

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

No. 04080 of 2013

JOTHAM PROPERTY HOLDINGS PTY LTD

Plaintiff

v

COOPERATIVE BUILDERS PTY LTD

First Named Defendant

and

DAMIAN MICHAEL

Second Named Defendant

and

ADJUDICATE TODAY PTY LTD

Third Named Defendant

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JUDGE:

VICKERY J

WHERE HELD:

MELBOURNE

DATE OF HEARING:

14 OCTOBER 2013

DATE OF JUDGMENT:

17 OCTOBER 2013

CASE MAY BE CITED AS:

JOTHAM PROPERTY HOLDINGS PTY LTD v  
COOPERATIVE BUILDERS PTY LTD & ORS

MEDIUM NEUTRAL CITATION:

[2013] VSC 552

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BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Application for judicial review of a determination of an adjudicator - Application for writ of certiorari to quash a decision of an adjudicator - Jurisdictional error - Whether a payment claim can be served multiple times - Application of s 14(8) and s 14(9) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether "single" or "one off" payment claim - Application of s 14(5) and s 9(2)(c) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether payment claim made in time s 18 of the *Building and Construction Industry Security of Payment Act 2002* (Vic).

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr J.A. Twigg

Millens Lawyers

For the First Named  
Defendant

Mr P.H. Caillard

Rockwell Oliver

For the Second Named  
Defendant

No Appearance

For the Third Named  
Defendant

No Appearance

HIS HONOUR:

**Introduction**

- 1 The Plaintiff, Jotham Property Holdings Pty Ltd (“Jotham”), contends that an adjudication (the “Adjudication” or the “Adjudication Determination”) made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the “Act”) is invalid. The Act creates a statutory mechanism that compliments the provisions of construction contracts, which is intended to put builders and subcontractors in a position where they can promptly secure payment of progress claims.<sup>1</sup>
- 2 On 9 September 2011 Jotham, as principal, and the First Defendant, Cooperative Builders Pty Ltd (“Cooperative”) as the main contractor, entered into 14 separate HIA building contracts (the “Construction Contracts”). Pursuant to the Construction Contracts Cooperative was to construct 14 double storey residential townhouse dwellings at 57 Grey Street, Bacchus Marsh, Victoria (the “Property”). Each contract was accompanied by separate drawings for each unit, but were otherwise in common form.
- 3 Works were performed by Cooperative from September to November 2012 and progress claims were submitted.
- 4 Cooperative served Jotham with three payment claims which were made under the Act (the “Three Original Payment Claims”):
  - (a) the first, dated 27 September 2012, for the sum of \$43,447.25 with respect to the “lock up” stage for unit 2;
  - (b) the second, dated 5 October 2012, for the sum of \$43,447.25 with respect to the “lock up” stage for unit 3; and
  - (c) the third, dated 2 October 2012, for the sum of \$18,620.25 with respect to the “frame” stage for unit 12.

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<sup>1</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156 [2].

5 The total of the Three Original Payment Claims amounted to \$105,514.75. No part of  
this total sum was paid.

6 Differences arose between Cooperative and Jotham, inter alia, as to payment, and on  
or about 19 October 2012, the parties entered into a Settlement Deed (the "Settlement  
Deed"). The Settlement Deed provided for a payment of \$45,000 to Cooperative and  
the payment of subcontractors identified in annexure A of that Deed.

7 However, the settlement was short lived and came to an end in the following  
circumstances:

(a) On 30 October 2012 at approximately 1:55, Mr Justin Prewett, Project Manager  
for Cooperative, sent an email to representatives of Cooperative, Mr Misho  
Vasiljevich of Misho + Associates, expressing concern about alleged breaches of  
the Settlement Deed;

(b) In response, at approximately 2:24pm that same day, Mr Vasiljevich sent an  
email in response to Mr Prewett stating that:

[I] have been instructed to inform you that the contract that was signed  
is terminated as you have breached the requirements.

(c) Later that day at approximately 3:40 pm, Mr Ashley Fenn, Director of Jotham,  
sent an email to Mr John Gdanski, solicitor for Cooperative, stating that:

As the agreement has clearly not worked out between us it appears we  
are back to the original building contracts.

(d) On 8 November 2012 at approximately 8:33 am, Mr Prewett sent an email to Mr  
Fenn stating that "*we currently have no agreement in place with this project*".

8 Following termination of the Settlement Deed, Cooperative purported to serve a  
further payment claim on Jotham on 25 January 2013 for a sum of \$105,514.75 (the "25  
January Payment Claim"). The 25 January Payment Claim was comprised of the sums  
claimed previously under the Three Original Payment Claims but which had  
remained unpaid by Cooperative.

9 Jotham failed to provide a payment schedule in relation to the 25 January Payment Claim and Cooperative served notices in accordance with s 18(2) of the Act. On 4 February 2013, Jotham then replied with a payment schedule valuing the 25 January Payment Claim as “nil”.

10 Cooperative then filed and served an adjudication application dated 5 February 2013 (the “Adjudication Application”). The statutory Authorised Nominating Authority, being the Third Defendant, Adjudicate Today Pty Ltd (“Adjudicate Today”), nominated the Second Defendant, Mr Damian Michael, as the adjudicator (the “Adjudicator”).

11 An adjudication Determination was made in favour of Cooperative on 4 March 2013 and sent to the parties on 30 May 2013 together with reasons for the decision. No application was made for an adjudication review under the Act. The Adjudication determined that the adjudicated amount for the purposes of the Act was the full amount of the 25 January Payment Claim, namely \$105,514.75.

12 An adjudication certificate was filed with the County Court and an order was made under s 28R of the Act by his Honour Judge Lacava to enforce the Adjudication Determination on 17 July 2013.<sup>2</sup> It was ordered by the County Court that:

The defendant (Jotham Property Holdings Pty Ltd ACN 140 974 947) pay to the plaintiff (Cooperative Builders Pty Ltd ACN 149 639 529) the sum of \$112,640.25 (being the Adjudicated Amount of \$105,514.75, interest of \$5,758.50 and costs of \$1,367.00).

13 Execution on the judgment has not yet proceeded.

### **Jotham’s Ground for Review**

14 Jotham’s grounds of review lie in the application of ss 9,<sup>3</sup> 14(4),<sup>4</sup> 14(5)<sup>5</sup> and 14(8)<sup>6</sup> of the Act. The elements of each of those sections of the Act are directed first to the right

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<sup>2</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 28R.

<sup>3</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9.

<sup>4</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(4).

<sup>5</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 15(5).

<sup>6</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

to a progress payment and then, if a right to a progress payment has accrued, the service of the payment claim to enforce that right.

15 On these grounds Jotham contends that the Adjudicator exceeded his jurisdiction and the Adjudication Determination was made contrary to law and should be quashed.

16 Alternatively, Jotham seeks a declaration that the Settlement Deed released it from liability with respect to its liability under the payment claims and Cooperative is estopped from relying upon the Adjudication.

### **A "single" or "one-off" Payment Claim**

#### *Cooperative's Submissions*

17 A central submission of Cooperative was that in this case, what was before the Adjudicator for determination was a "single" or "one-off" payment claim, and that the Adjudicator validly determined that the payment claim was made on 25 January 2013 and it was a single payment claim.

18 The 25 January Payment Claim, it was submitted, consisted of three parts, all relating to the same project, the same parties, the same address and common issues. As such, Cooperative contended it was a "single" or "one-off" payment claim, resulting in the earlier dates for work performed reflected in previous invoices to be deemed irrelevant to determining the applicable "reference date" and any prescribed date for service of the payment claim.

19 A payment claim can be made in respect of a "single" or "one-off" payment claim pursuant to s 14(7).<sup>7</sup> These terms are not defined in the Act or in the terms of the Construction Contracts.

20 However, it was contended that the Adjudicator was entitled to make a finding that the taxation invoices provided to Jotham on 25 January 2013 constituted one payment claim. Such a determination is available to an adjudicator and within jurisdiction. It

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<sup>7</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(7).

was submitted that there was some evidence to support this finding and that there was no error of law on the face of the record in respect of it.<sup>8</sup>

*Analysis*

21 The provisions relevant to determining the date of service of a “single” or “one-off” payment claim are s 14(5)<sup>9</sup> together with s 9(2)(c)<sup>10</sup>.

22 Section 14(5) provides:

- (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within-
  - (a) the period determined by or in accordance with the terms of the construction contract; or
  - (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.<sup>11</sup>

23 In the present case, Cooperative relied upon s 14(5)(b),<sup>12</sup> as it could point to no period determined by or in accordance with the terms of the relevant Construction Contracts.<sup>13</sup>

24 Section 9 provides for the statutory rights to progress payments.<sup>14</sup> For present purposes, the section relevantly provides:

9. Rights to progress payments

- (1) On and from each reference date under a construction contract, a person-
  - (a) who has undertaken to carry out construction work under the contract; or
  - (b) who has undertaken to supply related goods and services under the contract-

is entitled to a progress payment under this Act, calculated by reference to that date.

<sup>8</sup> *Grocon Constructors v Planit Cocciardi Joint Venture (No. 2)* [2009] VSC 426 [178]-[89].

<sup>9</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(5).

<sup>10</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c).

<sup>11</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(5).

<sup>12</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(5)(b).

<sup>13</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 4(5)(b).

<sup>14</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s (9).

- (2) In this section, reference date, in relation to a construction contract, means-
- (a) ... or
  - (b) ... or
  - (c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that-
    - (i) construction work was last carried out under the contract; or
    - (ii) related goods and services were last supplied under the contract; or
- ...<sup>15</sup>

25 In the present case, Cooperative relied upon s 9(2)(c)(i).<sup>16</sup>

26 In *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* (“Sugar”) it was determined that if an

adjudicator’s decision on jurisdiction is challenged in Court on judicial review, the Court may deal with the matter afresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.<sup>17</sup>

27 It was also determined in *Sugar* that, to the extent that anything inconsistent with this conclusion appears in paragraphs [115]-[116] of the decision in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (“Grocon”)<sup>18</sup> in the light of the later reasoning of the High Court in *Kirk v Industrial Relations Commission*<sup>19</sup> and of the New South Wales Court of Appeal which followed it in *Oyster Bar v Hamo Industries*,<sup>20</sup> this should not be followed.<sup>21</sup>

28 In the present case, as the jurisdiction of the Adjudicator was put in issue by Jotham. Cooperative sought to advance evidence on affidavit that was not before the

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<sup>15</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9.

<sup>16</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

<sup>17</sup> *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 [114].

<sup>18</sup> *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 [115] - [116].

<sup>19</sup> *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1.

<sup>20</sup> *Oyster Bar v Hamo Industries* [2010] NSWCA 190.

<sup>21</sup> *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 [114]-[115].

Adjudicator with a view to establishing the statutory reference date by satisfying s 9(2)(c)(i) of the Act.<sup>22</sup>

29 I admitted potentially relevant portions of the affidavit *de bene esse* pending the handing down of the judgment in *Sugar*, which took place on the day following completion of the present trial. Pursuant to the reasoning in *Sugar* which has been referred to, I will admit into evidence absolutely the portions of the affidavit relied upon by Cooperative.

30 However, in my opinion, the evidence falls short of establishing a relevant reference date for the purposes of either ss 9(2)(c)(i)<sup>23</sup> or 14(5)(b)<sup>24</sup>. The relevant evidence was read from an affidavit of the Sole Director of Cooperative, Mr Otto Paschkewitschus sworn 11 October 2013, and was as follows:

Justin Prewitt, Project Manager for Cooperative Builders, was Jotham's development at 57 Grey Street in Bacchus Marsh.

Justin was working on completing minor rectification works and any works required to be attended to that did not require a qualified trade.

Works carried out included materials management, plastering, site cleaning and site supervision of others engage to assist his efforts.

These works were specifically carried out by Justin until mid-January to demonstrate to the developer that Cooperative Builders were willing and able to the (sic) complete the works commenced under the contract.

[Underlining added for emphasis]

31 On the assumption that this was indeed a "single" or "one-off" payment claim pursuant to s 14(7),<sup>25</sup> I accept that the Construction Contracts make no express provision with respect to any applicable reference date for such a claim to which the statutory provisions can attach.

32 However, the evidence is not sufficient to pinpoint the relevant statutory reference date, which under s 9(2)(c)(i)<sup>26</sup> specifies for present purposes, that the reference date is

<sup>22</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

<sup>23</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

<sup>24</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(5)(b).

<sup>25</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(7).

<sup>26</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

to be “the date immediately following the day that construction work was last carried out under the contract”.<sup>27</sup> This date is defined with precision.

33 The evidence before the Court to the effect that work was carried out “until mid-January” does not establish that alleged service of a “single” or “one-off” payment claim, which was said to have been undertaken on 25 January 2013, as found by the Adjudicator, was within time.

*Whether a “single” or “one-off” Payment Claim*

34 In any event, I find that, in accordance with Method 1 for building work set out in Schedule 3 of the building contract in each case, and in accordance with s 40 of the *Domestic Building Contracts Act 1995* (Vic),<sup>28</sup> progress payments to be paid under each contract were “milestone” payments. Under this contractual and statutory regime, progress payments were to be made in accordance with the completion of prescribed stages of the building works.

35 The contract made no provision for “single” or “one-off” payment claims.

36 Accordingly, Cooperative, is not in a position to call in aid the time limits prescribed in s 9(2)(c) of the Act,<sup>29</sup> which are confined to “single” or “one-off” payment claims.

**Sections 14(8) and (9)**

37 In order for the adjudication process to be effectively invoked:

- (a) Section 14(4) of the Act identifies that the payment claim must be served on respondent within three months of the reference date with respect to the progress payment claimed;<sup>30</sup> and
- (b) If the right to a progress payment has accrued, s 14(8) prohibits service of a further payment claim, for the same [progress payment] reference date under

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<sup>27</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

<sup>28</sup> *Domestic Building Contracts Act 1995* (Vic) s 40.

<sup>29</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(c)(i).

<sup>30</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(4).

the construction contract.<sup>31</sup> It follows that a further claim in breach of s 14(8) cannot invoke jurisdiction of the adjudicator if it is for the same reference date.<sup>32</sup>

38 Sub-section 14(8) provides:

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.<sup>33</sup>

39 Sub-section 14(9) is the companion to s 14(8). It provides:

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.<sup>34</sup>

*Cooperative's Submission on s 14(9)*

40 It was submitted by Cooperative, however, that s 14(9) does not operate to prevent a claimant for a progress claim including in a current payment claim an amount that has been the subject of a previous claim if the amount has not been paid, and this is so whether the current payment claim is a new payment claim which has not been claimed before, or is merely a full repetition of a previous payment claim. In other words, provided that a previous payment claim has not been paid, it can be claimed afresh pursuant to s 14(9). No other criterion is required to be satisfied for s 14(9) to operate, so it was said.<sup>35</sup>

41 Thus it was put by Cooperative that s 14(9) does not prevent the 25 January Payment Claim from being made, merely because it was the subject of previous payment claims.<sup>36</sup>

*Analysis of s 14(9)*

42 The operation of s 14(9) has not been specifically considered in previous case law.<sup>37</sup>

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31 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

32 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

33 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

34 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

35 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

36 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

37 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

43 On a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference date under the construction contract.<sup>38</sup>

44 This construction provides consistency with s 14(8).<sup>39</sup>

45 On the other hand, if the construction contended for by Cooperative was to be accepted, it would give rise to a manifest inconsistency between ss 14(9)<sup>40</sup> and 14(8)<sup>41</sup>. It would, in effect, enable a claimant to serve more than one payment claim in respect of each reference date under the construction contract. This in turn would render s 14(8)<sup>42</sup> otiose.

46 Further, the construction which I have found serves to advance the purpose of the Act. To permit multiple payment claims to be made in respect of the same work (or goods or services) arising from the same contractual reference date, via the mechanism of s 14(9),<sup>43</sup> would be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments supported by an expeditious and efficient means for enforcement of those rights. It would cause the parties to expend needless time and be put to unnecessary expense.

47 If more than one payment claim was permitted to be made, it would also open up the prospect of there being more than one adjudication application for any particular payment claim made in respect of each reference date under the relevant construction contract. Such a regime would clearly not be in the interests of maintaining or promoting the core objective of the legislation.

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38 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

39 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

40 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

41 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

42 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

43 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9).

48 In *Rail Corporation of NSW v Nebax Constructions* McDougall J reinforced the need to advance this objective in the following passages in the course of considering s 13(5) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the equivalent to s 14(8) of the Victorian Act):

It seems to me that, because s 13(5) prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract.

The proposition that there may be multiple adjudication applications in respect of different parts of a payment claim seems to me to be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments and a speedy and relatively cheap and efficient means for enforcement of those rights. It also seems to me to be inconsistent, if not directly then at least by implication, with the approach of the plurality (Macfarlan JA and Handley AJA) in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69; (2009) 74 NSWLR 190, where their Honours expressed a clear view against the repetitious lodging of payment claims seeking to enforce the same claim. It may be noted that Allsop P concurred in the result, although for somewhat different reasons.<sup>44</sup>

49 It was conceded by Jotham that Cooperative did make earlier claims for payment in relation to this project.

50 Nevertheless, the adjudication application form (the "Adjudication Application Form") presented the matter for Adjudication as if it was for a single amount. The Adjudication Application did divide up the individual units within the Property by reference to the different contracts which applied, or otherwise. Consequently, there were not three separate adjudication applications, but one. The result was that the Adjudicator heard and determined the matter as if it was one single application claiming a total of \$105,514.75. In this regard the Adjudicator found:

I am satisfied on the documents that the payment claims constituted one payment claim because it was served on the Respondent at or about the same time.

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<sup>44</sup> *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 [44]-[45].

51 However, the payment claims attached to the Adjudication Application Form were three claims which were in each case endorsed on the face of the claim in accordance with s 14(2)(e)<sup>45</sup> with the following text: “This is a payment claim made under the building and construction industry security of payment act 2002”. Further, as indicated by the table below, each payment claim was differently dated; contained a different “Claim ID”; specified a different “Due Date” for payment; related to a different lot within the Property; one claim was for the “Frame Stage” and two were in respect of the “Lock-up Stage”; each had a different reference date; and on the evidence, each claim was made under a different construction contract. The total of the three payment claims was \$105,514.75. The table of payment claims is set out below:

**Table of Payment Claims**

Date	Claim ID	Reference Date	Due Date for Payment (7 days under clause 30 of the Contract s 15(4)(b)(i))	Lot Address	Stage	Claim
02/10/2012	4416L-PC3	02/10/2012	09/10/2012	12	Frame Stage 15%	\$18,620.25
27/09/2012	4416B-PC4	27/09/2012	03/10/2012	2	Lock-up Stage 35%	\$43,447.25
05/10/2012	4416C-PC4	05/10/2012	12/10/2012	3	Lock-up Stage 35%	\$43,447.25

52 In this case the 25 January Payment Claim was for the sum of precisely \$105,514.75, which was the same as the total figure made in the Three Original Payment Claims. The irresistible inference is that by serving the 25 January Payment Claim, Cooperative has served more than one payment claim in respect of each relevant reference date under each relevant construction contract.

53 Consequently, there has been a breach of s 14(8) in relation to the 25 January Payment Claim.<sup>46</sup>

54 The terms of s 14(8) impose a prohibition on the service of such a claim.<sup>47</sup> A breach of the section has the consequence that any purported payment claim which is sought to be served in contravention of the prohibition is invalid.

<sup>45</sup> Building and Construction Industry Security of Payment Act 2002 (Vic) s 14(2)(e).

<sup>46</sup> Building and Construction Industry Security of Payment Act 2002 (Vic) s 14(8).

55 The Adjudicator, however, determined that the 25 January Payment Claim was made in accordance with the Act and was validly made. The Adjudicator was satisfied on the documents that the payment claims before him “constituted one payment claim because it was served on the Respondent at or about the same time”. In so doing, in my opinion, the Adjudicator fell into error. The payment claims attached to the Adjudication Application were the Three Original Payment Claims. The fact that they may have been re-served together on 25 January 2013 did not alter the legal status of these payment claims for the purposes of the Act. They remained three separate payment claims dated variously of 2 October, 27 September and 5 October 2012. As such they should have been dealt with separately in the Adjudication Determination, alternatively the Adjudicator should have produced three separate Adjudication Determinations founded upon each payment claim, given that three separate construction contracts were involved, each with different reference dates.

56 The Adjudicator however, proceeded to make his Adjudication Determination on the basis of the 25 January Payment Claim.

57 Having determined that the 25 January Payment Claim was invalid, it follows that the Adjudication Determination which was entirely founded upon it is also invalid.

58 Further, under s 18(1) a claimant may only apply for adjudication of a “payment claim”.<sup>48</sup> That means a valid payment claim. The Adjudication Application Form executed and filed with Adjudicate Today by Cooperative on 5 February 2013 specified the “Payment Claim Date” as 25 January 2005. The Adjudication Application was purportedly made in respect of one payment claim and claimed the sum of \$105,514.75. As the 25 January Payment Claim upon which the Adjudication Application was based was invalid, there was no valid Adjudication Application to found the Adjudication Determination. It follows for this reason too, the Adjudication Determination which was entirely founded upon the invalid Adjudication Application, is also invalid.

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<sup>47</sup> *Building and Construction Industry Security of Payment Act 2002 (Vic) s 14(8).*

<sup>48</sup> *Building and Construction Industry Security of Payment Act 2002 (Vic) s 18(1).*

59 For these reasons the Adjudication Determination lacked jurisdiction, and on this  
basis must be quashed.

**Whether the Three Original Payment Claims Made Within Time**

60 I now turn to consider whether the Three Original Payment Claims could found the  
jurisdiction of the Adjudicator.

61 The Three Original Payment Claims did not contravene s 14(8).<sup>49</sup>

62 However, a second group of payment claims served on or about 14 December 2012  
made in respect of the same body of work and by reference to the same reference  
dates in the various construction contracts and claiming the same sums, also  
contravened s 14(8) and were accordingly invalid.<sup>50</sup>

63 The only relevant payment claims which were not invalid by the operation of s 14(8)  
were the Three Original Payment Claims.<sup>51</sup>

64 No payment schedule was served by Jotham to these claims pursuant to s 15.<sup>52</sup>

65 The question is whether, in the circumstances, the Adjudication Application in respect  
of each of these valid payment claims was made within the time prescribed by the  
Act.

66 In this case s 18(1) and (2) 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-
    - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

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<sup>49</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

<sup>50</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

<sup>51</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(8).

<sup>52</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 15.

- (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; or
- (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.

...

67 In this case s 18(1)(b)<sup>53</sup> is triggered because Jotham did not provide any payment schedule under s 15<sup>54</sup> and failed to pay the amount claimed in respect of each of the Three Original Payment Claims.

68 This in turn enlivened the time limits prescribed under s 18(2) for Cooperative to notify Jotham of its intention to apply for Adjudication of the unpaid payment claims. The dates for compliance with this sub-section were respectively: 23 October 2012 (in relation to the 2 October 2012 payment claim); 17 October 2012 (in relation to the 27 September 2012 payment claim); and 26 October 2012 (in relation to the 5 October 2012 payment claim), being 10 business days immediately following the due date for payment under each payment claim. Cooperative failed to notify with the result that Jotham was denied the opportunity to provide a payment schedule in relation to each of the Three Original Payment Claims. Consequently, the requirements of s 18(2)<sup>55</sup> were contravened, and the prohibition provided for in the sub-section operates.

<sup>53</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 18(1)(b).

<sup>54</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 15.

<sup>55</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 18(2).

69 For these reasons, to the extent that the Adjudication Determination was founded on the Three Original Payment Claims it lacked jurisdiction, and on this basis too must be quashed.

### **The Settlement Deed**

70 The findings made as to the invalidity of the Adjudication Determination make it unnecessary to consider the further submissions made on behalf of Jotham that the Settlement Deed released it from liability with respect to its liability under the payment claims and Cooperative is thereby estopped from relying upon the Adjudication Determination.

### **Valuation of the Payment Claim**

71 Further, in view of the findings made as to the invalidity of the Adjudication Determination, it unnecessary to consider the further submissions made on behalf of Jotham that the Adjudicator failed to properly perform the valuation task he was obliged to undertake in discharging the duty assigned to him under the Act.

### **Conclusion**

72 The central purposes of the *Building and Construction Industry Security of Payment* legislation comprised in the Act have been addressed in previous decisions.<sup>56</sup> In summary, the Act is intended to provide for the rapid determination of progress claims under construction contracts or sub-contracts and contracts for the supply of goods or services in the building industry. The process was designed to ensure cash flow to businesses without parties getting weighed down in lengthy and expensive litigation or arbitration. This was to be achieved by a procedure which provided for the prompt adjudication of payment disputes at a low cost to the parties. The amendments introduced into the Act, which operate from 31 March 2007, reinforce the scheme by creating, inter alia, a fast track system for enforcing payment in the courts through an expedited process for the entry of judgment founded on a certificate evidencing the adjudication determination and an affidavit of non-payment.

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<sup>56</sup> See: *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) VSC 156 [36]-[65] and *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) VSC 426 [33] - [34].

73 At the same time the Act gives very valuable, and commercially important, advantages to builders and subcontractors. It alters the balance of power in favour of those parties in relation to progress payments in a significant way. In recognition of this position, the availability of the rights conferred by the Act are governed by, and depend upon, the observance of clear specifications of time and the other requirements expressed in the Act, either in mandatory terms or as defined prohibitions. These provisions are to be found at each stage of the regime for enforcement of the statutory right to progress payments. Such provisions, in accordance with the legislative purpose expressed in the text of each, call for strict observance.

**Orders**

74 The Adjudication Determination is declared void and is quashed on the ground of jurisdictional error.

75 I will hear the parties on costs.

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