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 REPLY

Exclusion of judicial review for error of law on the face of the record

1. Mr Vadasz's written submissions (**VS**) adopt the submissions of Shade Systems (**SS**) in the *Probuild* appeal, in which two major propositions are advanced:

   (1) that the power to issue certiorari for non-jurisdictional error of law finds its source in statute (SS [21]-[13], and see VS [16]); and

   (2) that the question whether the BCISP Act excludes certiorari is a question of statutory interpretation in respect of which a presumption against reducing the Court's jurisdiction is only one among many relevant "interactional" principles, including the maxim *generalia specialibus non derogant* (SS [16]-[32]).

2. The emphasis upon a statutory source of power to grant certiorari provides the foundation for the respondents' reliance upon what are said to be settled "interactional principles" (SS [22]) governing the reconciliation of competing statutes of the one legislature. The respondents rely upon observations by Gleeson CJ in *Plaintiff S157/2002* that where a question of statutory interpretation arises "*all* relevant principles of statutory construction are engaged", such that it would be an error to assume that any presumption against reducing the jurisdiction of the Supreme Court "so dominates the constructional task as to deny the utility of other indicators of Parliament's intention" (SS [17]]). By this means, the respondents effectively seek to avoid the approach mandated by *Hockey v Yelland*, which is not mentioned in the respondents' submissions. The respondents' submissions should be rejected.

3. The observations of Gleeson CJ in *Plaintiff S157* do not assist the respondents' argument. Far from warning against treating a principle of construction such as that ordained by *Hockey v Yelland* as definitive, Gleeson CJ's remarks (at [26]) were directed to ensuring that the outcome of the process of reconciliation referred to by Dixon J in *Hickman*[1] was not treated as effectively immunising from review any

[1] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

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decision which on its face appeared to be within power and was in fact a bona fide attempt to act in the course of the decision-maker's authority. In fact, Gleeson CJ's approach involved an insistence, in the context of reconciling the potential inconsistency between a statute conferring limited powers and a privative clause which apparently precludes enforcement of those limits, upon the importance of the principle of legality and the presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied ([30]-[32]).

4. In the context of the provisions in *Plaintiff S157*, while other interpretive norms were engaged (such as a presumption favouring compliance with a treaty or international convention where legislation is enacted pursuant thereto), these all supported (and were not balanced against) the rule that citizens' rights of access to the courts are not limited other than by express statement or necessary implication.

5. Further, it is to be recalled that *Plaintiff S157* involved a privative clause which, despite its apparent literal effect, was treated as not excluding an obligation of procedural fairness or as precluding the Court's jurisdiction to grant certiorari where procedural fairness had not been accorded. Of course, in the present case, there is nothing in the nature of a privative clause. The contrast between the express language of the legislative schemes being considered in *Plaintiff S157* and *Hockey v Yelland* and the absence of any equivalent language in the BCISP Act is stark, and yet in both of those decisions, relevant forms of judicial review were nevertheless found to have been preserved.

6. As was observed in both decisions, privative clauses have a long history and different verbal formulae have developed settled meanings[2]. So it was that, in *Hockey v Yelland*, despite the apparent breadth of a clause which provided that a determination of the Medical Board was "final and conclusive" and that there was no right to have any such matter "heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever", the Supreme Court's power to issue certiorari for error of law on the face of the record was not removed. Accordingly, while that jurisdiction can be removed by necessary implication, the fact that even express words are given a narrow meaning in this context demonstrates that the circumstances in which the removal is achieved merely by implication will be exceedingly rare. Against that background, it is clear that the matters said to reflect statutory purpose or policy in the present case are insufficient to remove a jurisdiction which is an aspect of the rule of law.

7. The position is unaltered by the fact that the statute by which the Supreme Court of South Australia is continued as a superior court of record vests in it the like jurisdiction exercised by the Court of Queen's Bench (*Supreme Court Act* 1935 (SA) ss 6, 17). The same was true of the Supreme Court of Queensland when *Hockey v Yelland* was decided. Merely to point to a statutory root of jurisdiction does not transform the issue into one of qualitatively similar statutes to be reconciled by reference to such techniques of interpretation as *generalia specialibus non derogant* (cf. SS [25]). To suggest that certiorari jurisdiction is "general", and that the BCISP

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2 See, eg, *Hockey v Yelland* at 130-131 (Gibbs CJ), *Plaintiff S157* at [12] (Gleeson CJ).

Act is "specific", does not advance the argument since the context for the application of the jurisdiction will always be specific. In the present case, it would be more accurate to recognise the certiorari jurisdiction as being "fundamental", and the indications of a Parliamentary intention to exclude its availability in relation to the BCISP Act as "equivocal", and certainly not "unmistakeable".

8. Nor is it appropriate to interpret the BCISP Act by reference to what is said to have been the "prevailing position" in New South Wales at the time of its enactment in South Australia (cf. VS [20]), particularly in circumstances where the observations in *Brodyn Pty Ltd v Davenport*[3] were obiter (as Blue J noted at FC [203]), there was no reconsideration of the issues in *Coordinated Construction Co Pty Ltd v J M Hargeaves (NSW) Pty Ltd*[4], and the discussion in *Brodyn* doubted that the BCISP Act even involved the exercise of powers amenable to judicial review (see at [58]) and did not engage with the approach ordained by *Hockey v Yelland.*

The character of the error made by the adjudicator

9. Plainly, the error was in the application of s 12(2) as invalidating cl 11(e) of the contract. Blue J described the error as involving the application of s 12 (FC [138]).

10. For the purposes of analysing whether the adjudicator's error in the present case was jurisdictional Mr Vadasz contends that the Full Court should be taken to have found only an error in the construction of the contract and no error in respect of s 12 of the BCISP Act (VS [6]).

11. With respect, that is an artificial reading of the reasons. It is plain that Hinton J, who agreed with Blue J's reasons as to the identification of error (FC [270]), regarded the error as extending to the construction of s 12 (see especially FC [277], [282] and [283]). Nor, on proper analysis, can Blue J be taken to have confined his finding of error to the question of the construction of cl 11(e). After all, the construction of the clause was simple and not in dispute: the date for payment of the retention sums hinged about the issuing of a "Certificate of Occupancy". Construing that clause required no further analysis. It was only the question of the application of s 12(2)(c) which required an answer to the question whether, in making payment contingent on that event, payment was also made "contingent or dependent on the operation" of another contract. Blue J's critical conclusion was (FC [112]):

> 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.
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> 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 section 12(2)(c) of the Act.

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3 (2004) 61 NSWLR 421.

4 (2005) 63 NSWLR 385.

12. Putting to one side Blue J's acceptance that the head contract provided in the manner he indicated (a matter which arises under the notice of contention), Blue J's essential reasoning was to the effect that s 12(2)(c) is not engaged where payment is dependent upon an event (which has a separate and exogenous significance apart from another contract) merely because another contract may impose obligations which will lead to its fulfilment. Since the adjudicator must have reasoned otherwise, the error involved, if not wholly consisted in, a misconstruction of s 12(2)(c). Blue J's later comment that the adjudicator did not fail to take account of the definition in s 12(2)(c) (FC [146]) was not, or should not be taken as, an endorsement of the adjudicator's construction of it; his proposition was simply that the adjudicator directed himself to, and did not fail to consider, the relevant provision.

13. Ultimately, the adjudicator treated a clause which conditioned payment on an event which was, on the face of the construction contract, independent from any other contract, as requiring the payment claim adjudication to be conducted without regard to the retention sum clause. This was a fundamental error involving a misconception and miscarriage of the adjudicator's statutory function which was to adjudicate having regard to all of the terms of the construction contract save those rendered inoperative by the BCISP Act. The error was jurisdictional.

The notice of contention argument

14. Mr Vadasz now seeks to contend by notice of contention that the adjudicator did not err at all. The premise for the contention is that under a head contract the appellant was required to procure a certificate of occupancy (VS [46.1]). It is then submitted that although cl 11(e) turned on the achieving of the certificate of occupancy, rather than upon the appellant's discharge of the assumed contractual obligation in the head contract, the clause made payment dependent on the operation or performance of the head contract (VS [46.2]).

15. The appellant accepts neither the premise, nor the reasoning based upon it. As to the premise, Blue J's observation at FC [107] that the appellant accepted below that it was obliged to procure a certificate of occupation lacked a proper foundation. It appears to have been based on the absence of an express submission in the appellant's submissions to the adjudicator, combined, perhaps, with *Blatch v Archer* reasoning. However, in circumstances where s 22(2) confined the adjudicator's attention to documents and materials before him, such an approach was inappropriate. Further, as noted in the appellant's written submissions (AS [36]), Mr Vadasz abandoned a foreshadowed notice of contention in the course of the appeal to the Full Court, and did not challenge Stanley J's conclusion at first instance that there was no evidence to support a finding as to any obligations under the head contract.

16. Further, even if the premise were accepted, as Blue J noted, a certificate may be obtained by an owner without the involvement of a builder such as the appellant, and the principal obligation contemplated by the regulations is upon the owner (FC [105], [111]). Accordingly, the certificate was capable of being issued with or without the appellant discharging any particular obligations under the head contract. Moreover, bearing in mind the way in which s 22(2) confines attention to a limited body of relevant material, and the mischief to which s 12 is directed, s 12(2)(c) should be

construed as operating upon clauses which *ex facie* condition payment upon the performance or operation of other contracts. If a condition which might, in fact, be affected by the performance of other contracts attracts s 12(2)(c), few if any payment conditions would survive the operation of the section. Such a drastic interference with private and consensually agreed rights should not lightly be inferred.

Partial quashing and remitter

17. Mr Vadasz's reliance upon Rule 286(3)(b) as relevant to the power to quash only part of the determination is misplaced (VS [48]-[49]). The powers of the Full Court on the appeal against Stanley J's judgment included the ordinary suite of powers available to a Court hearing an appeal by way of rehearing, but the answer to the appropriate relief consequential upon relief in the nature of certiorari cannot depend upon whether the matter arises in the Full Court or at first instance.

18. The real question is not one of procedure but one of principle, and it involves a consideration of whether on the proper construction of the BCISP Act the determination of the adjudicated amount in respect of a payment claim is a single and indivisible exercise of power. The question is not what would be convenient or just, but rather an identification and characterisation of the power which is the subject of the Court's supervisory jurisdiction. In that connection, s 13 of the *Acts Interpretation Act* 1915 (SA) (**AIA**) is irrelevant (cf. VS [52]). First, it is not accepted that an adjudication determination is a "statutory or other instrument" within the meaning of the AIA[5]. Secondly, it announces a rule of construction and an approach to interpretation which preserves the operation and effect of an instrument apart from an invalid "provision", or in respect of subject matter which does not involve invalidity. In short, the section speaks to instruments of a legislative rather than adjudicative character. The present discourse is far removed from the operation of s 13.

19. Section 22 of the BCISP Act is not a source of power of the kind referred to in s 37 of the AIA, or, if it is, the BCISP Act as a whole manifests an intention not to extend to a determination of a dispute between parties to a construction contract pursuant to s 22.

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5 A "statutory instrument" is defined in s 4 of the AIA to mean a regulation, rule, by-law or statute made under an Act, a proclamation, notice, order or other instrument made by the Governor or a Minister, a code or standard made, approved or adopted under an Act or any other instrument of a legislative character made or in force under an Act.