrary to the requirements set out under section 23. It was not proper for the adjudicator to have adopted a process of working backwards from the claimant's total claimed amount by simply accepting such amount and then deducting from that amount those items that the adjudicator considered to be excluded amounts. Digby J also quashed the determination of the review Adjudicator on the basis that that determination related to a review of an invalid determination.

SHAPE AUSTRALIA v NUANCE GROUP [2018] VSC808

After the quashing of the adjudication determinations relating to the claimant's earlier payment claim, (see the case study above) Digby J heard a separate motion by the claimant respect of a subsequent payment claim that it had referred to adjudication.

The subsequent payment claim was for an amount of $1.2M and included claims for items of construction work that had been claimed in the previous payment claim and that had been the subject of the previous (but quashed) adjudication determination. In the subsequent adjudication the adjudicator found that that payment claim:

(a) Had no reference date and that the subsequent payment claim was invalid;
(b) The invalidity of the payment claim meant that the adjudicator had no jurisdiction; and
(c) In any event, the amount payable was $nil because the entirety of the purported payment claim was for an excluded amount, as it was an attempt to recoup the respondent's asserted entitlement to liquidated damages.

The claimant applied to the courts seeking orders remitting the First Adjudication or the Second Adjudication Determinations to the respective adjudicators, or appropriate persons for determinations according to law.

Digby J considered that there were 3 issues that he had to consider:

(a) Is there an *issue estoppel* which arises in respect of the claims within the Second Adjudication Determination?
(b) If no *issue estoppel* arises should the court grant relief in the nature of *certiorari* to quash the Second Adjudication Determination? and
(c) Should there be a remittal of the Adjudication Application.

The claimant argued that whilst an *issue estoppel* does not arise in respect of the First Determination that had been quashed, *issue estoppel* however arises in respect of the second determination. Digby J rejected this argument;

> *"In my view neither PC 14 nor PC 13 can be remitted for re-determination unless and until the Second Determination which has determined the claimant's entitlement to payment for PC14 (which represented the same claims as PC 13) has been quashed"*
> ([17]).

However, because His Honour determined that Second Determination should stand (see below) there was no basis for an order that the Second Determination can be remitted.

In relation to the question of whether a reference date existed in respect to the payment claim, Digby J determined that as no new work has been performed since PC13 was issued, PC14 was a second payment claim made in respect of the same reference date as PC 13. Thus as PC14 had no valid reference date there was therefore not a valid payment claim:

> *"Under the SOP Act, there must be a valid payment claim for the adjudicator to make a determination. An indispensable pre-requisite of a valid payment claim is an available reference date to found the payment claim. In this way Parliament has prescribed the existence of this particular factual situation as a condition precedent to the Adjudicator exercising his/her power to make a determination under the SOP Act. On an application for*

judicial review where relevantly in issue, the court must determine for itself whether the reference date exists.

…

Accordingly, if an Adjudicator purports to exercise power under the SOP Act despite the non-existence of a jurisdictional fact whether the non-existence of that part of the Adjudicator's jurisdictional base is ignored or wrongly determined by the adjudicator, the Adjudicator would have committed jurisdictional error.

Kirk has held that State Supreme Courts must have the power to review jurisdictional errors which are alleged to have occurred. If the SOP Act has the privative effect suggested in Grocon (by Vickery J, but recanted by His Honour after the High Court's decision in Kirk – refer to Sugar Australia) namely that the Supreme Court is precluded from relieving a certain species of jurisdictional error the SOP Act would, in that respect, be rendered unconstitutional".
([40]. [46][47]).

Digby J noted that in the present case the reference date is, by reason of s9(2)(a) of the Act, to be determined in accordance with the terms of the contract. Digby J agreed with the adjudicator's conclusion that there was no valid payment claim because PC14 was:

(a) Served more than 3 months after the last reference date; and
(b) That the claim was in respect of the previous payment claim.

His Honour also agreed with the adjudicator's conclusion that PC14 claimed an excluded amount under s10B of the Act;

…. I note in this regard that (the claimant) obliquely submitted that PC14 does not contain an express reference to liquidated damages. However, the Second Adjudicator appreciated that the amount of PC14 can be explained in no other basis given no new work had been performed and the other claims in PC14 have been satisfied. Accordingly, the PC14 claims, in all probability, are in substance in the nature of a claim to recoup (the respondent's) asserted entitlement to liquidated damages which had been earlier deducted from the Contract Sum by Superintendent effected adjustments from time to time.

…

The adjudicator had reasoned that an amount to 'recoup' liquidated damages is to be analogous reasons to those Vickery J referred to in relation to liquidated damages per se in Seabay Properties.

… However the key question is whether the language of s10(B)(1) and (2) of the SOP Act is broad enough to support the Second Adjudicator's conclusions on this aspect.

Section 10B(1) of the SOP Act provides in effect that all excluded amounts are to be ignored in relation to calculating the amount of progress payment to which a person is entitled under the construction contract. The statutory reference therein to the concept of undertaking the calculation of a progress payment entitlement is in my view very broad and sufficiently broad to take into account the application of any excluded amount which is relevant, including by way of set-off or allowance in respect of a progress payment.

I consider that s10B(2) of the SOP Act extends to cover claims for compensation due to the happening of an event and extends further to include any amount relating to a claim for time related costs. A claim for compensation for an event including an event giving rise to an asserted entitlement to time related costs in the nature of liquidated damages, triggers the operation of that section.

> *For the above reasons the Adjudicator was, in my view, correct to consider that the seabay supported his findings and was correct to exclude the entirety of PC14 as an amount calculated to recover earlier Superintendent effected adjustments to the Contract Sum on the basis of (the Claimant's) liability to pay or allow liquidated damages."* ([83], [87], [94] – [97]).

Digby J's comments construing the claim as a claim to recoup liquidated damages and therefore an excluded amount, have been the subject of some criticisms. It is argued that his Honour's observation cannot be reconciled with the primary objective of the Act which is to promote cash flow and that if the Second Adjudicator's reasoning were to be accepted then it would deny claimants from being paid amounts otherwise due because of the timing of when they dispute the levying of liquidated damages. If the claimant had made an earlier claim for work carried out and the respondent had contested that claim on the basis of a set-off by way of liquidated damages, then the respondent's set-off would have been excluded.

SOUTH AUSTRALIA

THE TRUSTEE FOR ALLWAY UNIT TRUST t/a WESTSIDE MECHANICAL CONTRACTING PTY LTD v R D AIR CONDITIONING PTY LTD [2018] SASC 46

The Claimant entered into a construction contract with the respondent. In October 2017 the claimant ceased work even though it argued that the contract had not been terminated but that the respondent had merely asked it to leave the site, which the claimant agreed to do. The respondent however argued that the contract had come to an end on 31 October 2017, either because of the respondent's acceptance of the claimant's repudiation, or alternatively, by the parties agreement to terminate the contract from 31 October 2017.

In any event, on 8 December 2017, the claimant served a payment claim on the respondent and the respondent replied by way of a payment schedule stating that there was no liability to pay and noting that the payment claim did not identify a reference date. Further, the payment schedule stated that the respondent was entitled to a set-off.

On 17 January 2018, the claimant lodged its adjudication application in relation to its payment claim. In its adjudication application, the claimant nominated a reference date of 23 December 2017 relying on the specific provision in the contract that provided for the time for submitting payment claims as the *"23rd day of the month for work done to and including the last day of the month".*

The adjudicator made an adjudication determination requiring the respondent to pay the claimant the claimed amount, noting in his determination that he had proceeded on the basis that the reference date was 23 December 2017 and that the contract remained on foot.

The respondent issued proceedings seeking judicial review, arguing that the Adjudicator fell into error in concluding that the payment claim had a valid reference date because the contract had been terminated, repudiated or mutually cancelled and that therefore 23 December 2017 was not an available reference date.

Doyle J noted that whilst the legal status of the contract was not of itself a matter determinative of the adjudicator's jurisdiction (and that therefore if the adjudicator erred in concluding that the contract remained on foot), this would not, of itself, involve jurisdictional error. Nonetheless:

> *"[The] existence or availability of a reference date is a precondition to the existence of a valid payment claim and hence a matter going to the adjudicator's jurisdiction. And because the status of the contract from late October 2017 is relevant to the existence of a reference date, it is a matter that I must consider as an aspect of my consideration of the parties competing submissions in relation to the existence of a reference date".*
> ([81]).

In this regard, his Honour's concluded (contrary to the adjudicator's finding) that the parties had agreed to bring the contract to an end or, alternatively, the parties had mutually cancelled or abandoned the contract:

> *"In my view, while the material before the adjudicator was not sufficiently detailed to be precise or exhaustive about the terms agreed by the parties, it was sufficient to conclude that the parties did agree the contract would come to an end; that is, that the contract was to be terminated by agreement.*

> *While the (unilateral) exercise of a contractual right to terminate requires strict compliance with any contractual preconditions to the exercise of the right (including, as here, any notice requirement), no such requirement attend a mutual agreement between the parties to terminate the contract. It is simply a matter of whether it may be inferred from an objective assessment of their communications and conduct, that the did not intend the contract to be further performed.*
>
> *… It follows from the above that a valid payment claim both assumes the existence of a reference date and also may only be served "on and from that reference date". Put another way, the existence of a reference date is a precondition to the making of a valid payment claim under the Act and marks the commencement of the period of time within which it may be served.*
>
> *In the circumstances of this case, the reference date must be one determined in accordance with the terms of the contract; that is, a contractually generated reference date. While limb(b) of the definition of a reference date (under s4) allows for the possibility of statutorily generated reference dates that cannot avail a claimant in circumstances where (as here) the contract provides for the making of progress claims. In this situation, the entitlement to serve a payment claim is only conferred upon a person on and from the contractually generated reference date. That is so even in circumstances where the contract has been terminated or has otherwise come to an end.*
> *([94] – [95], [104] – [105])*

Accordingly, as the contract was no longer on foot from late October 2017, the claimant was unable to rely upon the reference date of 23 December 2017. This was so even though s 13(4) permits a payment claim to be served up to 6 months after the construction work had been carried out because the payment claim must still be in respect of a contractually generated reference date. In other words, s 13(4) does not create a right to make a progress claim, but merely marks the end of the period within which a payment claim based upon that right may be served:

> *"When the parties' contract came to an end in October 2017, (the parties) retained any rights they had already accrued under the contract, but they did not thereafter accrue any further rights. There is nothing in the contract to suggest that rights to make progress claims continued to accrue after the contract came to an end…And if (the Claimant) did not accrue any further entitlement to make contractual progress claims after the end of October 2017, then no contractually generated reference dates arose after that date. Put another way, if (as I have found) the contract came to an end in late October 2017, then (the Claimant) was not entitled to rely upon any reference date that would have accrued had the contract remained on foot"*
> ([109])

Doyle J also considered as to what the outcome would be if his conclusion about the status of the contract was wrong and that the contract remained on foot. Could the claimant in such circumstances then have been able to rely on the reference date of 23 December 2017, given that it had served its payment claim on 8 December 2017? In this regard, his Honour followed the reasoning of the NSW Court of Appeal in *All Season Air Pty Ltd v Regal Consulting Services* [2017] NSWCA289 that it would be impermissible to serve a valid payment claim prior to the reference date of 23 December 2017. In other words, a payment claim served prior to the contractually generated reference date is premature and therefore invalid, and this is so even if the contract expressly provides that a payment claim served prior to the reference date was to deemed to have been made on that date. This is because there is a difference between a progress claim made under the contract and a progress claim made under the

Act, with the latter only able to be made "*on and from*" the reference date (see s8 of the Act). It will be noted that the approach Doyle J adopted on this issue is in sharp contrast to the position adopted by the Victorian Supreme Court (refer to Vickery J's decisions in *Metcorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* (2010) 30 VR 141 (at [71] – [114]; and *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 (at [130] – [138])..

Hansen Yuncken Pty Ltd v Yuanda Australia [2018] SASC158

This case deals with the relevant provisions within the SOP Act enabling an adjudicator, on his/her initiative or, on the application of the parties, to correct a determination if the determination contains a clerical mistake or an error arising from an accidental slip or omission, a material miscalculation of figures or a defect of form (i.e. the "*slip rule*", or s22(5) of the Act). The case is important because the court held that the criteria set out in s22(5) are not jurisdictional facts and as such, even if there were any error in respect of the application of s22(5) such error would be within jurisdiction and therefore not reviewable by the courts.

In the present case, the respondent claimed that the claimant had failed to meet the Date for Substantial Completion as specified under the contract and sought to exercise its right to impose liquidated damages in the sum of $6.4M. The respondent drew down 2 bank guarantees for an amount of $4.4M in partial payment of the assessed liquidated damages and alleged that the remaining $2M remained owing by the claimant.

The claimant subsequently served a payment claim on the respondent seeking payment for an amount of $7.7M and the respondent replied by way of a payment schedule scheduling an amount of($500K). Importantly, whilst the respondent's payment schedule took into account the deduction of $4.4M for liquidated damages, it did not deduct the balance of the liquidated damages of $2M.

The claimant referred its payment claim to adjudication and the adjudicator determined that the claimant was entitled to an adjudicated amount of $1.9M. Importantly, the adjudicated amount did not include a reference to the balance of the liquidated damages of $2M.

After it received a copy of the adjudicator's determination, the respondent wrote to the adjudicator asserting that the adjudicator had mistakenly used the amount of $4.4M (i.e. the sum recovered under the bank guarantee) as the respondent's entitlement to liquidated damages, rather than the full amount of $6.4M. The respondent requested that the adjudicator exercise his discretion and "correct" his determination under s22(5) of the Act. The adjudicator considered that he had not made an error and accordingly declined to exercise discretion to amend his determination.

The respondent sought judicial review arguing that the adjudicator made a jurisdictional error in determining an incorrect sum of liquidated damages and in subsequently determining that he could not exercise his powers under s22(5).

Lovell J held that enabling a court to review decisions relating to s22(5) would be inconsistent with the overall purpose of the object of the Act, which was to provide a *"prompt route to payment"*. His Honour also thought that there was no error by the adjudicator as he was correct in determining that the respondent had only put the in issue the sum of $4.4M for liquidated damages. The respondent's failure to include the balance of liquidated damages in its scheduled amount calculations was fatal and the adjudicator was correct to find that the balance of the liquidated damages was not in issue.

Lovell J also found that because the respondent had only put in issue the sum of $4.4M for liquidated damages and not $6.4M, it was not unreasonable for the adjudicator to have refused to exercise his discretion under s22(5) of the Act:

Relevantly, his Honour agreed with the following passage of the views that McDougall had expresses in *Musico v Davenport* [2003] NSWSC 977 (at [122]):

"…However, it is a matter for the adjudicator whether or not such correction is to be made. If an adjudicator declines to make any correction-for example, because he or she thinks there is no mistake- then the error (if any) will be an error within jurisdiction. This is really another way of saying that, under s22(5), a party to an adjudication has the right to request the adjudicator to consider the exercise of power under s22(5), not the right to have the power exercised in a particular way."