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

BETWEEN: **MAXCON CONSTRUCTIONS PTY LTD**
Appellant

and

MICHAEL CHRISTOPHER VADASZ
First Respondent

ADJUDICATE TODAY PTY LTD
Second Respondent

CALLUM CAMPBELL
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. The First Respondent (**Mr Vadasz**) certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The three issues stated by the Appellant (**Maxcon**) in its submissions filed on 16 June 2017 (**AS**) are the issues presented by the appeal. The third issue, more specifically, includes a question as to whether, if this Court decides to correct any error by the adjudicator, it should do so by setting aside the determination only in respect of that part affected by the error asserted by Maxcon.

3. Mr Vadasz has filed a notice of contention tendering a further issue for the Court's determination, namely, whether the adjudicator erred at all in construing the contract when considering the applicability of s 12 of the *Building and Construction Industry Security of Payment Act 2009* (SA) (**BCISP Act**).

PART III: SECTION 78B

4. Mr Vadasz has considered whether a notice under s 78B of the *Judiciary Act 1903* (Cth) is required and does not consider that one is required.

PART IV: MATERIAL FACTS

5. Maxcon's articulation of the facts at AS [7]-[12] is generally accurate.

O'Loughlin's Lawyers
Lvl 2, 99 Frome Street
Adelaide SA 5000

Telephone: (08) 8111 4000
Fax: (08) 8111 4099
Email: swhite@oloughlins.com.au
Ref: Stephen White

6. However, Maxcon does not identify with precision the relevant error of law which was found by the Full Court below: see AS [12(2)]. The relevant error of law was in the construction of the definition of "CFO" in the applicable construction contract: see FC [109], [145], [240], [270]. The error was *not* "in the construction of s 12 of the BCISP Act", nor was it "relying upon the terms or effect of the head contract of which there was no evidence", nor again was it because there was "an unintelligible decision involving legal unreasonableness": cf AS [35], [52]. The Full Court specifically rejected Maxcon's submission that there was a "no evidence" error: see at [109], [240]. There is no appeal against this finding. Further, the Full Court did not find that there was any error in the construction of s 12 of the BCISP Act; and the trial judge expressly found otherwise (TJ [65]). There is no appeal against the Full Court's failure to find that there was any such error, and Maxcon should not be heard on any arguments to the contrary: cf AS [52]-[56]. Maxcon's appeal is confined to the particular error discerned by the Full Court at FC [109], [145], [240] and [270] – which was an error in the construction of a particular definition in the construction contract.

PART V: RELEVANT PROVISIONS

7. Relevant provisions in addition to those set out in the Annexure to the AS are annexed.

PART VI: ARGUMENT

Summary

8. Mr Vadasz advances the following propositions on the appeal.

   8.1. The Supreme Court of South Australia does not have jurisdiction or power to issue relief in the nature of certiorari for non-jurisdictional error of law on the face of the record.

   8.2. There are some errors which an adjudicator may make in connection with a determination while nevertheless acting within jurisdiction when making the determination. Whether an error is or is not jurisdictional depends on Parliament's intention and can be resolved by answering the question: did Parliament intend that errors of the relevant kind take the adjudicator beyond his or her jurisdiction? That intention is to be ascertained in accordance with accepted principles of statutory construction.

   8.3. Parliament did not intend that errors of law of the kind which the adjudicator was found to have committed be jurisdictional.

   8.4. In any event, the adjudicator did not commit an error of law.

   8.5. If the adjudicator made an error of law in misconstruing or misapplying the pay when paid provisions, this Court has power to quash only that part of the determination affected by that error.

8.6. If there was an error (which Mr Vadasz denies), part only of the determination was affected by any such error and, if the issue arises, this Court should quash only that part of the determination.

8.7. If certiorari be granted, the matter should be remitted to the adjudicator for determination in accordance with law.

9. There is no issue as to costs. Maxcon has undertaken to pay Mr Vadasz's costs of the appeal and not to disturb the costs orders below.

10

Proposition 1: the Supreme Court of South Australia does not have jurisdiction to issue relief in the nature of certiorari for non-jurisdictional error of law by adjudicators

10. The case for Mr Vadasz in respect of this proposition is substantially the same as that which is advanced by Shade Systems in the related proceedings in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (S145/2017). Mr Vadasz adopts Shade Systems' submissions in that appeal.

20 11. There are no significant differences between the provisions of the BCISP Act and those of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the NSW Act**). In particular, the BCISP Act confers an entitlement to progress payments (s 8) and then erects a scheme for enforcement of that right. As with the NSW Act, the scheme erected by the BCISP Act:

11.1. involves tight time constraints: see BCISP Act ss 14(4), 17(3)(c)-(e), 20(1), 21(3). 23(1);

11.2. involves a significant degree of informality: see, in particular, BCISP Act
30 ss 21(4), (5), 22(3)(b);

11.3. gives adjudicator's determinations a degree of conclusiveness: see BCISP Act ss 23(3), 24(1), 25(1), 25(4); and

11.4. involves rights which are interim only: see BCISP Act ss 32(1), (3).

12. The striking similarity between the BCISP Act and the NSW Act is unsurprising: the BCISP Act was "based on" the NSW Act (Parliament of South Australia, Legislative Council, *Parliamentary Debates* (19 November 2009) 4096).

40

13. The BCISP Act was also addressed to the same mischief as the NSW Act, namely the difficulties which arise "when … subcontractors and suppliers in the building and construction industry are unable to secure in a timely fashion, or sometimes at all, payment for work performed or goods and services supplied".[1]

14. The Second Reading Speech to the Bill which became the BCISP Act identified key aspects of the scheme which Parliament established to respond to that mischief. Rights

---

[1] Parliament of South Australia, Legislative Council, *Parliamentary Debates* (19 November 2009) 4095.

were to be interim only: "The rights and liabilities created under the bill do not affect any other entitlement a person may have under a construction contract or any other remedy a person may have for recovering any such entitlement. However, in court proceedings in relation to a matter arising under a construction contract, the court must allow for an amount paid to a party to the contract as a result of an adjudication under the legislation in any order or award it makes [in] those proceedings".[2] Further, achieving rapid, low-cost decision making was a core object of the scheme: "The time frames set out by the bill for responding to payment claim[s] and for the making of an adjudication are tight. They are aimed at ensuring that the disputes under the legislation are resolved rapidly and at minimal expense to the parties".[3]

15. That which is true of the NSW Act is also true of the BCISP Act: the text, context and objects of the Act are against the availability of review for non-jurisdictional error of law.

16. How, then, should the BCISP Act be reconciled with the *Supreme Court Act 1935* (SA)? The South Australian Supreme Court's jurisdiction or power to issue certiorari for non-jurisdictional error of law on the face of the record derives from statute and, in particular, from ss 6 and 17 of the *Supreme Court Act 1935* (SA), which continue the Supreme Court in existence and vest jurisdiction in it by reference to the jurisdiction held by various English courts, including the Court of Queen's Bench. Those provisions are liable to statutory affection as much as those provisions of the *Supreme Court Act 1970* (NSW) addressed in Shade Systems' submissions. Further, for the reasons advanced in Shade Systems' submissions, Parliament's intent, considered across the body of its laws, was that ss 6 and 17 of the *Supreme Court Act 1935* (SA) be read as being subject to the intention manifested in the BCISP Act that judicial review not be available for non-jurisdictional error of law on the face of the record. If anything, the position in South Australia is even clearer: unlike in NSW, the *Supreme Court Act 1935* (SA) does not expressly confer jurisdiction to issue certiorari and does not declare that that jurisdiction includes a jurisdiction to issue certiorari for non-jurisdictional error of law on the face of the record.

17. The ability of the courts to regulate their proceedings to avoid undue delay, expense and prejudice does not deny that the commencement of court proceedings – or even merely threatened court proceedings – is apt to cause delay, expense and prejudice: cf AS [17(2)], [24]. As for cost: it ought not be forgotten that the quantum of the progress payments often in issue under security of payment legislation is often in the low tens of thousands (or even less) – an amount which is quickly subsumed by the cost of litigation. Further, there will often be cases, particularly where compulsory production from third parties is required,[4] where judicial proceedings cannot occur rapidly even with the best of intentions by both parties. Further, little imagination is required to conceive of the many steps which a head contractor can take, in bona fide pursuit of legitimate interests, which nevertheless cause significant delay in security of payment litigation.

---

2 Parliament of South Australia, Legislative Council, *Parliamentary Debates* (19 November 2009) 4096.

3 Parliament of South Australia, Legislative Council, *Parliamentary Debates* (19 November 2009) 4096.

4 As it often is where the financial position of a sub-contractor is in issue and is disputed.

18. That there might be prejudice to a head contractor if it makes an interim payment pursuant to a determination affected by non-jurisdictional error of law does not count against Mr Vadasz's argument: cf AS [17(4)]. The whole point of the BCISP Act – as with its related legislation in other States and Territories – is to allocate the risk of intervening insolvency to the head contractor: *RJ Neller Building Pty Ltd v Ainsworth* (2009) 1 Qd R 390 at [40] (Keane JA); *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 407 [52] (Spigelman CJ), 437 [207] (McDougall J); *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 313 FLR 163 at [64] (Warren CJ, Tate and McLeish JJA).

19. That the BCISP Act does not manifest an intention to exclude judicial review for jurisdictional error is sufficiently explained by the standing presumption that Parliament intends its statutes to be valid, not invalid: cf AS [17(2)].

20. There is a further reason why the South Australian Parliament should be taken to have intended that adjudicator's determinations not be reviewable for non-jurisdictional error of law. The BCISP Act was based on the NSW Act: see paragraph 12. At the time the BCISP Act was enacted, the prevailing position in New South Wales was that judicial review was not available for non-jurisdictional error of law: see *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 at [1], [2], [56]; *Coordinated Constructions Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 at [47]-[49]; see also *Illawarra Retirement Trust v Denham Constructions Pty Ltd* [2015] NSWSC 1173 at [94]. This established legal position was part of the context within which the BCISP Act was enacted. It is inherently unlikely that Parliament intended to depart from that established position sub silentio.

Proposition 2: some errors by adjudicators are non-jurisdictional and whether an error is jurisdictional or non-jurisdictional is a question of statutory construction

21. The BCISP Act gives adjudicators the power to make determinations as to the amount of a progress payment, the date on which the amount becomes payable and the rate of interest payable: s 22(1). In exercising that power, adjudicators have a limited jurisdiction to go wrong while nevertheless making a valid determination.

22. The nature of that jurisdiction to go wrong was described by Keane QC (as his Honour then was) in 2004:[5]

> Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.

23. The existence of a jurisdiction to be wrong is fundamental to a system where the merits of a decision is for the executive and a court is concerned only with legality. As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36:

---

5 Mr Pat Keane QC, "Judicial Power and the Limits of Judicial Control" in Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 295 at 298-301, quoted in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [16] (Gummow ACJ and Kiefel J).

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.

24. This Court has not taken the step of holding that *any* error of law is jurisdictional: see *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). To the contrary, this Court has continued to emphasise the distinction between those errors of law which are jurisdictional and those which are non-jurisdictional. The distinction bears particular importance in the Australian constitutional system because it identified the limits – at least at the State level – of the constitutionally-protected jurisdiction of the State Supreme Courts.

25. Whether an error of law is permitted or proscribed – that is, jurisdictional or non-jurisdictional – depends on Parliament's intention ascertained in accordance with conventional principles of statutory construction: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91]-[92] (***Project Blue Sky***); *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 91 ALJR 233 at [47]. The classification of an error as jurisdictional or non-jurisdictional is the conclusion or label which follows from this process of statutory construction and is not a substitute for that process.

26. In discerning Parliament's intention it is helpful to ask, as in *Project Blue Sky* at [91], whether "there can be discerned a legislative purpose to invalidate any act" that is affected by the particular error. Whether there is such a purpose "is ascertained by reference to the language of the statute, its subject matter and objects, and consequences for the parties of holding every act" affected by that error invalid: *Project Blue Sky* at [91].[6]

27. In this constructional task, where a legislative regime "places emphasis on the minimisation of formality and technicality", that evidences a parliamentary purpose that errors not vitiate the decision: see *Gnych v Polish Club Limited* (2015) 255 CLR 414 at [82]-[84] (Gageler J). Further, the availability of a mechanism other than judicial review by which errors can be corrected also supports the discernment of an intention that errors not be jurisdictional: *Hudson v Director-General, Department of Environment Climate Change and Water* (2012) 187 LGERA 207 at [67] (Bathurst CJ). In many cases, the discernment of an intention that errors of a particular class be jurisdictional will reflect a "functional" assessment of whether "review is felt to be necessary": Louis L. Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

Proposition 3: Parliament did not intend that errors of the kind which the adjudicator was found to have committed be jurisdictional

28. As mentioned in paragraph 6, the error of law which the Full Court found the adjudicator made was an error "in his construction of the definition of 'CFO' in the

---

[6] See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at [73] (McHugh J).

Contract": SASFC Judgment at [109], [145], [240], [270]; compare TJ at [67]. That error, in turn, was connected to the adjudicator's finding that the construction contract contained a pay when paid provision within the meaning of s 12 of the BCISP Act. There was no error in the construction of s 12 itself; the error was anterior to the application of the Act: see also TJ at [65].

29. The issue is therefore whether Parliament intended that a misconstruction of a construction contract, leading to a finding that a provision is a "pay when paid" provision within the meaning of s 12 of the BCISP Act but not involving a misconstruction of s 12 (or any other provision of the Act) itself, be a jurisdictional error.

30. Before turning to this specific issue, it is convenient to observe that there are many indicators that, in general, Parliament intended that the class of *jurisdictional* errors by adjudicators should be limited. Many of these indicators overlap with those which suggest an intention that certiorari not be available for non-jurisdictional error of law. The scheme aims to achieve low cost, informal, expeditious and relatively conclusive decision-making in respect of novel, statutory rights. Those objects are impaired each time an error is apt to generate litigation. The rights determined by adjudicators are interim only. Errors of law, if material, can be corrected in the final proceedings preserved by the BCISP Act. To that extent, judicial review is not "necessary" in the sense described by Jaffe: see paragraph 27. Adjudicators must be subject matter experts: BCISP Act s 18(1)(b); *Building and Construction Industry Security of Payment Regulation* (SA) r 6.

31. These general factors suggest an initial scepticism in the face of a contention that an error by an adjudicator is jurisdictional.

32. The particular class of error at issue here is an error in the interpretation of the construction contract. It is inherently unlikely that Parliament intended such errors, in and of themselves, to be jurisdictional. Construction contacts are – often and notoriously – detailed and complex. Adjudications are conducted in an extremely compressed statutory timeframe. Parliament must have contemplated that errors in the interpretation of the contract would be not only foreseeable, but commonplace. If such errors were to be jurisdictional – and thus were to vitiate the determination – the statutory objectives of low-cost, speedy and relatively conclusive extra-judicial determination would be frustrated. This Court would not attribute such an intention to Parliament.

33. Further, the content of the construction contract will often turn on the detailed facts of the case – particularly where the contract falls to be construed in its factual matrix or there are implied terms. In those cases, issues of law will be closely intertwined with issues of fact which are not readily amenable to judicial review. Maxcon appears to make this very argument at AS [52] when it observes that "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".

34. All of these factors lead to the conclusion that the adjudicator's error was not jurisdictional. The issue therefore becomes whether a different conclusion is warranted

if an error in the interpretation of the relevant construction contract leads the adjudicator to find that s 12 of the BCISP Act applies.

35. It can be assumed for present purposes that the consequences of an error are relevant to its characterisation as jurisdictional, such that the same error might in the one case be jurisdictional and in another case not jurisdictional. Even on that assumption, Parliament could not be taken to have intended that errors in the interpretation of a construction contract which lead an adjudicator to apply a provision of the BCISP Act in one way rather than another be jurisdictional. An adjudicator's task is to determine the scope of a right which derives from statute but which takes much of its content from the provisions of the applicable construction contract: see, as to the content of right, BCISP Act ss 9(a), 10(1), (2), 11(1)(a) (2). The intersection between statute and contract is emphasised by s 22(2)(a) and (b), which oblige the adjudicator to consider the provisions of the BCISP Act and the provisions of the relevant construction contract. It follows that virtually every error in the interpretation of a construction contract is apt to affect the way in which the adjudicator applies the BCISP Act in making the particular determination. Indeed, when making a determination under s 22(1), the adjudicator would not be interpreting the construction contract at all unless that interpretation was thought to affect the existence and nature of the statutory right under s 22(1). Accordingly, if an error in the interpretation of the construction contract were rendered jurisdictional merely because it affected the adjudicator's application of the BCISP Act, almost every error – perhaps every error – by the adjudicator in the interpretation of the contract would be jurisdictional. But Parliament cannot have intended that consequence for the reasons outlined in paragraph 32.

36. The conclusion is no different if the particular statutory provision the application of which is affected by an error of law is s 12. Nothing in that provision suggests that it bears some different character to other provisions in the BCISP Act such that an error in its application is jurisdictional. The definition of "pay when paid" provision – and, in particular, paragraph (c) – is just like other provisions in Pt 2 of the Act which identify the content of the statutory right to a progress payment by reference in whole or part to the provisions of the construction contract.

37. It is an error to start from some presumption that errors of law by non-judicial bodies are jurisdictional: cf AS [47]. The question in each case is one of Parliament's intention. Even if Parliament does not ordinarily intend non-judicial bodies to have jurisdiction to go wrong in deciding issues of law, the BCISP Act manifests a contrary intention for the reasons given in paragraphs 30 to 36 above.

38. Care should also be taken in describing adjudicator's decisions on issues of law as "authoritative" or "conclusive": cf AS [47]-[48], [52]. An adjudicator's determination under s 22 is not "authoritative" in the sense of being "valid until set aside": cf *State of NSW v Kable* (2013) 252 CLR 118 at [33]-[34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (***Kable***). If vitiated by jurisdictional error, the determination is not a "determination" and gives rise to no obligation under s 23 of the BCISP Act. Nor is an adjudicator's determination under s 22 "authoritative" in the sense of giving rise to an issue estoppel, binding in final judicial proceedings, on the issues decided in the course of making the determination.

39. Maxcon is not assisted by the adjudicator's duty to consider the "provisions of the contract" imposed by s 22: cf AS [50]. Maxcon's argument to the contrary assumes that the "provisions" referred to in s 22(2)(b) identify the provisions of the contract, as authoritatively interpreted in subsequent judicial proceedings, as distinct from the text in fact appearing in the contract. That argument assumes in Maxcon's favour the answer to the very question presently in issue.

40. Maxcon's arguments that Parliament would not have intended to permit an adjudicator to err in construing s 12 of the BCISP Act are misdirected: cf AS [52]-[55]. There is no finding that the adjudicator misconstrued the Act. There is no error constituted by asking the wrong question under s 12: cf AS [53]. There is no error constituted by misunderstanding the test or function in the adjudicator's constating instrument: cf AS [54].

Proposition 4: in any event, the adjudicator did not make an error of law

41. The adjudicator concluded "that the contractual provisions in respect of the retention sum were 'pay when paid' provisions rendered void by section 12 of the Act".[7] The Full Court held that the adjudicator erred in reaching that conclusion. In particular, Blue J held that "the adjudicator did err in law in his construction of the definition of 'CFO' in the Contract": FC at [109].[8] By notice of contention, the First Respondent contends that the adjudicator did not make an error of law.

42. Section 12(2) relevantly provides:

> *pay when paid provision* of a construction contract means a provision of the contract—
>
> ...
>
> (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.

43. Under the head contract between Maxcon and the principal, Maxcon was obliged "to achieve practical completion and to procure a certificate of occupation thereupon"; that was not in dispute below (FC [107]).

44. The issue before the adjudicator was whether there was a provision in the contract between Maxcon and Mr Vadasz which made the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract. The adjudicator determined that there was: FC [108]. On the adjudicator's reasoning, the head contract was "another contract" for the purpose of s 12(2).

45. The contract permitted Maxcon to hold retention sums, to be released to Mr Vadasz in accordance with clause 11(e) and Schedule E item 8 (quoted at FC [100]-[101]). By reason of these provisions 50% was to be released after "CFO" was achieved, with the

---

[7] Judgment, [94].
[8] Lovell J (at [240]) and Hinton J (at [270]) agreed.

remaining 50% to be released 365 days after the date of "CFO". "CFO" was defined as follows:

> CFO shall mean the certificate of occupancy and any other Approval(s) required under Building Legislation which are required to enable the Works lawfully to be used for their respective purposes in accordance with the Principal's project Requirements.

46. There are three elements to Mr Vadasz's submission.

46.1. By operation of the head contract between Maxcon and the principal, Maxcon was *required* to procure a certificate of occupancy. This is not in dispute: FC [107].

46.2. As noted above, clause 11(e) and Schedule E item 8 of the contract between Maxcon and Mr Vadasz prevented release of the retention amount by Maxcon to Mr Vadasz until the certificate of currency was obtained.

46.3. It follows that clause 11(e) made the liability to pay money owing and the due date for payment of money owing contingent or dependent on the operation of the head contract. Specifically, Maxcon's liability to pay, and the due date for payment, was contingent or dependent on Maxcon complying with its obligation to the principal, under the head contract, to procure a certificate of occupation: FC at [107].

48. Blue J concluded that the adjudicator erred in law "for the reason submitted by Maxcon to the adjudicator": FC [109]. That reason adopted by Blue J is set out at FC [107] and summarised by his Honour at [112] as follows: "[t]he 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."

49. It is true that the retention provisions made payment contingent on an independent event, namely completion of the building in the manner described by his Honour at [111]; but the retention provisions also made payment contingent upon Maxcon procuring such a certificate in accordance with its contractual obligations under its contract with the principal (i.e. the head contract).

50. As Blue J correctly noted, under the applicable development regulations, the principal requirement for obtaining a certificate of occupancy was the submission of a statement of compliance being a statement by the owner satisfying certain requirements: FC [105].

51. There was no suggestion or finding that such a certificate could be issued unilaterally without the owner taking any steps to procure such certificate. Quite the opposite: Blue J held that there was a condition precedent as described in the foregoing paragraph. But as between the principal and Maxcon, Maxcon promised to procure the certificate of occupation.

52. The question then arises as to whether the "achieving"[9] of an occupation certificate was contingent or dependent upon the operation of the head contract between Maxcon and the owner.

53. In circumstances where: (i) Maxcon promised the principal that it would procure a certificate of occupation; and (ii) there was no evidence that the certificate of occupation would be obtained in any other way; then (iii) the *timing* of the issue of the occupation certificate was dependent on action taken by Maxcon to obtain a certificate of occupation. In the absence of such occupation certificate, Mr Vadasz had no entitlement to payment.

54. The issue of the occupation certificate was therefore "contingent or dependent" on Maxcon fulfilling its contractual obligation to the principal. Thus, Maxcon's liability to pay, and the due date for payment was "contingent or dependent on the operation of" the contract between Maxcon and the principal within the meaning of s 12(2)(c) of the BCISP Act.

55. The issue of a certificate of occupancy may well have been dependent or contingent on other matters also. That does not detract from the foregoing submission. To put it another way, just because the issue of a certificate of occupancy "depends on the completion of the building in accordance with the plans and specifications" ([111]) does not mean that it was not *also* contingent or dependant on the operation of the head contract between Maxcon and the principal.

56. The adjudicator did not err in construing the contract.

Proposition 5: this Court has power to quash part only of a determination affected by error of law

47. If this Court finds that the adjudicator's determination was affected by error of law, a question will arise as to what (if any) relief the Court should give.

48. This Court has such remedial powers as were exercisable by the Full Court of the Supreme Court of South Australia: *Judiciary Act 1903* (Cth) s 37; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [111] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Kable* at [71] (Gageler J). The Full Court's remedial powers included the power to "amend or set aside the judgment subject to the appeal and give any judgment that the justice of the case requires": *Supreme Court Civil Rules 2006* (SA) r 286(3)(b) (**SCC Rules**). That power plainly includes the power to issue certiorari to an inferior tribunal on an appeal from a decision in the exercise of the Supreme Court's original jurisdiction to review a decision of the inferior tribunal.

49. The power given by r 286(3)(b) is expressed in the broadest of terms: *any* judgment *that the justice of the case* requires. The power is to be construed broadly and is not to be hedged about by limits: *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

---

[9] Schedule E, item 8 (at [101]).

50. Nothing in the text of the SCC Rules expressly or impliedly requires – or even suggests – that the Full Court's power to issue certiorari in respect of a decision affected by error of law is limited to quashing the whole of the decision under review.

51. The existence of such a power is supported by general principle as stated in *Re Skirving; Ex parte Forward* [1998] WASCA 340:[10] "[t]he general rule is that where part only of a decision of an administrative tribunal is beyond power, the Court may quash that part without interfering with the remainder".

52. This general rule reflects what has been described as "a common law doctrine of severance" which applies subject to contrary parliamentary intention: *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [115] (Vickery J) (***Gantley***); *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 at [66] (Vickery J). This general rule also derives from s 13 of the *Acts Interpretation Act 1915* (SA), which applies to "instrument[s] made pursuant to a power conferred by or under an Act" and provides that "where a provision of the instrument … is in excess of that power, the remainder of the instrument … is not affected". An adjudicator's determination – which must be in writing (s 22(3)(a)) – is an "instrument" made pursuant to the power given by s 22(1).

53. The BCISP Act does not manifest any intention to derogate from this general rule. To the contrary, as observed by Vickery J in *Gantley* in respect of the broadly similar Victorian legislation, "the purposes of the Act … are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality": at [115].

54. There is a further reason in support of the proposition that an adjudicator's determination is capable of being severed. When a party in Maxcon's position receives a payment claim under s 13, it must provide a payment schedule in response under s 14 if it wishes to dispute the claim: see s 14(4). A payment schedule must indicate the amount of the payment (if any) that the respondent proposes to make ("the scheduled amount"): s 14(2)(b). A claimant may apply for adjudication of a payment claim if the scheduled amount is less than the claimed amount: s 17(1)(a).

55. On Maxcon's case, the entire amount which an adjudicator has concluded is due, including the scheduled amount, should be set aside in such a case. That is, Maxcon submits that it should have no liability to pay the amount (here $141,163.55) which it did not dispute and which it expressly stated that it proposed to pay: s 14(2)(b). That would be a perverse outcome and at odds with the fundamental statutory purpose of facilitating cash flow.

56. The result of the application of severance principles to determinations under s 22 is that each determination is read distributively, with invalid operations susceptible to severance so long as they are not bound up with the valid operations: *Tajjour v State of New South Wales* (2014) 254 CLR 508 at [169]-[172]. Maxcon's contention that the power in s 22 is a single power to determine one amount assumes the answer to the present inquiry: cf AS [64].

---

[10] Applied in *Re Narula; Ex parte Atanoski* [2003] WASCA 156 at [49]. See also *Director of Public Prosecutions (Cth) v Ede* (2014) 289 FLR 82 at [40]-[46].

57. There is no difficulty with remitting to the adjudicator the re-determination only of those matters the subject of the quashing: cf AS [68]. The adjudicator's role was to determine the adjudication application: BCISP Act ss 19(1), (2), 21(3), 22(2). The effect of a partial quashing is that the adjudicator has determined part, but not all, of that adjudication application in accordance with law. The adjudicator remains subject to a duty to determine the balance of the application, which duty can be enforced by mandamus (see also proposition 7 below).

Proposition 6: if the determination is affected by error of law, the court should quash only that part which is affected by the error

58. If the adjudicator's determination was affected by error of law, this Court should quash only that part of it which was so affected. In this case, that is only that part of the determination under which the adjudicator awarded Mr Vadasz $38,999.40 on the basis that the retention sum provisions of the contract were unlawful "pay when paid" provisions.

59. Here, there were two further parts of the determination which, on any view, were not affected by any error. One part was the amount of $141,163.55, which Maxcon accepted in its payment schedule that it should pay to Mr Vadasz. That amount was, in the language of s 14(2)(b) of the BCISP Act, "the amount of the payment ... that [Maxcon] proposes to make". The other part was the amount of $24,750, reflecting an administration charges set off, which was disputed by Maxcon before the adjudicator but which was wholly severable from any error of law in respect of pay when paid provisions. Mr Vadasz adopts the Full Court's reasoning at FC [228]-[231], [234] and [238] in this respect.

60. The justice of the case requires that unimpeached and severable aspects of the adjudicator's determination not fall with any aspect of the adjudicator's determination which is affected by error of law. In the case of the amount identified in the payment schedule, that amount is not only unimpeached and severable, it is an amount which Maxcon has accepted it should pay. Such an order is consistent with the objects of the BCISP Act: it will ensure cash flow to Mr Vadasz in satisfaction of a present right which Maxcon does not dispute he has.

Proposition 7: if certiorari be granted, the matter should be remitted to the adjudicator for determination in accordance with law

61. The Court below found that, if certiorari were to be granted, the matter should be remitted to the adjudicator for determination in accordance with law: FC [238]. Maxcon opposes this course on the basis that "the adjudicator is functus officio, and the adjudication process initiated by the service of an adjudication application is stale": AS [58].

62. In support of that submission, Maxcon refers to s 21(3). Section 21(3) obliges an adjudicator to determine an adjudication application as expeditiously as possible and in any case within either a specified time (s 21(3)(a)) or such further time as the parties agree (s 21(3)(b)). The upshot of Maxcon's argument is that, once the time limit in s 21(3)(a) has expired, absent an agreed extension under s 21(3)(b), an adjudicator has

no power to determine an adjudication application – and that is so even if the adjudicator has constructively failed to exercise his or her duty to make a determination in accordance with law.

63. The term "functus officio" is a label which reflects the end result of a process of statutory construction and is not a replacement for that process: *Minister for Indigenous Affairs v MJD Foundation Ltd* [2017] FCAFC 37. In that process of statutory construction, the starting presumption is that stated in s 37 of the *Acts Interpretation Act 1915* (SA), namely, that a statutory power "is capable of being exercised from time to time, as occasion requires, unless the context, or the nature of the act or thing, indicates a contrary intention".

64. Section 21(3)(a) of the BCISP Act does not manifest a contrary intention. The overriding duty of an adjudicator is to determine an adjudication application: see ss 19, 21(1), 22(2). That is the whole purpose of the adjudicator's office: the adjudicator is "appointed *to determine the application*": BCISP Act s 19(2) (emphasis added). The provisions imposing that duty are leading provisions to which the "timing" provisions in s 21(3) are subordinate: see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [70]. When s 21(3) is read in light of, and subject to, the adjudicator's overriding duty to determine the adjudication application, the result is that the timing provisions are properly seen as only directory in nature. They do not deny the existence of a continuing duty to discharge the adjudicator's fundamental obligation. Nor do they manifest any contrary intention within the meaning of s 37 of the *Acts Interpretation Act 1915* (SA).

65. The result is analogous to that reached by this Court in *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203. That the Administrative Appeals Tribunal was there subject to an 84-day time limit after which there was a deemed decision (see at [75]) did not prevent this Court ordering mandamus directing the Tribunal to determine the application in accordance with law: see at [79].

PART VII: HEARING ESTIMATE

66. The First Respondent estimates he will need 2 hours to present his argument.

Dated 6 July 2017

MChristie

Michael Christie SC
P: (02) 9221 7118
E: mchristie@sixthfloor.com.au

David Hume
P: (02) 8915 2694
E: dhume@sixthfloor.com.au

Counsel for the First Respondent

ANNEXURE

***Supreme Court Act 1935* (SA) (current version)**

6—Continuance of Supreme Court

The Supreme Court of South Australia as by law established is hereby continued as the superior court of record, in which has been vested all such jurisdiction (whether original or appellate) as is at the passing of this Act vested in, or capable of being exercised by that court.

17—General jurisdiction

(1) The court shall be a court of law and equity.

(2) There shall be vested in the court—

(a) the like jurisdiction, in and for the State, as was formerly vested in, or capable of being exercised by, all or any of the courts in England, following:

(i) The High Court of Chancery, both as a common law court and as a court of equity:

(ii) The Court of Queen's Bench:

(iii) The Court of Common Pleas at Westminster:

(iv) The Court of Exchequer both as a court of revenue and as a court of common law:

(v) The courts created by commissions of assize:

(b) such other jurisdiction, whether original or appellate, as is vested in, or capable of being exercised by the court:

(c) such other jurisdiction as is in this Act conferred upon the court.

***Supreme Court Civil Rules 2006* (SA)**

286—Hearing of appeal [rule 286 substituted by Supreme Court Civil Rules 2006 (Amendment No. 10)]

(1) An appeal is to be by way of rehearing (unless the law under which the appeal is brought provides to the contrary).

(2) Subject to any limitation on its powers arising apart from these Rules, the Court may determine an appeal as the justice of the case requires despite the failure of parties to the appeal to raise relevant grounds of appeal, or to state grounds of appeal appropriately, in the notice of appeal.

(3) Subject to any limitation on its powers arising apart from these Rules, the Court may—

(a) draw inferences of fact from evidence taken at the original hearing and, in its discretion, hear further evidence on a question of fact;

(b) amend or set aside the judgment subject to the appeal and give any judgment that the justice of the case requires;

(c) remit the case or part of the case for rehearing or reconsideration;

(d) make orders for the costs of the appeal.

***Acts Interpretation Act 1915* (SA) (current version)**

13—Construction of statutory instrument so as not to exceed power

A statutory or other instrument made pursuant to a power conferred by or under an Act will be read and construed so as not to exceed that power, so that, where a provision of the instrument, or the application of a provision of the instrument to any person or circumstances, is in excess of that power, the remainder of the instrument, or the application of the provision to other persons and circumstances, is not affected.

37—Powers may be exercised from time to time

A power given by any Act to do any act or thing (including the making of an appointment), or to submit to any act or thing, is capable of being exercised from time to time, as occasion requires, unless the context, or the nature of the act or thing, indicates a contrary intention.