

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

No. 10573 of 2009

ASIAN PACIFIC BUILDING CORPORATION PTY LTD
(ACN 053 997 989)

Plaintiff

v

AIRCON DUCT FABRICATION PTY LTD & ORS
(ABN 80 199 641 164)

First Defendant

And

TED SMITHIES

Second Defendant

And

IAN HILLMAN

Third Defendant

<u>JUDGE:</u>	VICKERY J
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	30 JULY 2010
<u>DATE OF JUDGMENT:</u>	6 AUGUST 2010
<u>CASE MAY BE CITED AS:</u>	ASIAN PACIFIC BUILDING CORPORATION PTY LTD v AIRCON DUCT FABRICATION PTY LTD & ORS [No 2]
<u>MEDIUM NEUTRAL CITATION:</u>	[2010] VSC 340

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Adjudication determination made in part beyond jurisdiction - Adjudication determination declared void in part - Application to stay operation of valid part of adjudication determination on ground of alleged insolvency - *Grosvenor Constructions (NSW) Pty Ltd (In Administration) v Musico and Ors* [2004] NSWSC 344 considered - Costs of judicial review which was successful in setting aside one of two adjudication determinations.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr K.R. Naish	Dean Pavitt
For the First Defendant	Mr J.A.F. Twigg	MCW Lawyers

HIS HONOUR:

Background

- 1 The applications considered in these reasons arise from the delivery of reasons in *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd and Ors*¹ on 1 July 2010. These reasons should be read in conjunction with that decision.
- 2 In this matter, the Olsen Adjudication Determination dated 16 December 2009, which awarded to the contractor, Aircon Duct Fabrication Pty Ltd (“Aircon”), the sum of \$543,686.65, was declared void and was set aside.
- 3 In relation to the Blackman Adjudication Determination dated 2 December 2009, which awarded Aircon the sum of \$127,727.92 to Aircon, to the extent that the Adjudicator determined that the amount to be paid by Asian Pacific Building Corporation Pty Ltd (“APBC”) to Aircon comprised the sums of \$25,650.00 and \$79,997.75 (totalling \$105,647.75), this part of the Blackman Adjudication Determination was declared to have been validly found by the Adjudicator to be due and payable by APBC to Aircon as the adjudicated amount pursuant to s.23(1)(a) of the *Building and Construction Industry Security of Payment Act 2002* (the “Act”). The date upon which the said amount became due and payable was determined to be 30 November 2009 pursuant to s.23(1)(b) of the Act, and the rate of interest payable pursuant to s.23(1)(c) was the rate fixed under s.2 of the *Penalty Interest Rates Act 1983*. Otherwise, the Blackman Adjudication Determination was declared void to the extent that it determined that the sum of \$22,080.17 was also payable by APBC to Aircon, and to that extent it was set aside.
- 4 APBC made application to the Court for a permanent stay on the operation of the orders made in respect of the Blackman Adjudication Determination on the ground of the alleged impecuniosity of Aircon. It framed its application in terms of an injunction restraining Aircon from seeking payment pursuant to the Act in respect of any sum payable under the Blackman Adjudication Determination.

¹ [2010] VSC 300.

5 On 10 December 2009 the Court made interlocutory orders by consent that in the Blackman Adjudication Determination (No. 2009-ASCV-023), Aircon be restrained until 26 February 2010, the date of the adjourned trial of the proceeding, from taking any step to seek recovery of the adjudicated amount. The orders were made on the following undertakings given by APBC which were recorded as follows:

Upon the Plaintiff by its counsel undertaking to abide by any order the Court may make as to damages in case the court shall hereafter be of the opinion that the First Defendant shall have sustained any by reason of this order, which the Plaintiff ought to pay;

And upon the Plaintiff by its counsel further undertaking to establish, maintain, and not otherwise deal with, an amount of money equivalent to the Adjudicated Amount referred to as such in the Adjudication Determination 2009-ASCV-023 together with the amount of the adjudication fees and expenses made by the Second Defendant on 30 November 2009 (exhibited as DJP-19 in the affidavit of Dean John Pavitt affirmed on 8 December 2009) in an interest bearing term deposit held with the National Australia Bank, save as ordered by this Honourable Court or as the parties expressly agree in writing.

6 On 22 December 2009, the Court made similar orders in the Olsen Adjudication Determination (No. 2009-ASCV-022).

7 In accordance with the undertakings given by the Orders of 10 December and 22 December 2009, deposit of the required sums were made by APBC into the interest bearing account which was established.

8 By a writ issued on 19 February 2010, APBC as Plaintiff makes claims against Aircon as Defendant for damages arising from the Blackman Hotel Project (the "Principal Proceeding"). This was the same project which was the subject of the Blackman Adjudication Determination (No. 2009-ASCV-023), for the payment claim made by Aircon. APBC is in a position to make such a claim in the Principal Proceeding under s.47 of the Act which provides:

47. Effect of Part on civil proceedings

- (1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract-
 - (a) may have under the contract; or
 - (b) may have under Part 2 in respect of the contract; or

- (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsections (3) and (4).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal-
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- (4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.
- (5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

9 The effect of s.47 is to render any payments paid or ordered to be paid under the Act to be interim only and subject to any subsequent orders to the contrary made for the repayment of moneys paid pursuant to the Act in the event that any court, tribunal or appointed arbitrator should so determine. The principle that the respondent to a payment claim for a progress payment “should pay now and argue later” is given full effect under the Act: *Multiplex Constructions Pty Ltd v Luikens and Anor.*²

10 Pursuant to its amended counterclaim in the Principal Proceeding filed 26 May 2010, Aircon claims substantial moneys alleged to be unpaid by APBC in the sum of \$1,150,961.46 and damages.

11 In this application no material was advanced which enables any assessment of the relative merits of the claims and counterclaims in the Principal Proceeding to be

² [2003] NSWSC 1140 at [96].

undertaken, and I make no observation about the merits or otherwise of the matters raised by the parties in that proceeding.

12 By oral application made in this application, Aircon also seeks orders that:

From the fund held in the National Australia Bank Level 4, 330 Collins Street Melbourne in account number 083-004 16-695-1260 on term deposit:

- (a) pay the first Defendant (Aircon) the sum of \$121,132.45;
- (b) pay any balance to the Plaintiff (APBC).

The Plaintiff (APBC) be paid the whole of the amount held on term deposit in the National Australia Bank Level 4, 330 Collins Street Melbourne in account number 03-083 16-646-7903.

13 The sum of \$121,132.45 referred to in Aircon's application is comprised of the adjudicated sum in the Blackman Adjudication Determination, as declared by the Court, being \$105,647.75, together with the amount of the adjudicator's fees and expenses amounting to \$8,250.00 and interest in the sum of \$7,234.70.

14 There is ample Australian authority for the proposition that an order by way of a declaration as to existing rights, being a non-executory order, cannot be stayed. There is also support in a number of texts for the view that a declaratory order cannot be stayed.

15 A declaration is merely an authoritative statement as to the legal position with regard to the relevant subject matter at the time of its making. Thus it has been said that "a curial declaration says something about something. It has a legal effect but otherwise does nothing".³

16 In the *Roosters Club Inc v The Northern Tavern Pty Ltd (No 2)*,⁴ the Full Court of the Supreme Court of South Australia,⁵ Doyle CJ observed:⁶

³ Justice RS French, "Declarations - Homer Simpson's Remedy - Is there anything they cannot do?" Speech delivered on "Perspectives on Declaratory Relief", University of Western Australia Faculty of Law, 30 November 2007 p.4; cited in *Ambridge Investments Pty Ltd. v Baker and Others* [2010] VSC 59 at [66]

⁴ [2003] SASC 143.

⁵ Doyle CJ, Nyland and Bleby JJ.

⁶ *Roosters Club Inc v The Northern Tavern Pty Ltd (No 2)* [2003] SASC 143 at [20]-[21].

The decision of this Court does no more than declare authoritatively that, in the circumstances, s 15A(2) renders the grant of this particular licence void. The appellant wishes to continue to operate its gaming machines until its application to the High Court for special leave to appeal has been disposed of. The appellant appears to believe that the grant of a stay will mean that it is to be treated as holding a licence meantime, even though the Court has declared that it does not. The appellant may also believe, although this is not clear, that the effect of a stay will be that even if its application to the High Court is unsuccessful, or even if it gets leave to appeal and an appeal is ultimately unsuccessful, the appellant will be treated meantime as holding a gaming machine licence under the Act. In short, the application for a stay seems to be premised on the assumption that a stay would have the effect of deeming the appellant to hold a licence under the Act, even if ultimately the decision of the judge stands.

My view is that that assumption is wrong. I consider that a stay cannot alter the situation in that manner. If the decision of this Court and of the single judge stands, the position will be that the appellant does not hold the licence in question, and has never held it. That is the consequence of the terms of s 15A(2) of the Act. Even if this Court were to continue the stay, my view is that if the decision of the single judge stands, the appellant will not have held the licence in question at any stage, and that this will be so notwithstanding the stay granted by the single judge.

- 17 There is also authority for the proposition that in certain cases, pending an appeal, a stay of a declaratory order may be open to be granted. This was the view of the trial judge of the Federal Court of Australia in *Bunnings Forest Products Pty Ltd v Bullen*⁷ ("*Bunnings Forest Products*"). In that case, Carr J held that while a court making a declaratory order may suspend or postpone its coming into effect by reference to some appropriate further stage of the appellate process and while there is also power in an appropriate case to stay proceedings which might be taken consequent upon the making of a declaratory order, there no power per se to stay a declaratory order. Once a declaration has been made, the order has done its work and the legal rights or obligations of the parties the subject of the declarations are, subject to appeal, settled.
- 18 Reference is also made to the observation of Katz J in *Stellar Call Centres Pty Ltd v Community and Public Sector Union*⁸ which accepted Carr J's statement in *Bunnings Forest Products*:⁹

⁷ (1994) 54 FCR 342.

⁸ [1999] FCA 1236.

⁹ Ibid [347].

[T]he court or a judge might, in an appropriate case, stay the exercise of rights which might be declared to exist, pending an appeal, which might have the result of the declaration being set aside.

Examples of circumstances where a stay may be granted in relation to a declaratory judgment pending an appeal are:

1. a stay to preserve the subject matter of the appeal;¹⁰
2. a stay to prevent the hearing and determination of the appeal being rendered nugatory;¹¹ and
3. where a stay is necessary to forestall further proceedings of an executory kind, founded on a declaratory order, such as an action for ejection based on a declaration as to entitlement to possession of land.¹²

19 However, in the present case, no application for a stay is made on the basis that an appeal is pending and a stay is necessary, for example, to preserve the subject matter of the appeal or to otherwise prevent a successful appeal being rendered nugatory.

20 Accordingly, to the extent that a stay of the declaration made in this case is sought by the Plaintiff, APBC, I am of the opinion that the Court has no power to grant it.

21 The position in the present case may be contrasted with that which arose in *Grosvenor Constructions (NSW) Pty Ltd (In Administration) v Musico and Ors*¹³ ("*Grosvenor Constructions*"). *Grosvenor Constructions* was the first occasion upon which the New South Wales Supreme Court had to consider the circumstances in which the Court should grant a stay of the execution or operation of orders or judgments arising from the filing of an adjudication certificate under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ("the NSW Act"), where any moneys paid would in practice be irrecoverable because of the claimant's insolvency or liquidation.

¹⁰ *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* [1986] 161 CLR 681.

¹¹ *Marconi's Wireless Telegraph Company Ltd v Commonwealth (No 3)* [1913] 16 CLR 384.

¹² *McBride v Sandland* [1918] 25 CLR 69.

¹³ [2004] NSWSC 344.

22 More particularly, in *Grosvenor Constructions*, Einstein J considered an application for a stay where the Plaintiff in the proceedings obtained an adjudication certificate pursuant to s.24 of the NSW Act and filed the adjudication certificate as a judgment for a debt in accordance with s.25 of the NSW Act. The notice of motion before the Court sought an order staying the execution of the judgment debt which was entered. The basis put forward for the claim to a stay was that the Plaintiff had been placed under external administration and was in severe financial difficulty. The report to creditors identified a deficit of \$4,263,210.00 and identified the return to unsecured creditors as 11 cents in the dollar. It should be noted that the procedure for the entry of judgment under the Victorian Act is different to that which applies in the NSW Act, but the facility for the entry of judgment as the ultimate means of enforcement of a payment claim is the same under both enactments.

23 Einstein J concluded that, on the evidence before him in *Grosvenor Constructions*, it was plain that unless the stay of proceedings sought was granted, the Defendants, if successful in final proceedings, would suffer irreparable prejudice as payment pursuant to the judgment debt presently on foot could never be recouped. In effect, a failure to order the stay would convert an amount which ought to be an *interim* payment into a *final* payment.¹⁴

24 The Court in *Grosvenor Constructions* was found to have jurisdiction to grant the stay sought pursuant to the rules of court which empowered the Court to stay execution of its judgments and pursuant to the inherent jurisdiction of the Court to control its own processes. In this respect, Einstein J observed:¹⁵

The Court has the power on terms to stay the execution of a judgment or order by virtue of Part 44 rule 5 *Supreme Court Rules*. This power is exercisable whenever the requirements of justice so demand and is also in addition to the Court's inherent powers: see *Ritchie's Supreme Court Practice*, para [44.5.1] and authorities referred to therein. The Court's inherent powers, and its powers pursuant to section 23 *Supreme Court Act*, are well established. The orders sought by the Defendants can be made pursuant to such powers.

¹⁴ Ibid at [4].

¹⁵ Ibid at [14].

25 However, in the present case, no judgment has been entered. The Court is not being asked to control its own process consequent upon the entry of judgment, either pursuant to its rules of court or in the exercise of its inherent jurisdiction to do so.

26 The power to grant a stay in similar circumstances to the present, prior to the entry of any judgment under the NSW Act, was also considered, but not determined, in *Taylor Projects Pty Ltd v Brick Dept Pty Ltd*.¹⁶

27 In Victoria, r.66.16 of the *Supreme Court (General Civil Procedure) Rules 2005* provides that the Court may stay execution of a judgment. As a separate rule, r.64.25, deals with a stay of execution of proceedings pending an appeal. However, these rules are not applicable to the case at hand. There is no Court process by way of an executory judgment or other proceeding which is sought to be stayed.

28 Accordingly, it is not open to apply the approach of *Grosvenor Constructions* to the present matter in conferring jurisdiction upon the Court to entertain the present application of the Plaintiff.

29 ABPC also sought to found its application on the basis that it was seeking an injunction restraining Aircon from seeking payment pursuant to the Act in respect of any sum payable under the Blackman Adjudication Determination.

30 It submitted that the fundamental purpose of the Act is to provide for *interim* payment. An order to pay a sum following an adjudication is not a final determination of the parties' rights. It said that in the present case, if no injunction is granted, by reason of the parlous financial position of Aircon, it would not be in a position to repay the interim payment should it be ordered to do so following any judgment in the Principal Proceeding being made against it. In this way, an interim arrangement would be, in practice, converted into a final order. The effect of not granting a stay would be that the Plaintiffs' rights to recoup the adjudicated amount following it being successful in the Principal Proceeding instituted pursuant to s.47 of

¹⁶ [2005] NSWSC 571.

the Act would be rendered nugatory, and the Plaintiff would thus suffer irreparable prejudice. It said that, in the proper exercise of the discretion as to the balance of inconvenience, an injunction in the terms sought should be made.

31 Reliance was placed upon the statutory power conferred on the Court to grant injunctions pursuant to s.37 *Supreme Court Act 1986*, which provides:

37. Injunctions and receivers

- (1) The Court may by order, whether interlocutory or final, grant an injunction or appoint a receiver if it is just and convenient to do so.
- (2) An order made under subsection (1) may be made either unconditionally or on such terms and conditions as the Court thinks just.
- (3) The Court may grant an interlocutory injunction under subsection (1) restraining a party to a proceeding from removing from Victoria or otherwise dealing with assets located within Victoria, whether or not that party is domiciled, resident or present within Victoria.

32 However, it is fundamental that an injunction will not be granted to restrain acts which injure or would injure the Plaintiff unless there is a cause of action.¹⁷ The power to grant an injunction must be based on a cause of action, even though the only remedy is a declaration.¹⁸ Further, only a present right, not any future inchoate right will be protected.¹⁹

33 In the present case no cause of action to found an injunction has been identified. Indeed, the Act provides for a statutory entitlement to payment of the adjudicated amount in favour of a claimant if an adjudicator determines that such is payable. In this regard, s.28M of the Act makes it a requirement that the respondent to a payment claim is to pay the adjudicated amount. Section 28M provides:

28M. Respondent required to pay adjudicated amount

- (1) Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.
- (2) In this section relevant date means-

¹⁷ See: *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87.

¹⁸ *Supra* at p.94 per Jacob J.

¹⁹ See: *Glamagard Pty Ltd v Enderslea Productions Pty Ltd* (1985) 1 NSWLR 138.

- (a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or
- (b) if the adjudicator determines a later date under section 23(1)(b), that later date.

34 There is no basis for the Court to disregard this entitlement in respect of that part of the Blackman Adjudication Determination declared to be valid in this proceeding.

35 Accordingly, there is no power to grant the injunction sought.

36 The question then arises as to whether any order can and should be made, as sought by the first Defendant Aircon, for orders that:

From the fund held in the National Australia Bank Level 4, 330 Collins Street Melbourne in account number 083-004 16-695-1260 on term deposit:

- (a) the first Defendant (Aircon) be paid the sum of \$121,132.45;
- (b) any balance be paid to the Plaintiff (APBC).

37 In my opinion, the Court has power to make such an order. In doing so, the Court would be exercising its inherent jurisdiction to vary the effect of the order which it made in the proceeding on 10 December 2010, which has been earlier referred to, by discharging the undertakings given by the Plaintiff and disposing of the moneys deposited pursuant to the order.

38 The question then becomes, on what basis should the Court's discretion to vary the effect of its order be made in this case?

39 Reference is made to the observations of the Court of Appeal of the Supreme Court of Queensland in *RJ Neller Building Pty Ltd v Ainsworth*²⁰. Keane JA referred to the object and purposes of the Act and the risk assumed by the party engaging the builder, where the provisions of the Act apply, that a builder might not be able to refund moneys ultimately found to be due to the engaging party after a successful action by that party. His Honour said:

²⁰ [2008] QCA 397.

[39] It is evidently the intention of the BCIP Act [the equivalent to the Victorian Act], and, in particular, s 31 and s 100 to which reference has been made, that the process of adjudication established under that Act should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract, where those parties operate in a commercial, as opposed to a domestic, context. This intention reflects an appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment the subject of an adjudication is withheld pending the final resolution of the builder's entitlement to the payment, the builder may be ruined.

[40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.

[41] The mere existence of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.

40 These observations echo something of what this Court said in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*:²¹

The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism

²¹ [2009] VSC 156 at [2].

which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

41 In this application, I have carefully considered the evidence provided in the form of the affidavits and exhibits, principally being the evidence contained in the affidavits of Dean John Pavitt filed on behalf of the Plaintiff, APBC, and the affidavits of Peter Regan and Darren Vardy filed on behalf of the first Defendant, Aircon. I also heard and observed Mr Regan give oral evidence in the course of the application upon which he was cross-examined.

42 I am satisfied that Aircon is presently in a precarious financial position, and that its position has deteriorated since it entered into the Blackman construction contract on 24 September 2008. However, its creditors are giving it a considerable measure of financial accommodation at the present time. Its creditors include the Australian Taxation Department which is owed a considerable amount of money. Further, the creditors are giving opportunity to Aircon to trade out of its present financial position and the company, in my opinion, has prospects of doing so in the future.

43 I am not satisfied that Aircon will not be in a position to repay to APBC the sum of \$121,132.45 should it be ordered to make such a payment consequent upon the hearing and determination of the Principal Proceeding which should occur some time in the latter part of 2011.

44 Accordingly, given that Aircon is presently entitled to payment of the sum of \$121,132.45 pursuant to the Blackman Adjudication Determination, I will order that this sum be paid to it from the bank account established pursuant to the order of 10 December 2009.

45 As to costs, although, as I observed in the reasons delivered 1 July 2010, APBC was entirely successful in setting aside the Olsen adjudication determination, it achieved only a minor success in setting aside \$22,080 of the \$127,727 determined in the Blackman Adjudication Determination.

46 Further, in my opinion, it advanced grounds 2, 4 and 7 in the Blackman matter which I have determined had no merit. I indicated in those reasons that I would hear the parties on why an order to the following effect should not be made, that is: the First Defendant pay the Plaintiff's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Olsen Adjudication Determination and the Plaintiff pay the First Defendant's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Blackman Adjudication Determination.

47 This proceeding was unique in that the judicial review of the Blackman Adjudication Determination was the subject of the originating motion in the first instance. The initial application in relation to the Blackman Adjudication Determination was supported by affidavit material which was directed to that determination. Later, the Olsen Adjudication Determination was introduced into the proceeding by an amendment to the originating motion. The judicial review of the Olsen Adjudication Determination was then the subject of further affidavit material presented in respect of the challenge to that determination. As preparation of the matter proceeded, the affidavits and extensive exhibits in respect of the Blackman determination were prepared and presented in a court book which were in large part separate from the equally extensive materials presented in respect of the Olsen Adjudication Determination.

48 In my opinion, the way in which the cases were presented, both in terms of documents and oral argument, support the view that it is entirely feasible for taxation to occur in respect of the two matters separately.

49 Accordingly, in all the circumstances, I consider that an appropriate order should be made in accordance with what I observed as a proposed order in paragraph 135 of the reasons. I will make such an order.

50 The following orders are made:

1. From the fund held in the National Australia Bank, Level 4, 330 Collins Street, Melbourne in Account No. 083 004 16-695-1260 on term deposit
 - (a) the First Defendant be paid the sum of \$121,132.45; and
 - (b) the Plaintiff be paid the balance.
2. The Plaintiff to be paid the whole of the amount held on term deposit in the National Australia Bank, Level 4, 330 Collins Street, Melbourne in Account No. 083 004 16-646-7903.
3. The First Defendant pay the Plaintiff's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Olsen Adjudication Determination and the Plaintiff pay the First Defendant's costs, including reserved costs, of the application insofar as those costs relate to the judicial review of the Blackman Adjudication Determination.
