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

Not Restricted

No. 00884 of 2013

MAXSTRA CONSTRUCTIONS PTY LTD
(ACN 144 590 438) — Plaintiff

v

JOSEPH GILBERT (T/A J GILBERT CONCRETE)
(ABN 62 164 470 431) — First Defendant

AND

JOHN MCMULLAN — Second Defendant

AND

THE INSTITUTE OF ARBITRATORS AND MEDIATORS AUSTRALIA
(ACN 008 520 045) — Third Defendant

JUDGE:	VICKERY J
WHERE HELD:	Melbourne
DATE OF HEARING:	26 April 2013
DATE OF JUDGMENT:	10 May 2013
CASE MAY BE CITED AS:	Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors
MEDIUM NEUTRAL CITATION:	[2013] VSC 243

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) – Adjudication conducted under Part 3 Division 2 of the Act – Apparent conflict between s 10B(2)(c) with s 11(1)(b)(iv) of the Act – Conflict resolved by application of statutory construction principles –Adjudicator erred in statutory construction – Jurisdictional error – Certiorari granted – Determination of adjudicator quashed and matter remitted for determination in accordance with the law.

STATUTES INTERPRETATION - Apparent conflict between provisions of an Act – Conflict resolved by application of statutory construction principles – *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [69]-[71] considered and applied.

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Twigg	Moores Legal
For the First Defendant	Mr James Shaw	Nevett Ford Lawyers
For the Second Defendant	No Appearance	
For the Third Defendant	No Appearance	

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HIS HONOUR:

Introduction

1 The Plaintiff was the head contractor for the construction of a new service station on the Northern Highway at Echuca, Victoria, known as the United Service Station (the "Project").

2 The First Defendant, Mr Gilbert, is a concreter who trades as a sole trader. The Plaintiff and Mr Gilbert entered into a sub-contract pursuant to which Mr Gilbert agreed to perform concreting works on the Project. The sub-contract was in writing and comprised a number of documents. The terms and conditions of the sub-contract are contained in a document titled "Contract No: S10876, Sub-Contract: Concrete Works, Project: United Service Station Northern Highway Echuca". The sub-contract price was $580,000, excluding GST.

3 Mr Gilbert served a Payment Claim dated 21 December 2012 pursuant to the *Building and Construction Industry Security of Payment Act 2002* (the "Act") on the Plaintiff (the "Payment Claim").

4 The amount claimed on the Payment Claim was calculated by reference to the amount of work complete, and made allowances for retention under the contract and also for damage that had occurred to a diesel tank. The Payment Claim claimed an amount of $259,954.62.

5 The Plaintiff responded to the Payment Claim with a Payment Schedule dated 28 December 2012 (the "Payment Schedule"). The Plaintiff disputed the amount claimed by Mr Gilbert and sought to set-off amounts for the cost to complete certain items and the cost of rectification of damage in the amount of $234,729.63. It also sought to set-off an amount of $217,500 by way of "delay costs". After taking these items into account, the Payment Schedule asserted that the entirety of the amount claimed in the Payment Claim should be set-off, and in fact Mr Gilbert owed the Plaintiff $164,590.43.

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6 Mr Gilbert referred the matter to adjudication pursuant to s 18 of the Act. The Second Defendant, Mr McMullan, an experienced Adjudicator (the "Adjudicator"), was appointed as adjudicator by the authorised nominating authority, the Third Defendant, who was the Institute of Arbitrators and Mediators Australia.

7 The Adjudicator produced an Adjudication Determination dated 4 February 2013 (the "Adjudication Determination").

8 The Adjudicator determined that his fees were to be paid in the proportions of one-third paid by Mr Gilbert and two-thirds to be paid by the Plaintiff. The Plaintiff failed to pay its share of the fees. In order to obtain the Adjudication Determination Mr Gilbert paid the Adjudicator's fees in their entirety. Consequently, the Adjudicator amended the Adjudication Determination on 14 February 2013 to take this into account. The Adjudicator determined that the Plaintiff should pay Mr Gilbert $270,491.47, which amount includes interest and the Plaintiff's share of the Adjudicator's fees.

9 The Plaintiff's Payment Schedule did not deduct any amount for the cost of rectification of alleged defects in the concrete. This issue was raised by the Plaintiff in its adjudication response dated 15 January 2013 where it sought to set-off an amount of $400,000, as the estimated cost of rectification of alleged defects (the "estimated cost of rectification").

10 In reaching his determination, the Adjudicator determined that the set-off claimed by the Plaintiff for the estimated cost of rectification was in fact a claim for damages for breach of contract, and therefore was an excluded amount pursuant to s 10B of the Act.

Orders Sought by Plaintiff and Mr Gilbert's Response

11 In this proceeding the Plaintiff seeks:

1. a declaration that the Adjudication Determination is unlawful and void; and

2. an order quashing the Adjudication Determination.

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12 The grounds upon which the Plaintiff seeks the above orders are:

(a) the Adjudication Determination evidences an error of law on the face of the record, as the Adjudicator erroneously determined that he was not to have regard to the estimated cost of rectification when determining the value of the construction work in accordance with s 11 of the Act; and

(b) the Adjudication Determination is void or invalid for jurisdictional error as the Adjudicator misconstrued the Act, leading to his failure to consider relevant material and not to have regard to the cost of rectification when determining the value of construction work in accordance with s 11 of the Act.

13 On the other hand, Mr Gilbert says in response that:

(a) the provisions of s 11(1)(b) of the Act do not apply to the contract in question;

(b) the alleged defects, raised for the first time in the Adjudication Response dated 15 January 2013, are not "defects" within the meaning of s 11(1)(b)(iv) of the Act; and

(c) the amounts sought to be deducted by the Plaintiff as the cost of rectifying alleged defects are in fact damages for breach of contract, and therefore are excluded amounts pursuant to s 10B(2)(c) of the Act.

14 Thus the central issue in this proceeding is whether the Adjudicator was correct in treating the estimated cost of rectification as an excluded amount pursuant to s 10B(2)(c) of the Act. The Plaintiff asserts that the estimated cost of rectification should have been deducted from the amount owing when valuing the work the subject of the Payment Claim, and it relies on s 11(1)(b)(iv).

Availability of Judicial Review

15 The availability of judicial review and of associated remedies in respect of Adjudication Determinations made under the Act has been considered by this Court in a number of recent cases. The following principles have been established:

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(a) an Adjudication Determination made pursuant to the Act is amenable to the writ of certiorari on all the grounds available under that writ, including as a result of jurisdictional error or error on the face of the record;[1]

(b) a declaration of invalidity of an Adjudication Determination is only available if:[2]

(i) the basic and essential requirements of the Act for a valid determination are not satisfied,

(ii) the purported determination is not a bona fide attempt to exercise the power granted under the Act, or

(iii) there is a substantial denial of the measure of natural justice required under the Act;

(c) what amounts to the "basic requirements" of the Act or the "essential pre-conditions for the existence of an Adjudicator's Determination" may be equated to jurisdictional error;[3] and

(d) the granting of an order in the nature of certiorari and the granting of a declaration are subject to discretionary considerations.[4]

The Adjudication Determination

16 The Adjudicator identified the issues he considered were the substantive issues in the adjudication in the Adjudication Determination. The issue relevant to this proceeding was described by the Adjudicator as follows: "what amount (if any) should be deducted in respect of the quality/defects issues described in the CMET report, and/or whether that claim constitutes a claim for Excluded Amounts …"

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1 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172, 181–215 ("*Grocon*").

2 Ibid 216.

3 *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, 135 ("*Hickory*").

4 *Ibid*; *Grocon* (2009) 26 VR 172, 215, 216.

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17 The Adjudicator considered this issue in his Adjudication Determination. The Adjudicator commenced his analysis by noting that the allegation that the concrete work performed by Mr Gilbert was of sub-standard quality or was defective constituted a new issue raised in the Adjudication Response that was not the subject of any deduction in the Payment Schedule. He noted that the Plaintiff relied on a report dated 25 November 2012 produced by CMET Technology Pty Ltd ("CMET") to support the allegations of poor workmanship, and that the Plaintiff said that an amount of approximately $400,000 should be deducted in respect of those issues.

18 The Adjudicator proceeded on the basis that the construction work the subject of the Payment Claim should be valued in accordance with s 11(1)(b) of the Act, presumably on the basis that the contract did not contain terms stating how such work was to be valued.

19 Mr Gilbert submitted to the Adjudicator that clause 3 of the sub-contract provided a method of valuing the work performed under the contract, and therefore that the statutory method of valuing the work in s 11(1)(b) did not apply. This is dealt with further below. However, if it is correct that the sub-contract contains terms dealing with the valuation of the work, then the grounds relied upon by the Plaintiff fall away as s 11(1)(b)(iv) has no application and the estimated cost of rectification is clearly an excluded amount pursuant to s 10B(2)(c).

20 Notwithstanding that the Adjudicator proceeded on the basis that the work was to be valued in accordance with s 11(1)(b) rather than pursuant to the terms of the sub-contract, he concluded in any event that the allegation of defects, and therefore the amount sought to be deducted from the Payment Claim, was properly characterised as a claim for damages for breach of the sub-contract, or otherwise a claim for damages arising under or in connection with the sub-contract, and as such was an excluded amount pursuant to s 10B(2)(c). Given this conclusion, the Adjudicator was prevented from taking it into account in the Adjudication Determination by reason of s 23(2A)(a) of the Act.

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21 Save that Mr Gilbert submits that the Adjudicator should not have proceeded to value the work pursuant to s 11(1)(b), he submitted that the approach taken by the Adjudicator in resolving the tension between s 11(1)(b)(iv) and s 10B(2)(c) was correct, essentially because it was a construction that best advanced the objects and purposes of the Act.

Relevant Provisions of the Act

22 Section 10 of the Act provides in relation to the amount of a progress payment:

> **10. Amount of progress payment**
>
> (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be-
>
> (a) the amount calculated in accordance with the terms of the contract; or
>
> (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of-
>
> (i) construction work carried out or undertaken to be carried out by the person under the contract; or
>
> (ii) related goods and services supplied or undertaken to be supplied by the person under the contract- as the case requires.
>
> (2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
>
> (3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

23 Section 10B of the Act introduces the concept of "excluded amounts" which are not to be taken into account in valuing a claim for a progress payment. Section 10B provides:

> **10B. Excluded amounts**
>
> (1) This section sets out the classes of amounts (excluded amounts) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
>
> (2) The excluded amounts are-

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(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to-

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

24 Section 11 of the Act is concerned with the valuation of construction work carried out under the relevant construction contract. Section 11(1) provides:

11. Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued-

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to-

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

Whether the Sub-Contract Made Provision for the Calculation of a Progress Payment Claim or the Valuation of Construction Work the Subject of a Progress Payment Claim

25 It is clear from these provisions that the first step in valuing the work which is the subject of the Payment Claim is to ascertain whether the contract in question, namely

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the sub-contract in this case, contains provisions by which the work is to be valued (See: s 10(1)(a) and s 11(1)(a)).

26 On the other hand, if the contract makes no provision with respect to the valuation of the progress claim and the construction work claimed for, then the work is to be valued in accordance with s 10(1)(b) and s 11(1)(b).

27 It is to be noted that, pursuant to s 10(3) an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

28 It is to be further noted that, if s 11(1)(b) applies, the valuation is to be undertaken having regard to (inter alia) "if any of the work is defective, the estimated cost of rectifying the defect."

29 In seeking to make out a case that the sub-contract provided for the calculation of a progress claim or the valuation of construction work the subject of a payment claim, Mr Gilbert placed reliance on clause 3 of the sub-contract, which provided:

> 3.1 Payment of Contract Sum
>
> […]
>
> (b) […]The progress claim will be based on the Subcontractor's tender break down and expressed in percentages against each component. …
>
> […]
>
> 3.3 Rights of Maxstra
>
> Maxstra may without limiting any other right or remedy under this Sub-Contract:
>
> (a) withhold retention moneys from the Contract Sum or any progress payments of the Contract Sum in accordance with clause 4;
>
> (b) withhold payment of any part of the Contract Sum or any progress payment of the Contract Sum to the extent that actions or breaches by the Sub-Contractor may have exposed Maxstra to a claim for damages or liquidated damages whether under the Head Contract or otherwise;
>
> (c) reduce a progress claim to the extent Maxstra is not satisfied as to the value of the Work performed;

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(d) withhold payment of any part of the Contract Sum or any progress payment of the Contract Sum to the extent payment to Maxstra is withheld by its Principal under the head contract.

30 It was submitted on the basis of clause 3 of the sub-contract that the sub-contract provided for the manner in which the work was to be valued. It was put that essentially it required the progress payments to be based on the percentage of work done, and the Plaintiff was able to reduce the amount claimed if it was not satisfied as to the value of the work claimed. Pursuant to clause 3.3(b) the sub-contract also permitted progress payments to be reduced by amounts that are clearly "excluded amounts" under the s 10(3) of the Act.

31 It was further submitted that the Plaintiff in its Payment Schedule valued the amount owing in accordance with clause 3 of the sub-contract.

32 It followed, so it was submitted, that given this provision of the sub-contract, there was no need to refer to s 11(1)(b) of the Act to value the work. The only question in relation to the estimated cost of rectification was whether the amount of $400,000 that the Plaintiff sought to deduct was an excluded amount pursuant to s 10B(2)(c).

33 In my opinion, clause 3 of the sub-contract did not provide a contractual mechanism which was capable of producing a calculation of the amount due under a progress payment or a valuation of construction work carried out under the relevant construction contract. At best it provided for the broad parameters within which such a calculation or valuation might be conducted, leaving it to the person charged with the task to apply his or her own judgment as to how the progress claim should be assessed based on "the Subcontractor's tender breakdown and expressed in percentages against each component." Precisely how this is to be done in each case is left to the contractually appointed assessor.

34 A further issue in this case was that there was no "tender break down" incorporated into the sub-contract or referred to in the Payment Claim.

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35 It is to be noted that the Adjudicator did not proceed to assess the Payment Claim on the basis of any contractual mechanism provided for in the sub-contract. In my opinion, the Adjudicator was correct in his approach in this regard.

36 It follows that, given that the sub-contract makes no provision for the valuing of the construction work, s 11(1)(b) has application. The question then becomes whether the approach of the Adjudicator was correct in concluding that the estimated cost of rectification was an excluded amount pursuant to s 10B(2)(c).

Reasoning of the Adjudicator

37 Section 11(1)(b)(iv) of the Act provides that in circumstances where the contract makes no express provision with respect to the valuation of the work, it is to be valued "having regard to"(inter alia), defective work and the "estimated cost of rectifying the defect".

38 Mr Gilbert submitted that there are two relevant issues to be considered in the construction of s 11(1)(b)(iv): (a) it requires the work to be valued by "having regard" to the factors set out, which includes any defective work and the "estimated cost of rectifying the defect; and (b) it requires the existence of defective work before regard is to be had to the estimated cost of rectification of that defective work.

39 It was submitted on behalf of Mr Gilbert that the Adjudicator clearly had regard to the allegation of defective work and the estimated cost of rectification claimed by the Plaintiff. He dealt with this issue over a number of pages in the Adjudication Determination before concluding that he would not take the claimed estimated cost of rectification into account in the valuation of the work, and that rather the claimed amount was an excluded amount. As such, it was submitted that the Adjudicator "had regard to" the estimated cost of rectification in valuing the work, but concluded they were not to be taken into account.

40 This submission cannot be accepted if the Adjudicator, in arriving at his conclusion not to take the claimed estimated cost of rectification into account in the valuation of the work, based his conclusion on a finding that the estimated cost of rectifying the

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alleged defect was in fact an excluded amount, and this finding arose from a misconstruction of the provisions of the Act. In those circumstances the Adjudicator could not be said to have properly "had regard to" the statutory consideration provided for in s 11(1)(b)(iv).

41 In the Adjudication Determination the following observations were made as to the claim for defective work:

> Respondent's Claim re Quality/Defects/the CMET Report:
>
> The respondent raises a new issue in the Adjudication Response, that there are substantial quality/defects issues in relation to the Subcontract Works performed by the claimant, relating to the life of the slab and the general workmanship, and including substandard concrete works, inconsistent finishes and cracks.
>
> The respondent provides a report dated 25 November 2012 ("the CMET report") from CMET Technology Pty Ltd ("CMET"), a specialist corrosion and materials engineering consultancy, as to the condition of the concrete works carried out by the claimant, and says an amount of approximately $400,000 should be deducted in respect of these quality/defects issues.
>
> The CMET report sets out, in a 5 page summary plus Attachments, and an email dated 28 November 2012, a series of comments and conclusions. In brief, the CMET report indentifies defects and deficiencies in the concrete pavement, including that there were shrinkage cracks in some areas of the slab (potentially reducing the design life by 10 years, and necessitating patch repairs to reinstate the surface, and to prevent further corrosion), inadequate caulking of control joints (allowing seepage of water into the interface and retention of the moisture, long-term corrosion which could affect the connection between the slabs), and marked variation in the surface texture across the slab (attributable to poor workmanship, affect the appearance and creating cleaning difficulties). CMET notes (Section 3 of the CMET report) randomly orientated cracks (associated with poor moisture evaporation control from the top surface of the slab), perpendicular cracking (localised, reflecting the position of the underlying steel mesh, attributable to settlement cracking), parallel thickness), poor concrete surface texture, variable slab thickness, and deficient caulking integrity.
>
> CMET recommends a method for rectification of the claimant's defective works, namely application of an epoxy modified cementitious coating which is applied over the concrete surface (approximately 5mm depth) after treating the surface with acrylic primer. The specification advised by CMET is as follows:
>
> 1. Clean with a high pressure water jet > 5000 psi
> 2. May need detergent to treat areas with old spills/leaks
> 3. Seal with Intercrete 4850 (low viscosity acrylic)

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4. Apply next coat when colour change from blue to clear (~20 min) Apply Intercrete 4852 (epoxy modified cementitious coating with high resistance to oils, fuel and chemicals)

5. Apply curing agent Intercrete 4870 to retard cure rate

6. Broadcast fine sand onto top coat if increased slip resistance is required

The respondent advises the CMET estimates the cost of this system is close to $80/m2 which equates to $400,000 for a treated area of 5,000m2.

The claimant's response:

The claimant says, in response to the quality/defects claims:

1. It denies that the concrete works are sub-standard, contain inconsistent finishes and cracks.

2. It says, (correctly, in my view), that it has not had any opportunity to engage an expert to review the CMET report and respond to it.

3. Wayne Squire, in affidavit dated 18 January 2013, says that on 17 January 2013, on behalf of the claimant, made a phone call to Matthew of United Petroleum, and was advised (among other things) that the respondent was paid in full by United Petroleum on 16 January 2013, and that United Petroleum was very happy with the quality of the concrete works of the claimant. (I note, for completeness, that the respondent replies to Mr Squire's affidavit in the affidavit by Mr Nadinic dated 23 January 2013. Mr Nadinic says that he was telephoned by Matthew Davies of United Petroleum on around 18 January 2013, and Mr Davies advised Mr Daninic that he had been contacted by the concreter engaged by Maxstra at Echuca, the concreter had requested drawings for the project, the concreter had also asked whether United was happy with the project, and Matthew had advised the concreter that it would have to contact Maxstra for any drawings and that United was happy with Maxstra's performance and has awarded Maxstra further work.)

The claimant says, further, that if there are such quality/defect issues in the Subcontract Work, then such a claim for the cost of rectifying that work would be a claim for an Excluded Amount within the meaning of the Act, and therefore not able to be taken into account by me. The respondent disputes that any of the deductions asserted by the respondent in this case constitute "Excluded Amounts".

The Legislation

In my view, for the reasons set out below, the respondent's claim in respect of the quality/defects dispute, goes beyond the ambit of a claim for the estimated cost of rectification within the meaning of Section 11(1)(iv) of the Act, and is a claim more properly to be characterized as an Excluded Amount within the meaning of Section 10B.

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42 By way of summary, the Adjudicator noted the following:

(a) the issue of defective work was raised for the first time in the adjudication as a "new issue" in the Plaintiff's Adjudication Response [paragraph 145];

(b) the Plaintiff relied upon an expert report provided by CMET [paragraph 146];

(c) the CMET report identifies defects and deficiencies in the concrete pavement [paragraph 147];

(d) CMET recommends a method of rectification of the defective works and estimates to cost of rectification to be $400,000 [paragraph 148];

(e) Mr Gilbert's contentions were noted, namely that: he denied the work was defective; he said that he was not in a position to engage an expert to review the CMET report and respond to it (a position accepted by the Adjudicator); and that the ultimate client was happy with the concrete work and had paid the Plaintiff in full for the work [paragraph 150].

43 However, of the various issues before him on the question of defective work, the Adjudicator confined his findings to and determined the issue on one legal ground, namely that if there were any defects in the work undertaken by the sub-contractor Mr Gilbert, then such a claim for the cost of rectifying that work would be a claim for an excluded amount within the meaning of the Act, and therefore could not be taken into account in the adjudication.

44 The Adjudicator reasoned as follows in finding that the estimated cost of rectifying the defective work fell within the concept of an "Excluded Amount" under the Act:

> In summary, in relation to "Excluded Amounts" under the Act:
>
> 1. Section 10 refers to *amount of a progress payment to which a person is entitled*, and expressly provides that an excluded amount must not be taken into account in calculating such amounts.
>
> 2. Section 10B refers to *amount of a progress payment to which a person is entitled*, and expressly provides that "excluded amounts" are not to be taken into account in calculating such amounts.

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3. Section 11(1)(b)(iv) expressly requires an the adjudicator to take into account when valuing work: *if any of the work is defective, the estimated cost of rectifying the defect*.

4. Section 14 refers to *amount of the progress payment that the claimant claims to be due (in the claimed amount)*, and provides that the *claimed amount* must *not include any excluded amount*.

5. Section 23(1) requires the adjudicator to calculate *the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount)*.

6. Section 23(2A)(a) requires the adjudicator not to take into account *any part of the claimed amount that is an excluded amount*.

7. Section 23(2A)(b) further requires the adjudicator not to take into account *any other matter that is prohibited by this Act from being taken into account*.

8. Section 28B provides that a respondent may seek an adjudication review *on the ground that the adjudicated amount included an extra amount*.

9. Section 28C provides that a claimant may seek an adjudication review on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

Mr Gilbert's Submissions

45 It was submitted on behalf of Mr Gilbert that the Adjudicator was correct to conclude that the amount claimed by the Plaintiff as the estimated cost of rectification of alleged defects was in fact a claim for damages for breach of contract, and as such is an excluded amount pursuant to s 10B(2)(c).

46 Mr Gilbert placed particular emphasis on the object and purpose of the Act, as explained in a number of cases dealing with the Victorian legislation. These cases serve to illustrate the application of the principles and aids to interpretation provided for in *Interpretation of Legislation Act 1984* s 35(a) which is in the following terms:

> **35. Principles of and aids to interpretation**
>
> In the interpretation of a provision of an Act or subordinate instrument-
>
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) *shall* be preferred to a construction that would not promote that purpose or object;

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[…]

47 Mr Gilbert made reference to *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*[5] ("*Hickory*") where the Court identified the objects and purposes of the Act. In this regard the Court observed:

> The Act has had a substantial effect in shifting the power balance between principals and sub-contractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Sub-contractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements 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.[6]

48 In *Hickory* the Court referred to the object of the Act in s 3(1),[7] which provides that "any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work …". The Court also referred to the Minister's second reading speech in respect of the Act,[8] and in particular where the Minister stated:[9]

> This bill represents a major initiative by the government to remove inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work.
>
> […]
>
> […] quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.

49 The Court in *Hickory* noted particular objects and guiding principles of the Act, including that:

(a) it gives "full effect" to the "principle that the respondent to a payment claim for a progress payment 'should pay now and argue later' ";[10] and

(b) the provisions of the Act "demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality".[11]

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5 *Hickory* (2009) 26 VR 112.
6 Ibid 114-115.
7 Ibid 119.
8 Ibid 119-120.
9 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 2002, 427 (Mary Delahunty).
10 *Hickory* (2009) 26 VR 112, 121.

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50 In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor ("Seabay")*,[12] following an analysis of the Act, the Court concluded that the purpose behind the exclusion of matters identified in s 10B was clear. After listing the matters provided for in s 10B(2), the Court went on to say:[13]

> Experience points to these classes of issues regularly arising in construction disputes. They are often attended with considerable complexity and speedy resolution can be an elusive goal. Under the scheme of the Act such issues are removed from the interim payment regime provided for in the legislation. If such matters arise for determination in the course of a construction project to which the Act applies, they are not to be dealt with under the statutory scheme established for the provision of progress payments to the party entitled. Rather, they remain to be resolved under the general law, supported by court or arbitral proceedings. In this way the concept of "pay now and argue later" is given full effect.
>
> Further, the Act is not designed to accommodate such claims. […] Section 22(4) provides for a speedy resolution of an adjudication application. An adjudicator, who must conduct adjudication proceedings armed only with limited statutory powers, and who is directed to complete the adjudication process within an extremely narrow time frame, would be ill equipped to deal with many of the claims defined as "excluded amounts" if raised by a respondent.
>
> In my opinion, a proper construction of s 10B of the Act renders the defined "excluded amounts" applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent. Such a construction serves to advance the purposes of the Act. The contrary construction tends to work contrary to those purposes. The construction which I favour, will better promote the operation of the object of the Act to provide a facility for prompt interim payment on account in favour of contractors and subcontractors, pending final determination of any disputes arising under a construction contract. These considerations, in my view, override all of the textual arguments advanced by *Seabay* which point in the opposite direction.

51 However, the observations made by the Court in *Seabay* were made in the context of considering whether a claim for liquidated damages *made by a respondent* to a progress claim amounted to a claim for compensation in respect of "time-related costs" within the meaning of s 10B(2)(b)(ii) of the Act, and was therefore an "excluded amount" under the Act for this reason, or whether such a claim was confined under the Act to a claim *made by an applicant*. It was held in *Seabay* that the Adjudicator was correct in determining that the claim for liquidated damages made by the Respondent to the

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11 Ibid.
12 [2011] VSC 183.
13 Ibid [120]-[124].

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progress claim should have been treated as an "excluded amount" and excluded from the Adjudication Determination made in relation to the payment claimed under the Act. The objects and purposes of the Act were important in *Seabay* in considering the construction of s 10B(2)(b)(ii), and particular its scope and application to the liquidated damages claimed by the Respondent in that case.

52 *Seabay* did not consider the issue which is in sharp focus in the present case, namely the interaction of s 10B(2)(c) with s 11(1)(b)(iv) of the Act and the resolution of the apparent conflict in the text of these provisions.

53 Section 10B(2)(c) provides that "excluded amounts", which must not be taken into account in calculating the amount of a progress payment, include:

> (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

54 On the other hand, s 11(1)(b)(iv) provides that in valuing construction work for the purposes of calculating a progress payment regard must be had to a number of things, including:

> (iv) if any work is defective, the estimated cost of rectifying the defect.

55 It was put on behalf of Mr Gilbert that a legislative hierarchy is established by the Act in relation to s 10B(2)(c) with s 11(1)(b)(iv). This involves as a first step determining whether any of the amounts claimed for the progress payment in question are "excluded amounts". Having determined that issue and removed any excluded amounts from the calculation, the next step is for the decision-maker to go to s 11 and value the remaining work in accordance with its terms.

Analysis of the Apparently Conflicting Statutory Provisions

56 In *Project Blue Sky v Australian Broadcasting Authority*[14] ("*Project Blue Sky*") McHugh, Gummow, Kirby and Hayne JJ said this about conflicting statutory provisions and the need for them to be reconciled so far as is possible:[15]

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14 (1998) 194 CLR 355; [1998] HCA 28.

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> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".
>
> [Citations omitted]

57 However, in this case I do not find it necessary to resolve the apparent conflict between s 10B(2)(c) with s 11(1)(b)(iv) of the Act by adopting a hierarchical analysis involving a determination as to which is the leading provision and which the subordinate provision. This is not a case where the only way to give effect to the language and purpose of the Act, while at the same time maintaining the integrity of the statutory scheme, is by determining the hierarchy of the provisions which are in apparent conflict. In this case, the apparent conflict is to be resolved by a close examination of the text of the relevant provisions.

58 The starting point in this analysis is s 10B(2)(c). For the purposes of s 10B, an "excluded amount" which cannot be taken into account in calculating the amount of a

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15 Ibid [69]-[71].

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progress payment includes: "any amount *claimed for damages* for breach of the construction contract or for any other *claim for damages* arising under or in connection with the contract". [Emphasis added] The fulcrum of the provision is a "claim for damages".

59 The concept of "damages" has a particular meaning at law where there is a failure to discharge a contractual obligation. The objective in contract law is to place the party who has suffered loss caused by the breach in the position which he or she would have occupied had the other party performed the obligation breached. In *Gates v City Mutual Life Assurance Society Ltd*[16] Mason, Wilson and Dawson JJ, in the context of considering the appropriate approach to the assessment of damages under the *Trade Practices Act 1974*, said this about damages in contract:[17]

> In contract damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed – he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss).
>
> […] For breach of warranty [in a claim for damages recoverable for a breach of contractual warranty on a purchase of goods] the plaintiff is prima facie entitled to recover the difference between the real value of the goods and the value of the goods as warranted.

60 The same principles apply in relation to damages resulting from the breach of a construction contract. Commonly, damages are awarded arising from a breach of the contractual warranty of "good workmanship". With the object of placing the principal in the position in which it would have been had the contract been performed, damages may include an award for rectification of the defective work. However, consequential losses, for example arising from delay in contract completion and losses arising from liabilities incurred to third parties arising from such delay, may also be the subject of damages for breach of a contract.

61 On the other hand, the compensation in contemplation in s 11(1)(b)(iv) of the Act is of quite a different character. It is a purely statutory concept, providing that, in the event of any work being defective, the estimated cost of rectifying the defect is to be

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16 (1986) 160 CLR 1.

17 Ibid 11-12.

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taken into account in valuing the construction work. Two elements serve to differentiate the statutory concept from a "claim for damages" within the purview of s 10B(2)(c). The first is that under s 11(1)(b)(iv) it is only the "cost of rectifying the defect" which is to be taken into account. Other elements which may be included in a claim for damages arising from breach of a contractual warranty or a fundamental failure to perform the contract as a whole, such as compensation for consequential losses arising from delay, do not fall within s 11(1)(b)(iv). Second, the appointed decision-maker in considering the application of s 11(1)(b)(iv), is only required to undertake an "estimate" of the costs of the rectification, and this can only be done by an Adjudicator considering the matters defined in s 23(2) of the Act, and no other matters. The assessment of a claim for damages is quite different. Damages are not amenable to a determination based upon a mere "estimate". Rather, they are founded upon a claimant for damages proving its case to the usual civil standard, on the balance of probabilities based on the admissible evidence adduced.

62 The construction I have placed on s 10B(2)(c) and s 11(1)(b)(iv) of the Act resolves the apparent conflict between the provisions. They both have quite different tasks to perform. Claims for "damages" under s 10B(2)(c) are quite rightly treated as "excluded amounts", and are to be disregarded in calculating the amount of a progress payment. The forensic enquiry involved in assessing damages, and the potentially wide scope of any such claim is avoided, thereby reinforcing the limited ambit of the adjudication process contemplated under the Act and its objective of expedition. On the other hand, the enquiry to be conducted under s 11(1)(b)(iv) of the Act, properly confined as it is, as I have found it to be, would not be likely to defeat the objectives of the Act.

63 On the other hand, if a construction was given to s 10B(2)(c) and s 11(2)(b)(iv) of the Act which involved treating claims for damages as including claims for the rectification of defects, and these were treated as "excluded amounts" and therefore not taken into account in assessing a progress payment, with the result that the decision-maker was also precluded from estimating the cost of rectifying the defect

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and taking this into account in the valuation exercise contemplated by s 11, then s 11(2)(b)(iv) would in this circumstance have no work to do and would be reduced to superfluity.

64 The same would follow if the matter was to be considered by taking s 11(2)(b)(iv) as the starting point. If the estimated cost of rectifying a defect under the sub-section was to be regarded as damages for the purpose of s 10B(2)(c), it would become an "excluded amount" under s 10 and as such could not be taken into account, thereby defeating the clear words and intention of the valuation regime set up under s 11 which does quite the opposite.

65 I have resolved the conundrum by adopting the *Project Blue Sky* approach in construing the meaning of the competing statutory provisions in an enactment. This involves achieving a result which will best give effect to the purpose reflected in the text of those provisions, while at the same time maintaining the integrity of the statutory provisions and the working of the Act when considered as a whole. There is no need in this case to apply a hierarchical approach to resolve the apparent conflict in competing provisions and the approach as outlined in *Project Blue Sky* to this extent may be put to one side.

66 The approach to the construction of the provisions in question which I have determined, is also consistent with the equivalent statutory regime which exists in New South Wales. Section 10 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) is in all material respects a mirror of the Victorian Act. In particular, s 10(2)(b)(iv) of the New South Wales Act is in precisely the same terms as s 11(2)(b)(iv) of the Victorian Act. A principal difference between the two statutes for present purposes is the absence in New South Wales of a regime providing for "excluded amounts" as provided for in the Victorian Act. The complication of a possible conflict with s 10(2)(b)(iv) of the New South Wales Act does not therefore arise, and the sub-section is free to work as it was intended to work in accordance with its terms, unimpaired by any countervailing considerations. The New South Wales Act has not been amended to alter the force and effect of s 10(2)(b)(iv) since it

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came into force in 1999[18] which suggests that the object and purposes of the New South Wales Act have not been defeated by operation of the sub-section.

67 In *Quasar Constructions NSW Pty Ltd v AJ Stockman Pty Ltd*,[19] Barrett J considered the operation of s 10(1)(b) in the New South Wales Act. His Honour said:

> The requirement imposed by s 10(1)(b) [of the NSW Act] is that the adjudicator make his or her calculation "having regard to" the contract price and several other matters specified in subparas (i) to (iv). But those factors, in my view, represent no more than matters that must be recognised and accepted by an adjudicator as matters to be taken into account in performing the specified valuation task. A provision compelling a decision maker to "have regard to" specified matters in making the particular decision does no more than require that he or she "give weight to them as a fundamental element" in coming to a conclusion: *R v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333 per Gibbs CJ.[20]

68 However, given that the equivalent s 11(1)(b) of the Victorian Act applies, as it does in this case, the relevant decision-maker, which was here the Adjudicator, was obliged by the section to "have regard to" each of the matters listed in sub-paragraphs (i) to (iv) of s 11(1)(b) to the extent that they were applicable. This was a mandatory obligation.

69 However, arising from the construction given to s 10B(2)(c) of the Act, and its relationship with s 11(1)(b)(iv), which I have found to be incorrect, the Adjudicator did not embark upon an assessment of, nor did he make any determination as to:

(a) whether any of the work the subject of the progress payment in question was in fact defective; and

(b) the estimate cost of rectifying any such work.

70 Accordingly, the Adjudicator put it beyond his reach to consider the matters which arose for determination under s 11(1)(b)(iv) and make the necessary preliminary findings on those issues, one way or the other. If he determined that there was defective work, and if he was in a position to estimate the cost of rectification, he was

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18 By *Building and Construction Industry Security of Payment Act 1999* (NSW).
19 [2004] NSWSC 117.
20 Ibid [12].

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obliged to give weight to the matter in arriving at his valuation. On the other hand, if he found that there was no defective work, or that he was not in a position to estimate the cost of rectification, he would be entitled to disregard the matter. Either way, he was obliged to make findings on these issues.

71 This being the case, the Adjudicator, in my respectful opinion, fell into error and did not satisfy a basic and essential requirement of the Act for a valid determination, resulting in jurisdictional error.

Conclusion

72 In *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [No 2]*[21] the Court, having found a breach of the rules of natural justice in respect of an adjudication under the Act, made a consequential finding that the Adjudication Determination was invalid, granted relief in the nature of certiorari and quashed the Adjudication Determination. The Court also ruled that the matter was open to be remitted back to the original tribunal to be determined in accordance with law, which is both available and appropriate in the present case. This is the usual form of relief when certiorari is granted.

73 Although some elements of timing found in the provisions of the Act would tend to suggest that the remedy of remitting a matter back to the original tribunal for determination would not be open as a matter of implication, in my opinion, no such implication can arise.

74 In *Grocon* it was determined that the decisions of an Adjudicator and a Review Adjudicator appointed under the Act were amenable to certiorari provided that the recognised grounds for such relief are established.[22] Section 85 of the *Constitution Act 1975* (Vic) was considered and applied to oust any implication to the contrary.

75 It follows that an order remitting a matter back to the original tribunal for determination in accordance with the law, being a usual form of relief which may be

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21 [2010] VSC 255.

22 (2009) 26 VR 172, [35]-[102].

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granted on the quashing of the original decision on the grant of certiorari, would similarly remain available as an incident of the relief, untouched by any implication in the Act to the contrary.

76 This is an appropriate case to both quash the original decision of the Adjudicator in its entirety and remit the matter back in its entirety for re-consideration and for a fresh determination to be made in accordance with law.

77 Although severance of part of a determination which is valid from part which is determined to be invalid so as to preserve that part which is valid, is technically possible in some cases,[23] this is not the case for such relief. Section 11(1)(b) of the Act requires a person in the position of an Adjudicator to value the work in dispute "having regard to" the four factors specified in the sub-paragraphs which follow. Each of these statutory elements, so far as they may be applicable, need to be considered, both individually and as a whole in arriving at the value. If any one element of the four is changed, this may have a bearing on the remainder for the purposes of the valuation. Accordingly, where it has been found that one of the factors which was potentially open to have been considered, was not considered, there is little option but to remit the whole of the valuation back to the Adjudicator to determine afresh.

78 It should be noted that, in any reconsideration of the matter following the making of these orders, Mr Gilbert should be given a reasonable opportunity to file such material as he may be advised on the issue of the alleged defects and the estimate as to the costs of the rectification, in order to ensure that procedural fairness is provided for the process.

79 For these reasons it will be ordered that:

1. The Adjudication Determination is quashed.

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23 See *Gantley Pty Ltd and Ors v Phoenix International Group and Ors* [2010] VSC 106, [93]-[116].

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2. The adjudication application of the First Defendant be remitted back to the authorised nominating authority, the Third Defendant being the Institute of Arbitrators and Mediators Australia, for reference to the adjudicator the Second Defendant John McMullan, as soon as practicable, to be thereafter determined in accordance with law.

3. There be liberty to apply in relation to these orders.

80 I will hear the parties on costs.

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