IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A17 of 2017**

BETWEEN: **MAXCON CONSTRUCTIONS PTY LTD**
Appellant

and

MICHAEL CHRISTOPHER VADASZ
(TRADING AS AUSTRALASIAN PILING COMPANY)
First Respondent

ADJUDICATE TODAY PTY LTD
Second Respondent

CALLUM CAMPBELL
Third Respondent

APPELLANT'S SUBMISSIONS

I PUBLICATION

1. This submission is suitable for publication on the Internet.

II CONCISE STATEMENT OF ISSUES PRESENTED BY THE APPEAL

2. Did the Full Court err by following *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No. 2)* [2016] NSWCA 379 (***Probuild***) and concluding that the *Building and Construction Industry Security of Payment Act* 2009 (SA) (**BCISP Act**) excluded judicial review on the ground of error of law on the face of the record?

3. Did the majority in the Full Court err by holding that the error of law made by the adjudicator in the application of s 12 of the BCISP Act did not amount to jurisdictional error?

4. If the Full Court erred in either respect, what is the appropriate relief?

III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

5. Notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) is not required.

IV CITATION

6. *Maxcon Constructions Pty Ltd v Vadasz (No. 2)* [2017] SASCFC 2 (**FC**).

V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

7. The applicant entered into a contract with the first respondent (**Vadasz**), an undischarged bankrupt who carried on business under the name Australasian Piling Contractors (FC [2]).

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8. Vadasz applied for an adjudication under the BCISP Act of a payment claim for $204,864.55. Maxcon raised substantive objections in its payment schedule, including relevantly that the contract provided for a retention sum of $38,999.40. Vadasz contended in his application that the retention sum provisions in the contract were "pay when paid provisions" rendered void by s 12 of the BCISP Act (FC [3]).

9. The third respondent issued an adjudication determination in which he determined the adjudicated amount to be $204,864.55 and found that Vadasz was entitled to interest thereon and that the applicant was to pay the adjudication application fee (FC [4]).

10. The appellant instituted an action for judicial review of the determination contending that Vadasz's failure to disclose that he was an undischarged bankrupt in contravention of s 269(1)(b) of the *Bankruptcy Act* 1996 (Cth) rendered the building contract void. In respect of the retention sum issue, it contended the adjudicator wrongly found that the clause entitling it to retain a sum was a "pay when paid provision" rendered void by s 12 of the BCISP Act, and that that involved either jurisdictional error or error of law on the face of the record (FC [5]).

11. The trial judge (Stanley J) considered[1] that s 269(1)(b) had been contravened (TJ [41]) but held that the building contract was not void as a consequence (TJ [52]). That issue is no longer relevant[2]. In respect of the retention sum issue, Stanley J held that the adjudicator had made an error of law, but that the error was not jurisdictional (TJ [71]) and that the reasons did not form part of the record (TJ [78])[3].

12. On appeal to the Full Court:

    (1) as to error of law on the face of the record, the Court unanimously held that:

        (a) the trial judge erred by failing to treat the reasons as part of the record (FC [155], [240], [285]);

        (b) applying first principles, the legislature had not impliedly excluded judicial review on the ground of error of law on the face of the record (FC [186], [240], [286]);

        (c) however, *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (***Say-Dee***) required it to follow *Probuild* unless convinced it was plainly wrong, and it was not so convinced (FC [208], [240], [286]);

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1 *Maxcon Constructions Pty Ltd v Vadasz (No 2)* [2016] SASC 156 (**TJ**).

2 The Full Court unanimously agreed with the trial judge that contravention of s 269(1)(b) of the *Bankruptcy Act* 1966 (Cth) did not render the contract void or unenforceable (FC [92], [240], [248]). Furthermore, Hinton J, with whom Lovell J agreed on the issue, considered that the finding of breach had not been made according to the *Briginshaw* standard (FC [269]).

3 The Full Court considered that the trial judge had also ruled that review for error on the face of the record was impliedly excluded (FC [161]), albeit the judgment is arguably internally inconsistent on the point (see TJ [16], cf. TJ [69]).

(2) on the question of jurisdictional error, Blue J, with whom Lovell J relevantly agreed, considered the error of law respecting the application of s 12 of the BCISP Act was not jurisdictional (FC [148]). Hinton J disagreed and concluded that there was jurisdictional error (FC [284]);

(3) as to the question of relief:

(a) Blue J, with whom Lovell J relevantly agreed, considered that, had a basis for judicial review been made out, the determination could be severed, and in effect partially preserved (FC [234], [237], [240]);

(b) Hinton J considered that because there had been jurisdictional error the determination should simply be quashed (FC [287]).

VI SUCCINCT STATEMENT OF ARGUMENT

13. The appellant makes the following essential submissions.

(1) The Full Court erred by deferring to the conclusion of the NSW Court of Appeal in *Probuild*. It should have given effect to its (correct) conclusion that the Court's jurisdiction to grant relief in the nature of *certiorari* for an error of law on the face of the record had not been abrogated by the BCISP Act.

(2) Alternatively, and in any event, the error of law was jurisdictional. It involved an error in the application of an important part of the very legislation from which the adjudicator derived power and by reference to which he was bound to proceed.

(3) The adjudicator's determination involved a singular and indivisible exercise of power. The adjudicator, having made his determination, and due to the passage of time, was relevantly *functus officio*. The determination should be quashed in its entirety, and consequential relief granted.

(1) *Certiorari* for error of law on the face of the record

14. Blue J (with whom Lovell and Hinton JJ relevantly agreed) accepted that by reason of s 22(3)(b) of the BCISP Act, the reasons for determination of an adjudicator form part of the relevant determination and therefore part of the record (FC [155]).

15. The relevant question was whether the Supreme Court's power to grant *certiorari* in respect of an error of law appearing on the face of the record was excluded by the BCISP Act (FC [163]-[186]). That inquiry was to be resolved by reference to a presumption against limiting judicial review of administrative decisions, and by reference to the principle that the legislature is not taken to exclude or restrict judicial review in the absence of express words or necessary intendment (FC [165]-[169]).

16. Blue J observed that there was no express provision either in s 25(4)(a) of the Act or elsewhere expressly excluding judicial review on any particular ground (FC [175]).

17. The matters pointed to by Vadasz as manifesting an intention to exclude judicial review on the ground of error of law on the face of the record by necessary implication were not found to be sufficient (FC [176]-[185]).

(1) Section 25 precluded the setting aside of a judgment based on a challenge to an adjudicator's determination but was silent as to judicial review outside those proceedings (FC [177]).

(2) The argument that judicial review on the ground of error of law on the face of the record would frustrate a major purpose of the Act in providing a quick and relatively inexpensive procedure to resolve disputes was diminished by the fact that it was not suggested the Act excluded review on the ground of jurisdictional error. The responsibility of controlling judicial review proceedings in the exercise of jurisdiction to avoid undue delay, expense and prejudice is left to the courts and can be achieved by various means (FC [180]). Moreover, potential delay and expense caused by judicial review is not a sufficient basis for an implication for exclusion of review based on jurisdictional error, denial of procedural fairness or fraud, and the incremental delay and expense is not such as to give rise to an implied exclusion (FC [181]).

(3) The argument that review for error of law on the face of the record would be tantamount to an appeal on the ground of error of law, which is not conferred by the Act, has little weight in its own right and is not generally regarded as impliedly excluding judicial review (FC [182]).

(4) The fact that determinations under the Act do not finally determine ultimate rights is not an argument in favour of implication but an answer advanced to counter the prejudice that would be suffered by a party required to abide by an adjudication determination made erroneously. However, the prejudice on an interim basis could nevertheless be very substantial (FC [183]).

18. According to first principles, therefore, Blue J did not consider that judicial review for error of law on the face of the record was excluded (FC [186]).

19. Despite this, Blue J considered he was bound to follow what was regarded as a contrary conclusion expressed in *Probuild* by a bench of five justices unless convinced the construction adopted in that case was "plainly wrong". His Honour said (at FC [208]):

> While I do not find the reasoning in favour of implied exclusion persuasive for the reasons given above, equally I recognise there are arguments in favour of implied exclusion.

The Full Court's analysis from first principles was correct

20. In the appellant's submission, the approach from first principles favoured by Blue J was correct. It was required, *inter alia*[4], by the authorities he cited (FC [164]-[169]), including, most relevantly, *Hockey v Yelland*[5].

21. Furthermore, with respect, his Honour was right to consider that none of the matters relied upon by Vadasz, or indeed by Basten JA in *Probuild*, supported a conclusion of abrogation by clear words or necessary intendment.

22. Each of the matters raised by Vadasz, and which had been relied upon by Basten JA in *Probuild*, involved reasoning to the effect that:

10 (a) the legislative scheme contemplated expeditious dispute resolution, which, so the argument goes, might be endangered if review for error of law on the face of the record, as distinct from jurisdictional error, were permissible; or

(b) private rights outside the legislative scheme are preserved and, so the argument goes, the injustice of an unreviewable but erroneous determination is therefore less than it might otherwise be.

23. In the appellant's submission, neither line of reasoning could found a conclusion of implied exclusion of judicial review by necessary intendment. Both lines of reasoning involve a question-begging reliance upon an asserted policy of the legislation when in fact the extent to which the BCISP Act embodies a policy of
20 expedition or risk-allocation is contestable and uncertain.

24. In the appellant's submission, the policy of expedition (and the *prima facie* allocation of risk[6]) which may be discerned from the legislative scheme can be sufficiently catered for by bringing those policy considerations to bear should the party seeking to challenge the validity of the adjudication seek relief in the nature of a stay pending the resolution of the challenge.

25. Indeed, that was the process which occurred in the present case pending the disposition of the appeal; the Full Court resolved those competing considerations (the policy of the legislation, on the one hand, and the risk that because Vadasz was an

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4 See also, eg, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 170C (Lord Reid), at 182F-183G (Lord Morris of Borth-y-Gest).

5 (1984) 157 CLR 124 at 130-131 (Gibbs CJ, with whom Mason and Brennan JJ agreed).

6 *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 at [39]-[41] (Keane J, Fraser JA and Fryberg J agreeing), *Romaldi Constructions Pty Ltd v Adelaide Linings Pty Ltd (No. 2)* [2013] SASCFC 124 at [103], [108] (Blue J, Sulan and Stanley JJ agreeing). See also the Parliamentary materials referred to in *Southern Han* at [4] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

undischarged bankrupt, payment of the entire adjudication sum might cause irreversible detriment to the appellant) by striking a balance between them[7].

26. Any policy of expedition and risk allocation which may be discerned from the statute does not **necessitate** a conclusion that the Supreme Court's jurisdiction to review for error of law on the face of the record is excluded, bearing in mind were that jurisdiction to be abrogated in its entirety, this would entail the conclusion that a party to a construction contract (which may not itself even make provision for progress payments[8]) would have no capacity, even upon paying the adjudicated amount into court, to challenge the validity of an adjudication determination even though that determination might be the product of a manifest (but non-jurisdictional) error of law.

The Full Court should not have felt bound to follow the outcome in Probuild

27. On the appeal to this Court, strictly, there is no need for the Court to decide whether *Probuild* was "plainly wrong". It will be sufficient for this Court to consider whether the legislative scheme impliedly abrogates the Supreme Court's inherent jurisdiction in respect of error of law on the face of the record.

28. Nevertheless, it is submitted that the Full Court erred by failing to give effect to its own view of its own jurisdiction in respect of South Australian legislation, and that it is desirable that this Court clarify the approach to be taken by intermediate appellate courts in this context. To that end, the following brief submissions are made.

(1) The proposition made by the plurality in *Say-Dee* (supra) at [135], reflecting the observation of the Court in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 (***Marlborough Gold Mines***) at 492, that intermediate appellate courts should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or **uniform national legislation** unless they are convinced that the interpretation is plainly wrong, was inapplicable in this case.

(a) First, having regard to the duty of a court to give effect to the purpose of the relevant legislation, that proposition should be construed no more expansively than it was stated by the Court[9].

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7 See *Maxcon Constructions Pty Ltd v Vadasz* [2016] SASCFC 119 at [116]-[137] (Peek, Blue and Lovell JJ). The ultimate effect of the approach taken in this case was to require the appellant to pay the entire amount of the adjudication into Court, and, pending the Full Court appeal, half that amount was directed to be paid out to Vadasz. See also, eg, *Filadelfia Projects Pty Ltd v EntirITy Building Services* [2010] NSWSC 473 at [11] (McDougall J).

8 The creation of rights to progress payments even where not provided for by the contract has been described as a "statutory promise": *Southern Han Breakfast Pty Ltd (in liq) v Lewence Constructions Pty Ltd* (2016) 91 ALJR 233; [2016] HCA 52 (***Southern Han***) at [71] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

9 Any broadening of the principle would appear to conflict with the observations of McHugh J in *Marshall v Director General Department of Transport* (2001) 205 CLR 603 at [62], in a passage

(b) Secondly, the BCISP Act is not part of a uniform national scheme[10] in any sense comparable to the way in which the *Corporations Law* was adopted as part of a national scheme[11] at the time *Marlborough Gold Mines* was decided. It is difficult to reconcile treating the legislation in this case as part of a uniform national scheme when that approach has not been taken to the so-called "uniform Evidence Acts"[12].

(c) Thirdly, the deference shown to the decision in *Probuild* in the present case had the unfortunate consequence for the appellant that, had the state of authority remained as it stood at the date of oral argument before the
10 Full Court, the appellant would have succeeded, yet, because the NSW Court of Appeal pronounced judgment in *Probuild* before the Full Court gave its judgment in *Maxcon*, a different result ensued. This was in circumstances where the Court of Appeal in *Probuild* did not itself regard interstate authorities as binding (see at [84])[13].

(2) Further, even if the "plainly wrong" test applied:

(a) the difference in approach between that favoured by Blue J, and that adopted by Basten JA in *Probuild* was not simply one of degree or

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later approved by the Court in *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at [31]. His Honour said that when construing legislation of their own State, courts should not: "slavishly follow judicial decisions of the courts of another jurisdiction in respect of **similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation**".

10 It can fairly be said that the legislation (catalogued at FC [190]) in NSW, SA, Victoria, Queensland and the ACT is very similar (but not identical), albeit that the Victorian, Queensland and ACT legislation contains a statutory layer of review, the ACT legislation contemplates appeals, and the Victorian legislation is affected by a Constitutional overlay (as addressed by Vickery J in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture* (2009) 26 VR 172 at [97]). The legislation in Western Australia (*Construction Contracts Act* 2004 (WA)) and the Northern Territory (*Construction Contract (Security of Payments) Act* (NT) is structurally different to that which applies in the other jurisdictions.

11 The scheme was to effectuate the Heads of Agreement for Future Corporate Regulation, reached at Alice Springs, 29 June 1990, between the Commonwealth, the States and the Northern Territory: see, eg, *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at [29] (Gaudron J), at [87] (Gummow and Hayne JJ).

12 In *R v XY* (2013) 84 NSWLR 363 at [33], considering the so-called "uniform" Evidence Acts, Basten JA noted that, without knowing the legal basis for the principle in *Say-Dee*, it was not possible to say whether it applied to uniform legislation which was not national in its operation. He made the point that the need to consider characterising decisions of another court at the same level of the hierarchy as clearly or plainly wrong on a point of law was the antithesis of comity in the sense of courtesy and civility. Basten JA concluded (at [40]): "Uncertain though the state of current authority is, the course this court should take in all the circumstances is to **determine for itself** the correct approach to the statutory provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this court and in the Victorian Court of Appeal".

13 Even within the same Court, the proximity in time between two decisions on the same issue have resulted in different conclusions without the second decision having concluded that the first was plainly wrong: see, eg, *Wealthsure Pty Ltd v Selig* (2014) 221 FCR 1 (30 May 2014) and *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 (5 June 2014), cf. *Selig v Wealthsure Pty Ltd* (2015) 255 CLR 661 at [7] (French CJ, Kiefel, Bell and Keane JJ).

evaluation but rather one of principle and methodology. Whereas Blue J resolved the issue in terms of the approach required by *Hockey v Yelland*, Basten JA treated the matter as involving a quest for coherence between two statutes[14]. If Blue J's framework for analysis was correct, *Probuild* was plainly wrong;

(b) even if the matter could be treated as a quest for coherence between two statutes in NSW, on the basis that s 69 of the *Supreme Court Act* 1970 (NSW) was a relevant source of the Supreme Court's jurisdiction[15], that approach was inapplicable in South Australia, where there is no equivalent statutory modification to the inherent supervisory jurisdiction of the Supreme Court to grant relief in the nature of *certiorari*[16], and where the Rules have been treated as not affecting the scope of the remedies available by grant of prerogative writs or the circumstances in which relief is attracted[17].

29. These points having been made, the ultimate question for this Court will remain simply this: did the BCISP Act impliedly cut down the Supreme Court's jurisdiction to grant relief in the nature of *certiorari* in respect of error of law on the face of the adjudicator's determination? For the reasons the Full Court gave, the answer is "no".

(2) Jurisdictional error

30. The majority (Blue and Lovell JJ) concluded that the adjudicator's error of law did not amount to a jurisdictional error. The appellant submits that, as Hinton J found, the error was jurisdictional.

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14 To approach a conflict between two statutes of the same legislature as involving a quest for coherence tends to give primacy to the latter statute by requiring the conferral of power in the earlier statute to yield to the extent necessary to avoid "undermining" the purposes of the latter statute, and introduces undesirable qualitative issues into the process of statutory construction. It also tends to conflict with the basic rule of construction that in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied, and very strong grounds are required to support that implication, for there is a general presumption that the legislature intended that both provisions should operate: *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276, *Saraswati v The Queen* (1991) 172 CLR 1 at 17, *Shergold v Tanner* (2002) 209 CLR 126 at 137.

15 It is submitted that even in NSW, the source of power was not to be treated as statutory. See, eg, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) at [55]. Section 69 does not work any fundamental alteration to the jurisdiction of the Supreme Court. In so far as it may be seen to expand the scope of the "record", that expansion was not critical in the present case, having regard to s 22(3)(b) of the BCISP Act (and its NSW equivalent).

16 See the discussion in *Hinton Demolitions Pty Ltd v Lower* (1971) 1 SASR 512 at 532-536 (Wells J), *Clayton v Ralphs* (1987) 45 SASR 347 at 354 (Jacobs J), *S v Metanomski* (1993) 65 A Crim R 352 at 353 (King CJ).

17 *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australia Branch* (1991) 173 CLR 132 at 140 (Brennan J). See also *Prescott v Legal Practitioners Disciplinary Tribunal* (2009) 266 LSJS 1; [2009] SASC 309 at [94] (Layton J).

The error and its characterisation below

31. Section 12(1) of the BCISP Act provides that a "pay when paid" provision of a construction contract has no effect, thereby overriding the parties' bargain. It defines a "pay when paid" provision as a provision of a construction contract that, *inter alia*, "makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract".

32. The evident statutory purpose of the section is to prevent progress payments from being withheld pursuant to contractual provisions which, for example, make the contractor's obligation to pay a sub-contractor dependent upon receipt of payment by the contractor from the principal (or performance by the principal in some other relevant respect).

33. The construction contract in this case contained a provision, cl 11(e), which when read with definitional provisions[18] had the consequence that Vadasz was not entitled to 50% of a (specified) redemption sum until 90 days after "CFO is achieved", and the other 50% until 365 days after the date of "CFO". "CFO" was defined as meaning the certificate of occupancy and any other approvals required under relevant legislation which were necessary to enable the works to be used for their respective purposes in accordance with the "Principal's Project Requirements".

34. The trial judge and each member of the Full Court agreed that, by ruling that cl 11(e) was a "pay when paid" provision, the adjudicator had erred. The key passages in the adjudicator's reasons are set out at FC [108]. Although the adjudicator did not have before him any head contract, he appeared to reason that because there must be some obligation upon the head contractor to satisfy either the Principal's Project Requirements or otherwise achieve CFO, s 12 of the BCISP Act was engaged.

35. As the appellant submitted to the Full Court, the adjudicator's approach involved:

    (1) an error of law in the construction of s 12 of the BCISP Act;

    (2) alternatively, an error of law in relying upon the terms or effect of the head contract of which there was no evidence;

    (3) alternatively, an unintelligible decision involving legal unreasonableness.

36. Before the Full Court, Vadasz initially foreshadowed[19], but then later expressly abandoned[20], a notice of contention to the effect that Stanley J erred by finding the adjudicator had erred on this issue.

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18 The definitions are conveniently set out at FC [100].

19 "Outline of Argument of the Respondent" dated 11 November 2016, [8], [34].

20 Emails sent by Vadasz's solicitors to the Full Court dated 11 November 2016.

37. Blue J characterised the adjudicator's error this way (at FC [112]-[113]):

> The mere fact that the Principal's Project Requirements were to be ascertained from the head contract and the mere fact that the head contract provided for Maxcon to construct the building in accordance with those requirements and achieve practical completion whereupon a certificate of occupancy could be issued did not render release of the retention sum contingent or dependent on the operation of the head contract. The retention provisions of the Contract made payment of the retention sum contingent on an independent event which was exogenous to both the Contract and the head contract.
>
> Clause 11(e) and Schedule E item 8 of the Contract did not make the due date for payment of the retention sum "contingent or dependent on the operation" of the head contract within the meaning of s 12(2)(c) of the Act.

38. Blue J considered that this error was not jurisdictional. He considered that s 22(1) of the BCISP Act empowered and required the adjudicator to determine the amount of a progress payment, and that this *prima facie* empowered the adjudicator to consider and determine all issues of fact and law pertaining thereto (FC [125]). Further, the scheme of the Act, providing for quick and inexpensive determinations of progress payment entitlements, required the adjudicator to have this jurisdiction. And because the adjudication was not a final determination of ultimate rights, this rendered it "more likely that the legislature intended an adjudicator to have jurisdiction to determine issues of law for the limited purpose of the interim rights of the parties without prejudice to their ultimate rights" (a reference to s 32) (FC [129]).

39. He concluded that an adjudicator had jurisdiction to determine questions of law rightly or wrongly and it did not matter whether the question of law related to the construction of the contract or the construction of the statute (FC [130]-[131], [138]). The mere fact that s 12 appeared in the BCISP Act rather than in some other legislation was "happenstance"; it could have been found elsewhere (FC [146]).

40. By contrast, Hinton J said (at FC [280]-[283]):

> [A]n adjudicator may adjudicate the right to, and determine the amount of, a progress payment despite the existence of a pay-when-paid provision, but has no power to adjudicate the right to, and determine the amount of, a progress payment incorporating a sum excluded by reason of a provision of a contract that does not answer the statutory definition of a pay-when-paid provision ...
>
> For an adjudicator to include in a determination an amount that may be retained pursuant to a clause of a contract that is not a pay-when-paid provision in the belief that it is a pay-when-paid provision amounts to the misapprehension of a limit on the right vested by s 8 of the BCISP Act, a misapprehension of the limit on the correlative obligation, and a misapprehension of the limits of the power permitting the adjudicator to determine an adjudication application.
>
> An alternate way of looking at the issue is to say that the erroneous application of s 12(1) to clause 11 has expanded the jurisdiction of the adjudicator in that it has resulted in the adjudicator awarding a progress payment including a sum excluded by the BCISP Act from his or her consideration. In the language of the High Court in *Craig*, the adjudicator has reached a mistaken conclusion, and the exercise or purported

> exercise of power is thereby affected with the consequence that he or she has exceeded their authority or power. In the language of the majority in *Kirk*, the adjudicator has mistakenly asserted jurisdiction in that he or she has misapprehended the limits of the power to be exercised. ...
>
> I can find nothing in the BCISP Act that would suggest that Parliament intended that any error made by an adjudicator in the construction and application of s 12(1) BCISP Act shall not result in invalidity. I do not think the "pay now – litigate later" nature of the scheme nor any implication to be drawn from s 25 BCISP Act or the absence of a right of appeal alters this conclusion.

10 ***Was the error jurisdictional?***

41. Distinguishing between jurisdictional and non-jurisdictional error may be difficult, but the distinction is maintained by Australian law[21]. It is not possible prescriptively to mark out the metes and bounds of jurisdictional error[22].

42. There is no rigid taxonomy ordained by the authorities[23], but a number of considerations may be relevant to deciding whether an error is jurisdictional. They include:

(1) the nature of the decision-maker (generally speaking an inferior court will ordinarily have jurisdiction to decide questions of law, as well as questions of fact, in contrast to an administrative tribunal which will ordinarily lack power
20 either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law[24]);

(2) the subject matter of the error (eg, whether it concerns the existence of a fact or matter which is a pre-condition to the existence of jurisdiction[25]), its character (eg, whether it involves a failure to accord procedural fairness, or relates only to the merits of an evaluative decision) and its gravity[26].

43. These considerations are to be resolved by reference to the statute pursuant to which the impugned decision or exercise of power is purportedly made[27]. A statute might,

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21 *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) at 177-180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163] (Hayne J), *Kirk* at [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

22 *Kirk* at [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

23 *Kirk* at [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

24 *Craig* at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), *Kirk* at [68] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

25 *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at [43] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ), *Southern Han* at [47] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

26 *Kirk* at [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

27 *Craig* at 177-180 (Brennan, Deane, Toohey, Gaudron and McHugh JJ), *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163] (Hayne J), *Kirk* at [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

for example, subtract from what would have been jurisdictional error, or confer an authoritative power of resolution of questions of law upon a non-court[28].

44. It may readily be accepted, as Blue J observed (FC [127]), that the position and role of an adjudicator under the Act is *sui generis,* in that, while the adjudication involves an exercise of power pursuant to statute rather than by reason of any voluntary submission to jurisdiction, the decision-maker is not a member of the executive in a conventional sense.

45. However, the mere fact that the task an adjudicator is required to perform will or may routinely involve considering issues of law does not justify treating the nature or role of the decision-maker as being akin to that of an inferior court (cf. FC [127]). Administrative decision-making always has the potential to require consideration of issues of law.

46. Further, it is submitted that the distinction drawn in *Craig* between courts and administrative tribunals owed less to the likelihood of a court having to address questions of law than to the distinction between executive and judicial power, it being an ordinary characteristic of judicial power that it involves the conclusive quelling[29] of questions of law (subject to any rights of appeal). And it is a feature of the rule of law that unlawful executive or administrative action may be superintended by superior courts[30].

47. Accordingly, since an adjudicator is undoubtedly not a court, the starting proposition should be that recognised in *Craig*, namely, that in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. As was said of administrative tribunals in *Craig*, there will be jurisdictional error if the tribunal[31]:

> falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected ...

48. Blue J approached the matter by reasoning, by reference to s 22, that an adjudicator would commonly be called upon to resolve questions of law, including, for example, the proper interpretation of the building contract, and that because the scheme

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28 See, eg, Leeming, *Authority to Decide: Jurisdiction in Australia* (2012) at pp 56-60.

29 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ), *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at [33], [34], [41] (French CJ, Kiefel, Bell, Gageler and Keane JJ), *Kendirjian v Lepore* [2017] HCA 13 at [31] (Edelman J).

30 See, eg, *Kirk* at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), *R (Cart) v Upper Tribunal* [2011] QB 120 at [34] (Laws LJ).

31 *Craig* at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

contemplates quick and inexpensive determinations which have an interim quality (in the sense that ultimate rights are unaffected in civil proceedings) the adjudicator is required to have jurisdiction to resolve all questions of fact and law relevant to the substantive issue of the entitlement to and amount of a progress payment (FC [129]). With respect, these considerations are insufficient to justify a departure from the ordinary limits on the conclusive authority of a non-court, at least with respect to manifest errors in the construction of the BCISP Act.

49. Further, Blue J's approach overlooks that in the section of the BCISP Act relating to the adjudicator's determination (s 22), it is provided, in s 22(2), that in determining an adjudication application, the adjudicator is to consider **specified matters only**, relevantly including (a) "the provisions of this Act" and (b) "the provisions of the construction contract".

50. In the appellant's submission, far from providing a source of authority "to go wrong", s 22 made the proper application of the provisions of the Act a fundamental aspect of the jurisdiction conferred upon the adjudicator, whose function and power can rise no higher than that conferred upon him by legislation. Moreover, by wrongly applying the Act to disregard a provision of the contract, the adjudicator failed to comply with the requirement in s 22 to have regard to the "provisions of the contract".

51. It is not to be doubted that the adjudicator should consider the issues of fact and law which s 22 requires him or her to address in determining the amount of any progress payment, but it does not follow that any error of substantive law made in that process is to be treated in the same way for the purposes of jurisdictional error (cf. FC [131], [146]).

52. It is one thing to accept that, in the context of legislation of this kind, the construction, and application to the facts of, a construction contract are matters for the authoritative determination of the adjudicator[32]. While those matters may throw up questions of mixed fact and law or even questions of law, they have a different quality[33] to the resolution of the meaning of the BCISP Act itself. Moreover, the construction of the building contract, and a consideration of the work that has been performed under it, are the very things the adjudicator has to determine by reference to the unique circumstances of the individual application. By contrast, the proper construction of s 12 of the Act is neither case-specific, nor a matter which is quintessentially for the adjudicator to resolve.

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32 See, eg, *Laing O'Rourke Australia Construction Pty Ltd v Samsung C&T Corporation* (2016) 50 WAR 399 at [101] (Martin CJ, McLure P and Newnes JA agreeing).

33 While the objective meaning of a term of a contract is a question of law, it involves making an assessment of the meaning a reasonable person would give to the terms in the relevant context. This inquiry has a fact-sensitive and functionally similar quality to the question whether a putative tortfeasor's conduct meets the standard of reasonable care in tort (which is said to be a question of fact): see, eg, *Jones v Bartlett* (2000) 205 CLR 166 at [57] (Gleeson CJ), *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [29] (McHugh J).

53. If an adjudicator misconceives the concept of a "pay when paid" provision, he or she will inevitably ask him or herself the wrong question, and will consider irrelevant material. He or she will fail to apply him or herself to the question which s 12 prescribes[34] and the material required by s 22 to be considered will be wrongly identified.

54. If the analogy with an expert determination under a contract is apposite[35], the error is akin to an error as to the meaning of the test or function contained in the constating instrument appointing an expert[36].

55. The adjudicator was only entitled to award a progress payment which ignored the retention clause if, on a proper construction of s 12, he concluded that the retention clause met that construction. Because he misconstrued s 12, he misdirected himself and acted beyond his authority, as Hinton J found.

56. Alternatively, and in any event, as was argued below, the adjudicator's decision on this issue was made in the absence of any evidence regarding the head contract and involved legal unreasonableness of a kind which has been considered to involve jurisdictional error[37].

(3) The form of the relief in the nature of *certiorari*

57. In the appellant's submission, whether *certiorari* lies on the basis of error on the face of the record or jurisdictional error, the appropriate order is that the adjudication be quashed (and the corresponding judgment set aside), and that, to the extent necessary, there be an order for repayment of the amounts ordered by the courts below to be paid pursuant to the adjudication and the judgment.

58. In the appellant's submission, the adjudicator is *functus officio*, and the adjudication process initiated by the service of an adjudication application is stale: see s 21(3).

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34 See the reference in *Coal and Allied v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [31] (Gleeson CJ, Gaudron and Hayne J) to the observations of Jordan CJ in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* [1947] NSWStRp 24; (1947) 47 SR (NSW) 416 at 420, which in turn drew upon *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243, and *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432.

35 See, eg, *Musico v Davenport* [2003] NSWSC 977 at [51]-[53], FC [127].

36 Cf. *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305 at [27] (French CJ, Crennan and Kiefel JJ), *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 331-337 (McHugh JA), *Holt v Cox* (1997) 23 ACSR 590 at 596-597; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] Aust Contract Rerports 90-241 at [51]-[54].

37 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

The approach taken to this issue below

59. Blue J considered that if jurisdictional error had been shown, it did not follow that the entire determination was required to be quashed. But this turned on the proposition that what appeared to be a single decision might on analysis be divisible into two separate elements such that as a matter of substance (rather than form) there were really two decisions (FC [222]).

60. Blue J noted that the view had been taken in various decisions in New South Wales, Queensland and Western Australia[38] that, by dint of the legislation, there is in all cases but a single adjudication of a progress payment (FC [232]-[233]). However, in his view, the mere fact that s 22(1)(a) requires the determination of an amount did not entail that the adjudicator could not make separate decisions leading to a single total amount (FC [231]).

61. Hinton J held that since jurisdictional error had been demonstrated, the determination had to be quashed, leaving extant an adjudication application to be dealt with in the normal way by the nominating authority. Since the adjudicator does not hold an office or position that continues in existence once a determination is made, it was inappropriate partially to quash and remit matters for further adjudication (FC [287]).

A single indivisible exercise of power

62. With respect, Blue J's approach overlooked that judicial review is essentially bound up with the exercise of power. That there may be distinct decisions, reasons or determinations leading to an exercise of power does not entail that there are separate exercises of power that may be quashed differentially.

63. The task remains one of determining whether there is a single dispositive determination and/or exercise of power, and that question ought to have been resolved consistently with the approach hitherto taken to similar legislation (see FC 233], fn 183). In *Multiplex Constructions Pty Ltd v Luikens*[39], Palmer J said:

> It seems to me that because the Act requires a determination to produce only one amount for payment pursuant to a payment claim served under s 13(1), despite the fact that the payment claim might have comprised numerous claims for separate and distinct items of work, and because the Act does not provide for variation of the adjudicated amount, or the judgment debt, if the adjudicator's decision as to any component part of the adjudicated amount is shown to be liable to be set aside on judicial review, the consequence is that, subject to other discretionary considerations, the whole of the determination must be quashed if jurisdictional error infects any part

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38 *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140; *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145 at [55] per Atkinson J; *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd* [2012] QSC 373 at [61] per Lyons J; *Anderson Street Banksmeadow Pty Ltd v Helcon Contracting Australia Pty Ltd* [2013] NSWSC 657 at [9] per Stevenson J; *Samsung C&T Corporation v Loots* [2016] WASC 330 at [414]- [426] per Beech J.

39 [2003] NSWSC 1140 at [92].

> of the process whereby the adjudication amount has been produced. That is, no doubt, a highly inconvenient result. However, I do not see any means of avoiding it, as the Act presently stands.

64. Whether or not that is truly inconvenient, the conclusion is, respectfully, correct in principle. An adjudicator has power to determine an "adjudicated amount": s 22(1)(a). He or she has no power to determine separately enforceable components of any such amount. The "adjudicated amount" may then be the subject of an "adjudication certificate" (s 24) and, ultimately, result in a judgment debt (s 25).

65. The authorities referred to by Blue J at FC [220]-[226] are distinguishable and do not warrant treating the exercise of a power to fix an adjudicated amount as severable[40].

66. The matters raised by Blue J at FC [231] and [238] are not relevant once a claimant has elected not to accept the amount put forward by a respondent in a payment schedule or, if they are, they will affect a future adjudication.

67. A theoretically distinct issue potentially presents itself if the adjudication is infected, not by jurisdictional error[41], but by error on the face of the record (as noted by Blue J at FC [235]-[236]). It is submitted, however, that the answer ought to be the same in the context of this legislation which contemplates and requires an indivisible and single exercise of power.

68. The Court has no power to substitute the *correct* award[42], and since partial quashing would necessitate partial remitter, which is problematic for reasons identified by Hinton J, the matter should be approached on the basis that the determination required to be made by the adjudicator is relevantly indivisible.

VII LEGISLATIVE PROVISIONS

69. See the annexure.

VIII ORDERS SOUGHT

70. The orders sought are as follows.

    (1) Appeal allowed.

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40 *Public Service Board of New South Wales v Etherton* (1985) 1 NSWLR 430 involved a stay rather than *certiorari*. In *Re Media, Entertainment and Arts Alliance; Ex parte Arnel* (1994) 179 CLR 84, the award had not been made, and the primary relief was prohibition. The order of *certiorari* related to a separate (entire) decision. Moreover, the decision-maker was a body with perpetual existence. The decisions in *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151 and *Director of Public Prosecutions (Cth) v Ede* (2014) 289 FLR 82, [2014] NSWCA 282 involved very different statutory contexts and powers of courts rather than of administrative decision-makers. There was no doubt in those cases the court could validly have made separate divisible orders and/or conditions.

41 A decision affected by jurisdictional error may properly be regarded as no decision at all: *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597 at [51] (Gaudron and Gummow JJ).

42 Cf. *Building and Construction Industry (Security of Payment) Act* 2009 (ACT), s 43(6)(a).

(2) Set aside the orders made by the Full Court of the Supreme Court of South Australia on 8 February 2017 and in lieu thereof order that:

(i) the appeal to that Court is allowed;

(ii) the orders made by Stanley J on 30 September 2016 are set aside and in lieu thereof it is ordered that the adjudicator's determination is quashed (and the corresponding judgment set aside);

(iii) the first respondent is to repay to the appellant the moneys paid to him from the suitors fund[43].

71. There should also be an order for payment out to the appellant of the balance of the funds presently held in the suitors fund.

IX ESTIMATE OF ORAL ARGUMENT

72. The appellant anticipates that there will be a substantial adoption of the oral submissions of the appellant in *Probuild* on the common question relating to error of law on the face of the record, and that its submissions on the other matters would occupy no more than one hour.

73. If there were to be submissions on all issues by the appellant, it is estimated that this would occupy approximately two hours.

Dated: 16 June 2017

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Counsel for the appellant

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43 In October 2016, pending the disposition of the Full Court appeal, the Court ordered payment of $105,000. Subsequent to delivering its reasons, in February 2017, a further sum of $36,163.55 was ordered or permitted to be paid out of the suitors fund (pending an application for special leave to appeal and any appeal).

ANNEXURE (PART VI – STATUTORY PROVISIONS)

Building and Construction Industry Security of Payment Act 2009 (SA)

3—Object of Act

(1) The object of this Act is to ensure that a person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

[...]

8—Rights to progress payments

On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract,

is entitled to a progress payment.

9—Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter—the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

[...]

12—Effect of "pay when paid" provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract.

(2) In this section—

money owing, in relation to a construction contract, means money owing for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) under the contract;

pay when paid provision of a construction contract means a provision of the contract—

(a) that makes the liability of 1 party (the ***first party***) to pay money owing to another party (the ***second party***) contingent on payment to the first party by a further party (the ***third party***) of the whole or a part of that money; or

(b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or a part of that money is made to the first party by the third party; or

(c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

[...]

17—Adjudication applications

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

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

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

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

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or a part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

(3) An adjudication application—

(a) must be in writing; and

(b) must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under subsection (1)(a)(i)—must be made within 15 business days after the claimant receives the payment schedule; and

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

(e) in the case of an application under subsection (1)(b)—must be made within 15 business days after the end of the 5 day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority; and

(h) may contain such submissions relevant to the application that the claimant chooses to include.

(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

[...]

20—Adjudication responses

(1) Subject to subsection (3), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the ***adjudication response***) at any time within—

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application,

whichever time expires later.

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) may contain any submissions relevant to the response that the respondent chooses to include.

(3) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14(4) or 17(2)(b).

(4) The respondent cannot include in the adjudication response reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

(5) A copy of the adjudication response must be served on the claimant.

21—Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after—

(i) the date on which an adjudication response is lodged with the adjudicator; or

(ii) if an adjudication response is not lodged with the adjudicator on or before the last date on which the response may be lodged with the adjudicator under section 20(1)—that date; or

(iii) if the respondent is not entitled under section 20 to lodge an adjudication response—the date on which the respondent receives a copy of the adjudication application; or

(b) within any further time that the claimant and the respondent may agree.

(4) For the purposes of proceedings conducted to determine an adjudication application, an adjudicator—

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5) If any such conference is called, it is to be conducted informally and the parties are not entitled to legal representation.

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

22—Adjudicator's determination

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which any such amount became or becomes payable; and

(c) the rate of interest payable on any such amount.

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act;

(b) the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(3) The adjudicator's determination must—

(a) be in writing; and

(b) include the reasons for the determination (unless the claimant and respondent have both requested the adjudicator not to include those reasons in the determination).

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

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

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

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

(5) If the adjudicator's determination contains—

(a) a clerical mistake; or

(b) an error arising from an accidental slip or omission; or

(c) a material miscalculation of figures or a material mistake in the description of a person, thing or matter referred to in the determination; or

(d) a defect of form,

the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

23—Respondent required to pay adjudicated amount

(1) In this section—

relevant date means—

(a) the date occurring 5 business days after the date on which the adjudicator's determination is served on the respondent concerned; or

(b) if the adjudicator determines a later date under section 22(1)(b)—that later date.

(2) If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.

24—Consequences of not paying claimant adjudicated amount

(1) If the respondent fails to pay the whole or a part of the adjudicated amount to the claimant in accordance with section 23, the claimant may—

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section; and

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

(2) A notice under subsection (1)(b) must state that it is made under this Act.

(3) An adjudication certificate must state that it is made under this Act and specify the following matters:

(a) the name of the claimant;

(b) the name of the respondent who is liable to pay the adjudicated amount;

(c) the adjudicated amount;

(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.

(4) If an amount of interest that is due and payable on the adjudicated amount is not paid by the respondent—

(a) the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate; and

(b) the amount so specified is to be added to (and becomes part of) the adjudicated amount.

(5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the ***unpaid share***)—

(a) the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate; and

(b) the amount so specified is to be added to (and becomes part of) the adjudicated amount.

25—Filing of adjudication certificate or costs certificate as judgment debt

(1) An adjudication certificate may be filed as a judgment for a debt in a court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or a part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent—

(a) is not, in those proceedings, entitled—

(i) to bring a cross-claim against the claimant; or

(ii) to raise a defence in relation to matters arising under the construction contract; or

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

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

32—Effect of Part on civil proceedings

(1) Subject to section 33, nothing in this Part affects any right that a party to a construction contract—

(a) may have under the contract; or

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

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

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

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

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

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

[...]