

Not Restricted

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

No. SCI 2012 02191

470 ST KILDA ROAD PTY LTD
(ACN 006 075 341)

Plaintiff

v

REED CONSTRUCTIONS AUSTRALIA PTY LTD
(ACN 003 340 341)

First Defendant

and

PHILIP MARTIN

Second Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 30 APRIL 2012
DATE OF JUDGMENT: 7 JUNE 2012

470 ST KILDA ROAD PTY LTD v REED CONSTRUCTIONS
AUSTRALIA PTY LTD & ANOR

MEDIUM NEUTRAL CITATION: [2012] VSC 235

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Adjudication conducted under Part 3 Division 2 of the Act - Whether 'good faith' a pre-condition to a valid payment claim - Whether 'good faith' implied into the statutory scheme for a payment claim - Whether compliance with the adjudication application time limits provided in s 18(3) of the Act a basic and essential condition of validity - Whether Adjudicator's determination on compliance with the adjudication time limit reviewable - Allegedly false statutory declaration accompanying payment claim - Whether finding by adjudicator that payment claim valid reviewable - Whether reasons provided by adjudicator sufficient to comply with s 23 of the Act.

STATUTORY INTERPRETATION - Implying words into the text of legislation - Implying "good faith" into statutory text.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr T.J. Margetts SC
Mr T. Cogley

Baker & McKenzie

For the First Defendant
For the Second Defendant

Mr N. Pane
No Appearance

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HIS HONOUR:

Background

1 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the “Act”). It raises questions as to whether there was a valid payment claim and whether there was a valid adjudication determination under the Act.

2 The Plaintiff, 470 St Kilda Road Pty Ltd (“St Kilda Road”), seeks judicial review of an adjudication determination (the “Adjudication Determination”) dated 10 April 2012 of the Second Defendant, Mr Philip Martin (the “Adjudicator”), purportedly made pursuant to s 23 of the Act. The Adjudicator took no part in the present proceeding.

3 The First Defendant, Reed Constructions Australia Pty Ltd (“Reed”), was a claimant under a payment claim pursuant to the provisions of the Act.

4 A construction contract within the meaning of s 7 of the Act (the “Construction Contract”) was entered into between St Kilda Road as the Principal and Reed as the Contractor. The Contract was for the design and construction of residential apartments, office suites and associated works at 470 St Kilda Road, Melbourne, known as the Leopold Project (the “Project”). There was no issue that the Act therefore applies to the Project in its amended form.¹

5 The Principal’s Representative appointed under the Construction Contract was Reshape Development Pty Ltd (“Reshape”).

6 Pursuant to clause 37 and item 33 of Annexure Part A of the Construction Contract, Reed was required to make claims for payment progressively on the 28th day of each month for work done under the Construction Contract during the relevant month (defined as “WUC”). The due date for the payment of payment claims under the Construction Contract was within the earlier of 21 days of Reed’s receipt of a payment schedule from St Kilda Road or within 35 days after the Principal’s Representative, Reshape, received the payment claim.

¹ As amended by the *Building and Construction Industry of Payment (Amendment) Act 2006* (Vic), see s 53 of the Act; s 42 of the Act commenced 30 March 2007.

7 Reed sought payment from St Kilda Road of \$760,698.84 (including GST) (the “Scheduled Amount”) for works undertaken in January 2012 pursuant to the Construction Contract in a payment claim the subject of the adjudication (“Payment Claim 16”). St Kilda Road provided a payment schedule which indicated that it proposed to pay no amount in respect of this claim (the “Payment Schedule”).

8 This was an unusual case. As found by the Adjudicator, the parties were in agreement as to the value of the work included in Payment Claim 16. However, as indicated in its Payment Schedule, St Kilda Road withheld payment of the whole of the amount claimed on the basis that Reed was not entitled at law to receive it.

9 The matter proceeded to adjudication under the Act. The Adjudicator was validly appointed and made his Adjudication Determination dated 10 April 2012. The Adjudication Determination required St Kilda Road to pay Reed the full amount of Payment Claim 16, being \$760,698.84 (including GST).

10 St Kilda Road seeks to challenge the Adjudication Determination on a number of grounds. St Kilda Road’s grounds raise three principal issues:

- (a) The Adjudicator did not have jurisdiction to make the Adjudication Determination as Payment Claim 16 was void for want of good faith (the “Good Faith Ground” (a) in the Notice of Motion);
- (b) The Adjudicator erred in finding that the scheduled amount was \$760,698.84 and not nil (the “Payment Schedule Grounds” (b) & (c) in the Notice of Motion); and
- (c) Central to the case of St Kilda Road is the allegation that Payment Claim 16 included a false statutory declaration (the “Statutory Declaration”) which was said to state that all subcontractors had been paid all amounts which were due to them when this was alleged not to be the case. Specifically, St Kilda Road submitted that the Adjudicator erred in his consideration of the Statutory

Declaration (the “Statutory Declaration Grounds” (d), (e), (f) & (g) in the Notice of Motion):

- (i) in finding that the Act did not empower or require him to consider whether the Statutory Declaration was false;
- (ii) in finding that the Statutory Declaration was true by finding that Reed had complied with clause 38.1 of the Construction Contract by providing the Statutory Declaration and failing to provide any or any adequate reasons for this finding; and
- (iii) by failing to take into account the terms of the Construction Contract in determining the amount properly due and payable.

11 Each of the principal issues will be addressed in turn.

The Good Faith Ground (Ground (a))

The Case of St Kilda Road

12 St Kilda Road alleges that on 10 December 2010 Reshape gave a lawful direction to Reed that with each payment claim Reed was to provide a statutory declaration in a particular format to satisfy clause 38 of the Construction Contract.

13 It was submitted that by email dated 10 December 2010, St Kilda Road (via Reshape) notified Reed that pursuant to clause 38 of the Contract it required a statutory declaration in the form approved by it to accompany each payment claim. The approved form of statutory declaration required a representative of Reed to confirm that Reed’s workers, subcontractors and suppliers had been paid *all amounts* which were due and payable to them as at the time the statutory declaration was sworn. St Kilda Road submitted that it had provided, and Reed had in each payment claim completed, a form of statutory declaration which required Reed to confirm that all amounts which were due and payable had been paid.

14 Reed provided a statutory declaration in the approved form with each payment claim up to and including Payment Claim 16.

- 15 The Statutory Declaration was made by Mr Glenn Robinson of Reed on 31 January 2012 and was submitted with Payment Claim 16 on 31 January 2012.
- 16 In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* (“*Nepean Engineering*”), the Court of Appeal of the Supreme Court of New South Wales held that in order for a payment claim to be valid it needed to be made in good faith and in purported compliance with s 13(2) of the *Building and Construction Security of Payment Act 1999* (NSW) (the “NSW Act”)^{2,3}. In *Metacorp Australia v Andeco Construction Group* (“*Metacorp*”), the Victorian Supreme Court similarly held that for a claim to be made validly under the Act it must be made bona fide.⁴
- 17 It was the submission of St Kilda Road that the falsity of the Statutory Declaration demonstrated that Payment Claim 16 was not made in good faith and was not bona fide. Put simply, it was said that Reed asserted as part of its claim, and on oath, that it had paid its subcontractors at the relevant time when it had not. It was put that Reed claimed payment from St Kilda Road on a false basis.
- 18 It was further contended on behalf of St Kilda Road that clause 2.2(a)(x) of the Construction Contract also imposed an obligation on Reed to “act honestly and with utmost good faith”. It was submitted that service of a false statutory declaration as part of Payment Claim 16 was not in compliance with the honest standard of conduct arising out of the obligation under the Construction Contract and/or otherwise at law including in making any application under the Act. The requirement of bona fides must include a requirement to act with honesty.
- 19 It was submitted further by St Kilda Road that in *Metacorp* the Court considered a statutory declaration in similar terms to the Statutory Declaration which was alleged to be false in the present case.⁵ In that case the Court found that the plaintiff had failed to prove, on the balance of probabilities (taking into account the *Briginshaw*

² The equivalent section in Victoria is s 14(2) of the Act.

³ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* (2005) 64 NSWLR 462 [49], [76].

⁴ *Metacorp Australia v Andeco Construction Group* [2010] VSC 199 [101].

⁵ *Metacorp Australia v Andeco Construction Group* [2010] VSC 199.

principles⁶), that the statutory declaration was false and accordingly no lack of bona fides had been demonstrated.⁷ However, it was put in the present case that, in contrast to the evidence before the Court in *Metacorp*, there was substantial direct and probative evidence which demonstrated the falsity of the Statutory Declaration.

20 St Kilda Road submitted that the falsity of the Statutory Declaration is conclusively demonstrated by:

- (a) Reed not denying the falsehood although it has had ample opportunity to do so;
- (b) A “creditors list” provided by Reed to St Kilda Road dated 1 February 2012 (the day after which the Statutory Declaration was made) which showed that Reed owed its subcontractors over \$2.5 million for works performed in November 2011;
- (c) A letter from Reed in response to a Show Cause Notice received from St Kilda Road, in which Reed admitted that its subcontractors had not been paid amounts owed in respect of works performed in October, November and December 2011 and that Reed proposed to “re-execute” the Statutory Declaration once payment had been made; and
- (d) Evidence of Reed’s subcontractors that they had not been paid the outstanding amounts due and payable to them.

21 St Kilda Road also placed reliance on the fact that no affidavit was provided by Reed from relevant and apparently available witnesses to deny and advance evidence as to the falsity of the allegation that the Statutory Declaration was false.

22 St Kilda Road submitted that the evidence before the Court on this issue is certain, direct and convincing and the Court ought to be positively satisfied (on the balance of

⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁷ *Metacorp Australia v Andeco Construction Group* [2010] VSC 199 [215]-[219].

probabilities bearing in mind the principles of *Briginshaw*) that the Statutory Declaration was false.

23 For these reasons, St Kilda Road urged the Court to find that Payment Claim 16, which included the Statutory Declaration, was not made in good faith and was not bona fide. On this basis it seeks a declaration that Payment Claim 16 was invalid and the entire Adjudication is null and void as a consequence.

The Case of Reed

24 Reed, in response, submitted that moneys were not due and payable to Reed's subcontractors for works performed in January 2012 at the time the Statutory Declaration was made on 31 January.

25 Reed further submitted that, in any event, there is no obligation for a payment claim to be served in good faith or for the claimant to have a bona fide or good faith belief in the validity of the claim.

26 It was put that a payment claim which on its face reasonably purports to comply with the requirements of s 14(2) of the Act will not be a nullity and that as the Adjudicator correctly found that the payment claim complied with those requirements, it was a valid payment claim.

27 Reed submitted further that whether a payment claim complies with the Act is a matter to be determined by the Adjudicator. So long as the Adjudicator makes the decision in good faith, an error in the conclusion will not render the determination invalid.

Must a Payment Claim be Made in Good Faith?

28 A first question is as to whether the Act requires that a payment claim be made in good faith as an element essential to validity.

29 St Kilda Road placed reliance first on the observation of Ipp JA in *Nepean Engineering*.⁸

⁸ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* (2005) 64 NSWLR 462, 484 [76].

30 *Nepean Engineering* concerned whether or not a defence to a cause of action under s 15 of the NSW Act was available.⁹ Section 15 provided that where no payment schedule was forthcoming from the respondent to a payment claim, the claimant may recover the claimed amount as a debt due in any court of competent jurisdiction.

31 Ipp JA said in relation to construing the *Building and Construction Industry Security of Payment Act 1999* (NSW):

Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act,¹⁰ the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17¹¹ and not a ground for resisting summary judgment in proceedings under s 15^{12,13}

32 Consistently with the obiter dictum of Ipp JA, Santow JA in *Nepean Engineering* also said:

I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s 13(2) of the Act, both minimal requirements of the Act.¹⁴

33 However, the observations of Ipp and Santow JJA are a long way from authoritatively ruling, following reasoned analysis, that “good faith” was an essential requirement for a valid payment claim under the statute.

34 A submission to this effect had been earlier rejected by Einstein J in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd*, but again without any detailed analysis.¹⁵

35 The issue was raised and considered in some depth in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (“*Bitannia*”):

There the Appellants submitted that the only person who could make a payment claim pursuant to s 13(1)¹⁶ was the person who “is or who claims to

⁹ The equivalent section in Victoria is s 16 of the Act.

¹⁰ The equivalent section in Victoria is s 14(2) of the Act.

¹¹ The equivalent section in Victoria is s 18 of the Act.

¹² The equivalent section in Victoria is s 16 of the Act.

¹³ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* (2005) 64 NSWLR 462, 484 [76].

¹⁴ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liquidation)* (2005) 64 NSWLR 462, 484 [49].

¹⁵ *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103, [78]-[79].

¹⁶ The equivalent section in Victoria is s 14(1) of the Act.

be entitled” to the payment. The Appellants argued that this provision was not intended to provide a mechanism for claims which were known to be hopeless and accordingly required that the person have a bona fide belief in the substance of the claim.¹⁷

- 36 Basten JA, with whose reasons on the question of whether there existed an obligation to make a payment claim in good faith Hodgson JA agreed,¹⁸ said in relation to the Appellants’ submission:

Such an approach has an undeniable attraction. However, s 13 should not be read in isolation: rather, consideration must be given to the whole of the procedure envisaged under Part 3 of the *Building Payment Act*. Thus, a proprietor who seeks to resist a payment claim is entitled (and required) to provide a payment schedule in reply. A claimant who makes a patently unsustainable or untrue claim is thus likely to be met by a payment schedule. If the claimant wishes to pursue the claim in that event, it must be referred to and determined by an adjudicator, who is very likely to disallow so much of the claim as is patently false or unsupportable. Accordingly, as the Respondent argued, the “bona fides” of the claimant should not be treated as a separate criterion of a valid claim: rather, as with any other issue going to the merit of the claim, the scheme of the legislation was to require that an assessment be made by an adjudicator.¹⁹

- 37 After pointing out that the observation of Ipp JA in *Nepean Engineering* appeared to be obiter “and also without explanation”,²⁰ Basten JA continued:

This last statement invites closer attention to what is meant by a lack of good faith on the part of the claimant. At the very least it would appear to involve two elements, namely that the claim was without merit and that the claimant knew it. But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in *Coordinated Construction Pty Ltd v Climatech*, at [43]-[46] (a passage cited without disagreement by Hodgson JA in *Nepean Engineering* at [32]-[34]) determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a Court. If the express requirements of the Act are to be so treated, it is difficult to see why some unexpressed precondition should have a different status. Even more is that the case when, as has been noted, a key element in the supposed condition of “good faith” is that the claim is without merit, a matter indisputably within the powers of the adjudicator to determine.

²¹

¹⁷ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [57].

¹⁸ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [2].

¹⁹ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [58].

²⁰ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [69].

²¹ *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [71].

38 Basten JA was also careful to point out in *Bitannia*, in observations which I adopt, that a distinction was to be made between the making of a payment claim, where there is no implied obligation of good faith as an essential requirement of validity, contrasted with the position of an adjudicator appointed under the Act, who may be considered to be required to exercise the statutory powers conferred on the office in good faith and for the purposes for which they are conferred. In this regard His Honour observed:

By contrast, there is good reason to suppose that the powers conferred on an adjudicator must be exercised in good faith and for the purposes for which they are conferred. The case law in favour of that proposition is discussed in the decisions of this Court referred to above and with expansive treatment by Brereton J in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, [63]-[117]. It is possible that the language of “good faith” has been imported from this separate situation to that of the essential preconditions to a valid claim. However, and with respect to the views of Santow and Ipp JJA (to the extent that they are to the contrary) there is, in my view, no separate precondition to the making of a valid payment claim under s 13 of the *Building Payment Act*, requiring, as a precondition to enforcement action under s 15, proof that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed.²²

39 The Queensland Court of Appeal in *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* (“*Neumann Contractors*”)²³ took a similar approach, noting that Basten JA in *Bitannia* found that it was not a requirement of a valid payment claim that the claimant had an actual bona fide belief in the truth of the facts asserted. Muir JA in *Neumann Contractors* continued:

There being no material differences in the wording of the relevant statutory provisions, this Court should follow the decision in *Bitannia* unless persuaded that it was plainly wrong. In my respectful opinion, Basten JA’s relevant conclusions are not wrong, let alone plainly so. The importing into the Act of an implied obligation to make payment claims in good faith would detract materially from the simple robust mechanism provided by the Act to achieve a speedy interim resolution of payment claims to promote early recovery of progress claims. In keeping with the Act’s purpose, s 17 sets out the requirements for a valid payment claim.²⁴

40 The reasoning of Muir JA in *Neumann Contractors* is compelling and I adopt it.

²² *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9 [75].

²³ *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 [70]-[71].

²⁴ *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 [72]-[73].

Implying Words into Statutory Text

41 Further, the circumstances in which words can be implied into the text of legislation is strictly limited. Lord Mersey, in *Thompson v Goold & Co*, said:

It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do so.²⁵

McHugh JA in *Bermingham v Corrective Services Commission of New South Wales* similarly observed that:

[I]t is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.²⁶

In *Bermingham* McHugh J drew from his approach in *Kingston v Keprose Pty Ltd*²⁷ in relation to implying words into a statute in the following passage:

First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.²⁸

In *Momcilovic v R & Others*, Crennan and Kiefel JJ said to like effect that:

In *Wentworth Securities Ltd v Jones* [1980] AC 74 [105] Lord Diplock stated certain conditions as necessary to be fulfilled before a court, construing legislation, could read words into the text. However, they were directed to correcting a defect or omission which had been overlooked by parliament. Moreover, as Kirby J pointed out in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53, his Lordship made it plain that that possibility only arises "if the application of the literal or grammatical meaning would lead to a result which would defeat the clear purpose of a statute".²⁹

[Footnotes omitted]

²⁵ *Thompson v Goold & Co* [1910] AC 409, 420.

²⁶ *Bermingham v Corrective Services Commission of New South Wales* (1988) NSWLR 292, 302.

²⁷ *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423 in which His Honour drew from the judgment of Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74, 105-106.

²⁸ *Bermingham v Corrective Services Commission of New South Wales* (1988) NSWLR 292 at 302.

²⁹ *Momcilovic v R and Others* (2011) 280 ALR 221, 387 [580].

42 The fundamental duty of the Court is to apply the law as enacted by the parliament.³⁰ As Kirby J said in his dissenting judgment in *Commissioner of Taxation v Day*

this requires scrutiny of the enacted words in their context and in the light of any relevant considerations of history or of legislative purpose.³¹

43 In my opinion there is no warrant for implying into the Act an obligation of good faith on the part of a claimant in preparing and submitting a payment claim. Following the service of a payment claim the Act provides mechanisms for the claim to be reviewed by the respondent and, if necessary, part rejected or wholly rejected by the serving of a payment schedule. It is at this point that a spurious claim lacking any proper foundation can be addressed. The Act also provides for a process of adjudication. Upon appointment, the adjudicator is in a position to address and determine the merits of the parties' dispute as articulated in the payment claim and payment schedule.

44 No enquiry into the bona fides of a claimant is necessary for the effective functioning of these processes. Nor is any such enquiry desirable, given the important objective of providing expedition in the determination of the interim rights of the parties in relation to the recovery of progress claims under a construction contract. It would fly in the face of this purpose of the Act, and the robust determination of disputes under the statutory adjudication process, to import an element of good faith as an issue to be considered and determined for a valid payment claim, in addition to the s 14 requirements.

Conclusion as to Good Faith Ground

45 In *Metacorp* the Court was called upon to consider the validity of a payment claim that had been served prematurely, that is before the appointed "reference date" as defined in s 9(2) of the Act.³² In the course of considering the issue I observed:

... under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons "who claim to be

³⁰ See, for example, *Central Bayside General Practice Association Ltd v Cmr of State Revenue (Vic)* (2006) 228 CLR 168; 229 ALR 1; [2006] HCA 43 [84], fn CLR 86; ALR 64 and cases there cited.

³¹ *Commissioner of Taxation v Day* (2008) 250 ALR 388.

³² *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2011] VSC 199 [71]-[114].

entitled” to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, *and that claim is made bona fide*, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served. [Emphasis added]³³

46 In the light of the authorities I have cited in these reasons, which were not referred to the Court in *Metacorp*, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.

47 There is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.

48 For this reason St Kilda Road’s Ground (a) in the Notice of Motion (the Good Faith Ground) fails and is dismissed.

The Payment Schedule (Grounds (b) & (c))

St Kilda Road’s Case

49 St Kilda submitted that the Adjudicator erred in finding that the Scheduled Amount was \$760,698.84 and not nil because the Adjudicator had no jurisdiction to determine the Adjudication Application. This was so, it was submitted, because Reed failed to submit the Adjudication Application within the required timeframe being 10 business days after Reed received the Payment Schedule.

50 Section 18 of the Act provides:

18. Adjudication applications
 - (1) A claimant may apply for adjudication of a payment claim (an adjudication application) if-
 - (a) the respondent provides a payment schedule under Division 1 but-

³³ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2011] VSC 199 [101].

- (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount;
- (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless-
 - (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.
- (3) An adjudication application-
 - (a) must be in writing; and
 - (b) subject to subsection (4), 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 10 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 10 business days after the due date for payment; and
 - (e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 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 the application fee (if any) determined by the authorised nominating authority; and
 - (h) may contain any submissions relevant to the application that the claimant chooses to include.
- (4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the

application must be made to one of those authorities chosen by the claimant.

- (5) Copy of the adjudication application must be served on the respondent.

51 St Kilda Road submitted that the Payment Schedule in the present case was a payment schedule to which only s 18(1)(a)(i) applies because the Scheduled Amount, properly construed, was nil. It said that as there can be no due date (or failure) to pay an amount of nil, s 18(1)(a)(ii) of the Act could not apply, leaving only s 18(1)(a)(i) which could apply.

52 In this regard, St Kilda Road further submitted that s 15(2)(b) of the Act provides that a payment schedule “must indicate the amount of the payment (if any) that the respondent proposes to make” and defines this as the scheduled amount. It put that it was obvious from the face of the Payment Schedule that St Kilda Road did not propose to make payment of any amount to Reed in respect of Payment Claim 16. The Scheduled Amount was therefore nil.

53 Consequently, pursuant to s 18(3)(c) it said that the Adjudication Application must be made within 10 business days after the claimant receives the Payment Schedule. It was common ground that the Payment Schedule was received by Reed on 13 February 2012. It was also common ground that the Adjudication Application was commenced on 20 March 2012, well outside the 10 day time limit provided by s 18(3)(c) of the Act.

54 For this reason St Kilda Road contended that a basic and essential requirement for Adjudicator’s jurisdiction was absent, giving rise to its claim to relief.

55 The issue was raised directly by St Kilda Road before the Adjudicator in its further submission dated 4 April 2012 provided to the Adjudicator in response his request dated 3 April 2012.

Reed's Case

56 On the other hand, Reed contended that the time regime provided under s 18(3)(c) and (d), and it would follow under s 18(3)(e) of the Act, was not a basic and essential requirement, with the consequence that a failure in compliance would not result in the Adjudication Application being rendered invalid.

57 In the alternative it further submitted that the appropriate regime to be applied fell within s 18(1)(a)(ii) because St Kilda Road, being the respondent to the payment claim failed to pay the whole or any part of the scheduled amount to Reed as the claimant by the due date for payment of the amount.

58 This being the case, it was submitted that s 18(3)(d) applied, resulting in the time limit for the Adjudication Application being required to be made within 10 business days after the due date for payment, in which case the Adjudication Application was within time.

Whether Time Compliance in s 18(3)(c) & (d) a Basic and Essential Requirement

59 In *Grocon Constructors Pty Ltd v Plannit Cocciardi (No 2)* ("*Grocon*") the Court observed:

With the exception of the case where the basic and essential requirements of the Act for a valid determination are not satisfied, or where the purported determination is not a bona fide attempt to exercise the power granted under the Act, if the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.³⁴

60 Further, as observed in *Hickory v Schiavello* although the mandatory word "must" appears in s 18(3)(c) of the Act, this does not in itself render an act done in breach of the provision invalid.³⁵ This is not the purpose of the legislation as reflected in its text.

³⁴ *Grocon Constructors Pty Ltd v Plannit Cocciardi (No 2)* (2009) 26 VR 172 [115].

³⁵ *Hickory v Schiavello* (2009) 26 VR 112 [136].

61 Pursuant to s 23(2) of the Act an adjudicator, in determining an adjudication application, must consider the listed matters and those matters only. Included in these matters is s 23(2)(a) described as “the provisions of this Act and any regulations made under this Act”. Section 23(2B) then makes specific provision for the circumstances in which an adjudicator’s determination is void. Section 23(2B)(a) provides that to the extent that it has been made in contravention of subsection (2) it is void. However, s 23(2B) falls short of declaring that an adjudication application which fails to comply with the time limits provided for in s 18(3) of the Act is void. All that is required is for the an adjudicator, in determining an adjudication application, to consider the Act. If this is done, and the adjudicator arrives at a wrong conclusion, no invalidity arises.

62 The time regime set out in s 18(3) of the Act is not a basic and essential requirement resulting in an invalid adjudication if the initiating adjudication application is not made within time. The Act confers jurisdiction on the appointed adjudicator to determine the question of his or her jurisdiction, including the question of compliance with the time limits provided under s 18(3). The adjudicator may determine the question wrongly and may commence the adjudication. However, this is not a matter which should be the subject of an objective determination by a court, and even if it is, and the matter is determined against a finding of jurisdiction made by the appointed adjudicator, the outcome will not render the adjudication determination invalid.

Adjudicator’s Determination

63 On the present issue, central for the determination of the Adjudicator was the factual question as to the proper construction of the Payment Schedule and what it intended to convey.

64 The Adjudicator considered the submission of St Kilda Road in his Adjudication Determination and rejected it, finding that he had jurisdiction to determine the Adjudication Application because it had been made within time. The Adjudicator determined the matter in the following passages of his Adjudication Determination:

5.2 Validity of adjudication application

The Respondent submits that the adjudication application has not been submitted within the 10 business days after the Claimant received the payment schedule.

The Respondent submits that the scheduled amount is less than the claimed amount as provided in section 18(1)(a)(i) of the Act so that an adjudication application must be made in accordance with section 18(3)(c) of the Act, that is within 10 business days after the Claimant receives the payment schedule.

The Claimant submits that the scheduled amount is the same amount as the claimed amount so that section 18(1)(a)(ii) applies with section 18(3)(d) requiring the adjudication application be made within 10 business days after the due date for payment.

The Act provides at section 15(2)(b),

A payment schedule must indicate the amount of payment (if any) that the Respondent proposes to make (the scheduled amount).

The Act also provides at section 15(3),

If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the Respondent is withholding payment for any reason) the Respondent's reason for withholding payment.

The Respondent submits in the payment schedule that the assessment of the amount payable with respect to the payment claim is \$760,698 (inclusive of GST). The Respondent also notes that no adjustment has been made to the payment claim in the assessment. The wording in the payment schedule makes it clear that the amount that the Respondent proposes to make, but is withholding, is equal to the claimed amount.

The Respondent submits in the reply to the adjudicator's request for further submissions that the amount that the Respondent agreed to pay was "nil" however this is not stated in the payment schedule. The payment schedule states that the assessed amount is \$760,698 (inclusive of GST).

I determine that the scheduled amount is the same as the claimed amount. In that case section 18(1)(a)(ii) and section 18(3)(d) apply so that the adjudication application is to be made within 10 business days after the due date for payment.

The contract provides at clause 37.2, The Principal must within the earlier of 21 days of the Contractor receiving the payment schedule, or 35 days after the Principal's Representative receives the payment claim, pay to the Contractor the amount shown in the payment schedule. The due date for payment is calculated as 5 March 2012. The Act requires that the adjudication application is to be made on or before 20 March 2012.

I determine that the adjudication application has been made within the time limit provided in the Act.

65 In reasoning in this way, the Adjudicator fulfilled his statutory duty as required under s 23(2) of the Act. He considered and applied the Act's provisions to the facts of the case as he found them to be.

66 For the reasons earlier considered, I will not embark upon an assessment or review of the merits as to whether or not the Adjudication Application was made under s 18(1)(a)(i) of the Act in which case it appears to have been made out of time, or was made under s 18(1)(a)(ii), in which case it appears to have been made within time. This was a matter for the Adjudicator, and the court is not in a position to disturb his findings on the matter.

67 For these reasons St Kilda Road's Grounds (b) and (c) in the Notice of Motion (the Payment Schedule grounds) fail and are dismissed.

The Statutory Declaration (Grounds (d), (e), (f) & (g))

68 I turn now to consider the Statutory Declaration Grounds relied upon by St Kilda Road in Grounds (d), (e), (f) & (g) in the Notice of Motion.

69 This ground centres on clause 38.1 of the Construction Contract which provided:

38 Payment of Workers and Subcontractors

38.1 Workers and Subcontractors

If requested by the *Principal* or the *Principal's Representative*, the *Contractor* shall give in respect of a payment claim, documentary evidence of the payment of moneys due and payable to:

- (a) workers of the *Contractor* and the *subcontractors*; and
- (b) *subcontractors*,

in respect of *WUC* the subject of the payment claim.

If the *Contractor* is unable to give such documentary evidence, the *Contractor* shall give other documentary evidence of the moneys so due and payable to workers and *subcontractors*.

Documentary evidence, except where the *Contract* otherwise provides, shall be to the *Principal's Representative's* satisfaction.

The *Contractor* will indemnify and keep the *Principal* indemnified in relation to any claim made by workers of the *Contractor* or workers employed by *subcontractors* of the *Contractor* engaged on the *WUC* for any amounts due and payable to them in respect of their employment.

70 St Kilda Road submitted that the Statutory Declaration provided by Reed in support of Payment Claim 16 was false and untrue and that a statutory declaration in this form did not satisfy the requirement of clause 38.1. Reliance was placed on *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* (“FPM”), where the Court of Appeal of the New South Wales Supreme Court held that:

A declaration which is, in fact untrue will justify the withholding of a payment.³⁶

And:

If a statutory declaration was not provided, or the statutory declaration which was provided was ineffective because false, the Principal was entitled to withhold payment and in its discretion could make direction payment pursuant to cl 34.3.³⁷

71 It was on this basis that St Kilda Road submitted that under Construction Contract Reed had no entitlement to be paid any sum in respect of Payment Claim 16, and the Payment Claim was not valid for this reason.

72 The issue was squarely raised by St Kilda Road before the Adjudicator in the Adjudication Response dated 26 March 2012 and in a further submission provided by St Kilda Road dated 4 April 2012 in response to a written request from the Adjudicator dated 3 April 2012.

73 St Kilda Road in its adjudication response submitted in its “Executive Summary”:

- 1.1 470 submits that the Adjudicator should determine the amount of the Payment Claim to be paid by 470 to Reed as nil.
- 1.2 The Payment Claim is invalid or unenforceable as it does not comply with the Contract.
- 1.3 Pursuant to its obligations under clause 38.1, Reed was obliged to a provide statutory declaration (documentary evidence) of payment of moneys due and payable to subcontractors in respect of the works the subject of the payment claim. The statutory declaration dated 31 January 2012 (annexured to this Adjudication Application Response as Annexure 6 and to the Adjudication Application as Annexure 2) stated that:

³⁶ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 [120].

³⁷ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 [14].

“all subcontractors or suppliers of material who are or at any time have been engaged on the work under the Contract have been paid in full all monies which have become payable to the sub-contractor under terms of the sub-contractor or to the supplier of materials under the terms of agreement for supply”.

- 1.4 The statutory declaration (documentary evidence) required to satisfy clause 38.1 must be true. The provision of a false/wrong statutory declaration as part of the Payment Claim obviously does not satisfy clause 38.1 of the Contract. See *FPM Constructions Pty Ltd v Council of the City of Blue Mountains*³⁸ (“FPM”), where the Court of Appeal of the New South Wales Supreme Court held that:

*“A declaration which is, in fact untrue will justify the withholding of a payment”.*³⁹

*“If a statutory declaration was not provided, or the statutory declaration which was provided was ineffective because false, the Principal was entitled to withhold payment and in its discretion could make direction payment pursuant to cl 34.3”.*⁴⁰

- 1.5 Reed provided to Reshape Development Pty Ltd (“Reshape Development”), the principal’s representative, on 3 February 2012 a creditor’s list dated 1 February 2012. This creditor’s list stated an outstanding amount of between 60-90 days totalling \$2,760,755.21 payable to subcontractors and suppliers. This, *inter alia*, establishes the falsity of the statutory declaration.
- 1.6 In fact, 470 and Reshape Developments ascertained through direct communication from certain subcontractors and/or suppliers that their invoices had not been paid in accordance with the terms of their respective subcontracts and had “walked off the job” and refused to return to the project site until payment was received. 470 has had to make payment to subcontractors and/or suppliers to keep the works under the Contract progressing and to avoid the subcontractors and/or suppliers from permanently “walking off the job”. 470 has entered into subcontract completion agreements and paid in accordance with the subcontract completion agreements in excess of \$1.7 million to Reed’s subcontractors in lieu of part of the amounts owed by Reed. The balance of money owed by Reed to these subcontractors and/or suppliers will be paid by 470 upon completion of their works.

74 The issue was developed further by St Kilda Road in the body of its Adjudication Response.

³⁸ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340.

³⁹ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 [120].

⁴⁰ *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 [14].

Finding as to the Power of the Adjudicator to Consider the Statutory Declaration

75 St Kilda Road submitted that the Adjudicator wrongly made a finding that the Act did not empower or require him to consider whether the Statutory Declaration was false. This was put as an error on the face of the record, resulting in the Adjudication Determination being amenable to the issue of *certiorari*.

76 In this regard, the Adjudicator said in his Adjudication Determination, after reciting clause 38.1 of the Construction Contract:

5.6 Contract clause 38.2

...

The Claimant provided a statutory declaration by Glenn Robinson, dated 31 January 2012, to the effect that all moneys that have become payable have been made by the Claimant. The Respondent submits that the statutory declaration contains untrue statements and that the payment claim was not made in good faith.

The Claimant has provided a statutory declaration to comply with the requirements with [*sic* of] clause 38.1 of the contract. The Respondent submits that the statutory declaration contains untrue statements.

The Act requires at section 23 that I determine the amount of the progress payment to be made, the date on which it becomes payable and the rate of interest payable. I am able to take into account the provisions of the Act, the provisions of the construction contract, the payment claim, the payment schedule and duly made submissions provided by the parties. The Act does not empower me to determine whether a statutory declaration is true or not.

The Claimant has complied with clause 38.1 in providing the statutory declaration. I determine that the Claimant has complied with the requirements of the contract and that the Respondent is not entitled to withhold payment under clause 38.2 of the contract.

[Emphasis added]

77 Although the Adjudicator expressed the view that he did not have power to determine whether the Statutory Declaration in issue was true or not, he did proceed to consider the issue further in the Adjudication Determination, determining that:

[t]he Claimant has complied with clause 38.1 even though the Respondent questions the veracity of the Claimant's documents.

78 Accordingly the statement made by the Adjudicator that he had no power to consider the Statutory Declaration is not born out by a consideration of the Adjudication determination when considered as a whole.

79 Accordingly, the submission of St Kilda Road on the issue does not result in reviewable error.

Finding as to the Veracity of the Statutory Declaration

80 The Adjudicator had before him the Statutory Declaration dated 31 January 2012 of Glenn Robinson, the authorised employee of Reed entitled to make Progress Claim 16, stating that all subcontractors or suppliers of materials have been paid all monies that has become due and payable under the subcontract agreement. The Statutory Declaration relevantly stated:

To the best of my knowledge and belief having made all reasonable enquiries, at this date – all workman who are or at any time have been engaged on the work under the Contract have [sic been] paid in full amounts which have become due to them by virtue of their employment on the work under the Contract ... all sub-contractors or suppliers of materials who are or at any time have been engaged on the work under the Contract have been paid in full all monies which have become payable to the sub-contractor under terms of the sub-contract or to the supplier of materials under terms of agreement for supply.

81 The Adjudicator did not have the advantage of having Mr Robinson cross-examined or directly challenged on his Statutory Declaration. Such a forensic tool, which is a traditional means of determining controversial issues of fact by courts, is not appropriate for adjudications conducted under the Act. Adjudications are ill-equipped to deal with controversial issues of fact in this way, particularly within the tight time frames permitted for the delivery of Adjudication Determinations. The interim determination which results from an adjudication determination can always be tested, and indeed reversed or modified in the appropriate case, following a later court hearing in the matter. This is clearly the appropriate forum to determine contractual entitlements founded upon controversial issues of fact. As for the approach of the Adjudicator to such issues, each must do the best they can to arrive at a level of positive satisfaction one way or the other based on the documentary material before them.

82 In this case the Adjudicator also had before him documentary material relied upon by St Kilda Road which put in issue the veracity of the Statutory Declaration of Glenn

Robinson. He had before him five statutory declarations provided by sub-contractors to the effect that as at 18 March 2012 they were each owed money for work done earlier for Reed on the Project. The statutory declarations of the subcontractors also deposed to the fact that on 19 March 2012 they had entered into an arrangement whereby the "full or part of the amount" said to be owed was paid by St Kilda Road. The Adjudicator also had before him a creditor list provided by Reed as at 1 February 2012 on its face in respect of the Project, and a further such creditor list as at 23 February 2012. However the Adjudicator was compelled to proceed without the advantage of cross-examination and a careful analysis of precisely what work was done, when and pursuant to what terms of a subcontract the claimed entitlement to payment arose. He also had before him a letter from Reed dated 23 February 2012 explaining the claimant's position.

83

In *Grocon* the Court considered the learning on the question of the circumstances in which an error in the finding of a fact may result in an error on the face of the record in respect of which *certiorari* will lie. I repeat below what was said in *Grocon* on the issue:

The question as to whether the evidence before a tribunal may be examined on judicial review on the ground of error of law on the face of the record has received judicial attention in Australia. It is settled that the question as to whether there is any evidence of a fact is a question of law. Thus, in the context of judicial review, it has been accepted that the question whether there is any evidence of a particular fact is a question of law, as is the question whether a particular inference can be drawn from the facts. However, it is also the position that "(t)here is no error of law simply in making a wrong finding of fact." In *Bond*, Mason CJ, in the course of considering the issue, made reference to the observations of Menzies J in *Reg v The District Court; Ex parte White*:

Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (e.g. illogical) inference of fact would not disclose an error of law.

Mason CJ in *Bond* went on to conclude that:

Thus at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.

Batt J in *Road Corporation v Dacakis* cited these observations of Mason CJ in *Bond* with approval. Having reviewed the current state of the authorities on the point, Batt J concluded:

For the foregoing reasons, I think that I should proceed on the basis that a *finding* of fact will only be open to challenge as erroneous in law if there is no probative evidence to support it (and not also if it is not reasonably open on the evidence), whilst an *inference* will be open the challenge as being erroneous in law if it was not reasonably open on the facts.⁴¹

[Footnotes omitted]

84 In my opinion, although the Adjudicator may have made a wrong finding of fact and it was open for him to arrive at a different conclusion on the issue, equally there was some evidence upon which the Adjudicator could have arrived at the finding of fact which he did, namely that:

The Claimant has complied with clause 38.1 even though the Respondent questions the veracity of the Claimant's documents.

85 For this reason, the submission of St Kilda Road on the point must fail.

Finding as to Compliance with Clause 38.1 and Adequacy of Reasons

86 St Kilda Road alleged that the Adjudicator erred in:

- (a) finding that "the Statutory Declaration was true by finding that Reed had complied with clause 38.1 of the Contract by providing the Declaration"; and
- (b) failing to provide any or any adequate reasons for this finding.

87 In my opinion, for the reasons earlier stated, there was some evidence for the Adjudicator to have found that the Statutory Declaration was true and that Reed had complied with clause 38.1 of the Contract by providing the Statutory Declaration.

88 As to the adequacy of the reasons comprised in the Adjudication Determination, the Adjudicator said in the Adjudication Determination on the issue:

5.8 Payments outstanding to Claimant's subcontractors

The Respondent submits that there are outstanding payments owed to the Claimant's subcontractors. The Claimant has issued a statutory declaration by

⁴¹ *Grocon Constructors Pty Ltd v Plannit Cocciardi (No 2)* (2009) 26 VR 172 [123]-[124].

Glenn Robinson dated 31 January 2012 stating that all subcontractors or suppliers of materials have been paid all monies that has become due and payable under the subcontract agreement. The Claimant issued a list showing outstanding payments to creditors for October, November and December 2011. The Claimant issued a letter dated 23 February 2012 explaining the Claimant's position.

The Claimant is entitled to payment for construction work undertaken by the Claimant under the contract. The Respondent is entitled to withhold payment for work not undertaken or not completed under the Contract.

The Respondent submits that it has made payments to a number of the Claimant's subcontractors in lieu of money owed by the Claimant to these subcontractors. The Respondent has included a number of statutory declarations from subcontractors in the adjudication response to support that submission. The Respondent has submitted in broad terms that it has made payments to the Claimant's subcontractors but has not shown that these payments correspond to the items in the payment claim.

The Respondent accepts the value of the work as calculated by the Claimant and included in the payment claim. The Respondent has not established a contractual entitlement or agreement from the Claimant to directly pay the Claimant's subcontractors instead of paying the Claimant for work. The Claimant has complied with clause 38.1 even though the Respondent questions the veracity of the Claimant's documents.

...

6 Determination

The parties agree on the value of the work included in the payment claim. The Respondent has withheld payment of the claimed amount on the grounds that there are outstanding payments due to the Claimant's subcontractors and the Respondent has issued a notice for the Claimant to show cause why work should not be taken out of the hands of the Claimant or the contract terminated.

The Respondent has questioned the statutory declaration issued by the Claimant with the payment claim regarding payment to the Claimant subcontractors and the workers but has not shown that this entitles it to withhold payment to the Claimant.

The Respondent has not established that it is entitled to withhold the payment on the grounds that the Claimant has not paid all of the Claimant's subcontractors the money owed to them. The Respondent has not established an entitlement to pay money directly to the Claimant's subcontractors and then withhold money from the Claimant.

I determine that the Claimant is entitled to a progress payment for the work that it has carried out.

89 It is well established that the failure to provide adequate reasons in an arbitral award will constitute error of law on the face of the record.⁴² The basis for this stems from legislation requiring reasons to be provided as said in *In re Poyser and Mills' Arbitration*:

... people's property and other interests might be gravely affected by a decision of some official. The decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of section 12 was to remedy that, and to remedy it in relation to arbitrations under this Act. Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award.⁴³

90 Section 23(3) of the Act provides that an adjudicator's determination must be in writing and must include reasons for the determination and the basis on which any date or amount has been decided.

91 The policy behind requiring reasons was analysed by the Court of Appeal in *Fletcher Construction Australia Limited v Lines MacFarlane & Marshall Pty Ltd (No 2)*.⁴⁴ Four fundamental purposes underlying the judicial obligation to give reasons were identified:

First, a Court of Appeal must be in a position to determine whether the decision of the trial judge contains appealable error. As Meagher JA observed in *Beale*:

"Perhaps the primary reason for an obligation on courts to provide reasons is the fact that a party seeking an appeal may generally only appeal where the trial judge has made an error of law. The absence of reasons or insufficient reasons may not allow an appeal court to determine whether the trial judge's verdict was or was not based on an error of law or an appealable error".

Secondly, an adequate statement of the reasons "provides the foundation for the acceptability of the decision by the parties and the public." As Lord McMillan once said the main object of a reasoned judgment "is not only to do but to seem to do justice". Conversely, a failure to provide sufficient reasons or the provision of reasons which are riddled with error is likely to leave the

⁴² *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346, [61]-[65].

⁴³ *In re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478.

⁴⁴ *Fletcher Construction Australia Limited v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1, 31 [100].

losing party with a sense of injustice. As Megaw J said in *In re Poyser and Mills' Arbitration* -

"The decision may be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made".

Thirdly, it furthers judicial accountability guarding "against the birth of an unconsidered or impulsive decision".

Next, the provision of adequate reasons has an educative function in that it "enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future".

[Footnotes and some citations omitted]⁴⁵

92 In the present case, I am satisfied that although the reasons were relatively brief, in my opinion they were adequate to satisfy s 23(3) of the Act in the context of the robust procedure provided for in the Act. The procedure set in place for an adjudicator under the Act is not designed to operate as a court of law. The limited evidentiary material to be considered, the tight time frames within which a determination is required to be made, and the interim nature of the effect of the determination which results from the process, all point to this being the case. The determination of an adjudicator made under the Act is quite unlike a curial decision of a court or the award of an arbitrator. It cannot finally determine the rights of the parties to the dispute.

93 In my opinion, the Adjudicator not only made a bona fide attempt to provide the required reasons, in my opinion he also provided adequate reasons which dealt with all substantive issues in dispute. They were sufficient to inform the parties as to the basic findings made which led to the determination and were sufficient to enable judicial review to be undertaken.

Failing to take into Account the Terms of the Construction Contract

94 St Kilda Road submitted that the Adjudicator fell into error by failing to take into account the terms of the Construction Contract in determining the amount properly due and payable.

⁴⁵ *Fletcher Construction Australia Limited v Lines MacFarlane & Marshall Pty Ltd (No 2)* (2002) 6 VR 1, 31 [100].

95 In my opinion, the Adjudicator did consider the terms of the Construction Contract. This is not a case such as that considered in *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* where Brereton J concluded that:

[a] failure by an adjudicator to have regard to a provision of the construction contract which is relevant to the adjudication under consideration is a jurisdictional error, resulting in the invalidity of the determination.⁴⁶

96 However, in this case the Adjudicator did consider clause 38.1 of the Construction Contract. He did not ignore it. Any error made in the construction of its terms was within his jurisdiction. The Adjudication Determination is not open to review on this ground.

Conclusion as to Statutory Declaration Grounds (d), (e), (f) & (g)

97 For these reasons, St Kilda Road's Statutory Declaration Grounds (d), (e), (f) & (g) fail and the Grounds must be dismissed.

Orders

98 The following orders will be made:

- 1) The proceeding is dismissed.
- 2) It is declared that the Adjudication Determination dated 10 April 2012 made by the Second Defendant Mr Philip Martin pursuant to s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) is valid.
- 3) The interlocutory injunction is discharged.

99 I will hear the parties on costs.

⁴⁶ *Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129, [51].