

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING & CONSTRUCTION LIST

S ECI 2017 0049

MELBOURNE STEEL ERECTORS PTY LTD (ACN 140 972 998)

Plaintiff

v

M&I SAMARAS (NO 1) PTY LD (ACN 007 988 516)
M&I SAMARAS (NO 2) PTY LD (ACN 007 988 525)
M&I SAMARAS (NO 3) PTY LD (ACN 007 988 534) and
DAVID THYER (in his capacity as adjudicator appointed under s 20(1) of
the *Building and Construction Industry Security of Payment Act 2002* (Vic)

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 29 May 2017
DATE OF JUDGMENT: 30 May 2017
CASE MAY BE CITED AS: Melbourne Steel Erectors v M&I Samaras
MEDIUM NEUTRAL CITATION: [2017] VSC 308

ADMINISTRATIVE LAW – Judicial Review – Determination of an Adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Withdrawal of payment claim – Duplication of Final Payment Claim in respect of the same reference date – Whether error of law amounting to jurisdictional error – Certiorari sought – *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 14(6) and 14(8).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Roberts QC	Piper Alderman
For the First, Second and Third Defendants	Mr T Margetts QC	Ezra Legal
For the Fourth Defendant	No appearance ¹	

¹ The fourth defendant, by letter to the plaintiff's solicitors dated 9 March 2017, advised he would not be participating in the proceeding and will abide by the order of the Court, save if any issue of costs affecting him arises.

HIS HONOUR:

- 1 In this proceeding the plaintiff (MSE) applies for judicial review of an Adjudication Determination made by the fourth defendant (Adjudicator) on 13 February 2017² (Adjudication Determination) under the *Building and Construction Industry Security of Payment Act 2002 (Vic) (SOP Act)*.
- 2 The Adjudicator in the usual way agreed to be bound by the decision of the court and took no part in this proceeding.
- 3 By Originating Process filed 3 March 2017, MSE seeks orders quashing parts of the Adjudication Determination.
- 4 The elements of the Adjudication Determination which MSE seeks to quash relate to MSE's Progress Payment Claim No 21 dated 20 October 2016 and the Adjudication Determination in relation to MSE's subsequent payment claim, also designated No 21 dated 1 December 2016, and the Adjudicator's decisions in relation to that second payment claim dated 1 December 2016 that it constituted a second final payment claim and that the payment claim dated 1 December 2016 was submitted by MSE in respect of the same reference date and was therefore invalid pursuant to s 14(6) and s 14(8) of the *SOP Act*.
- 5 In addition to other ancillary claims for relief MSE seeks to have its adjudication application remitted back to the authorised nominating authority for reference to the Adjudicator and have the Adjudicator determine MSE's interim payment entitlements according to law.

Background

- 6 The background of this matter is succinctly summarised, in a way not suggested by the parties as inaccurate, as follows:³
 1. In or about early January 2015, SSE and MSE entered into a contract or other arrangement whereby SSE engaged MSE to erect the structural steel for the Chadstone Shopping Centre Retail Development Stage 40

² Affidavit of Pei Chin Yau, 3 March 2017, Exhibit "PCY-15".

³ Adjudicator's Determination dated 13 February 2017 [1]-[18].

(Project), in return for which SSE agreed to pay MSE the amount of \$3,550,291.00 (plus GST) (Contract).

2. MSE on 1 December 2016 submitted a payment claim to SSE in the amount of \$3,595,362.04 (inclusive of GST) (Payment Claim).
3. SSE on 14 December 2016 provided a payment schedule to MSE in reply to the Payment Claim indicating that the Payment Claim was invalid and that MSE was indebted to SSE in the amount of -\$1,552,725.26 (inclusive of GST) (Payment Schedule).
4. MSE on 23 December 2016 made an adjudication application to Rialto Adjudications, an authorised nominating authority, for the appointment of an adjudicator (Adjudication Application). The Adjudication Application comprises the documents so described in Annexure A.
5. Rialto Adjudications, by email sent on 28 December 2016, referred the Adjudication Application to me, David Thyer as adjudicator to determine and provided me with a copy of the Adjudication Application.
6. A copy of the Adjudication Application was served on SSE on 3 January 2017.
7. By letter dated 3 January 2017, SSE advised that it objected to my accepting the adjudication on the basis that I did not have jurisdiction as the Payment Claim was invalid.
8. By letter dated 4 January 2017 to both MSE and SSE, I advised the parties that I considered an adjudicator appointed under the Act had the power to deal with the jurisdictional issues raised by SSE as part of his/her determination and that I did not therefore intend to refuse to accept the adjudication on the basis of the objection made by SSE in its letter dated 3 January 2017.
9. By email sent on 5 January 2017, SSE restated its objection to my accepting the adjudication and requested that I attend to the jurisdiction issue not as part of any determination, but as a preliminary threshold matter.
10. By letter dated 6 January 2017 to both MSE and SSE, I advised the parties that I considered the appropriate course of action in the circumstances was to proceed to accept the Adjudication Application and deal with the jurisdictional issues raised by SSE as part of my determination, as preliminary threshold matters and I gave notice of my acceptance to determine the Adjudication Application (Notice of Acceptance). A copy of the Notice of Acceptance was forwarded to the Victorian Building Authority at the same time.
11. SSE on 10 January 2017 lodged an adjudication response (Adjudication Response). The Adjudication Response comprises the documents so described in Annexure A.
12. By letter dated 11 January 2017, I requested MSE provide further

written submissions in response to the submissions made by SSE in the Adjudication Response and for SSE to provide any comments it wished to make in reply to same in accordance with Section 22(5) of the Act. I also requested MSE's agreement to extend the date by which I was required to determine the Adjudication Application to 13 February 2017 in accordance with Section 22(4)(b) of the Act.

13. MSE by email sent on 11 January 2017 advised its agreement to extend the date by which I was required to determine the Adjudication Application to 13 February 2017.
14. MSE on 16 January 2017 provided further written submissions pursuant to Section 22(5) of the Act in response to the request made in my letter dated 11 January 2017 (MSE's Further Submissions). MSE's Further Submissions comprise the documents so described in Annexure A.
15. SSE on 18 January 2017 provided submissions in reply to MSE's Further Submissions (SSE's Reply). SSE's Reply comprises the documents so described in Annexure A.
16. By letter dated 19 January 2017, I requested MSE provide further written submissions in response to the submissions made by SSE relating to jurisdiction in SSE's Reply and for SSE to provide any comments it wished to make in reply to same in accordance with Section 22(5) of the Act.
17. MSE on 20 January 2017 provided further written submissions pursuant to Section 22(5) of the Act in response to the request made in my letter dated 19 January 2017 (MSE's Second Further Submissions). MSE's Second Further Submissions comprise the documents so described in Annexure A.
18. SSE on 23 January 2017 provided submissions in reply to MSE's Second Further Submissions (SSE's Second Reply). SSE's Second Reply comprises the documents so described in Annexure A.

7 Further, the parties agreed, for present purposes concerning the review of the Adjudicator's relevant decision only, that the relevant Reference Date for the purposes of the *SOP Act* is 5 October 2016, the day after MSE completed works and left the Chadstone Shopping Centre retail development site.⁴

8 MSE's grounds for the above relief and remedies it seeks are in essence:

Ground 1 - Finding regarding withdrawal of Payment Claim No 21 dated 20 October 2016

(a) At [183] of the Adjudication Determination, the Adjudicator wrongly

⁴ See Adjudicator's Determination [147].

determined that MSE's 20 October 2016 payment claim was not withdrawn by consent or agreement between the parties.

- (b) MSE contends that it withdrew its Payment Claim dated 20 October 2016 by consent or with the agreement of the first, second and third defendants (SSE), subsequent to SSE inviting MSE to revise or resubmit MSE's Payment Claim No 21 of 20 October 2016.
- (c) MSE contends that the Adjudicator's finding that Payment Claim No 21 dated 20 October 2016 was not withdrawn following an invitation from SSE to resubmit the Payment Claim contained errors of law on the face of the record, and was contrary to the evidence before the Adjudicator and was so unreasonable that no Adjudicator acting properly could have arrived at the result he did.

Ground 2 - Finding that MSE's 20 October 2016 was not unilaterally withdrawn

- (a) MSE contends that at [197] of the Adjudicator's Determination, the Adjudicator wrongfully determined that MSE's 20 October 2016 Payment Claim was not unilaterally withdrawn by MSE.
- (b) MSE contends that the Adjudicator's above finding also contained errors of law on the face of the record, was contrary to the evidence before the Adjudicator and was so unreasonable that no Adjudicator acting properly could have arrived at the result the Adjudicator did.

Ground 3 - Finding that SSE is not estopped from resiling from its assessment that MSE's October 2016 Payment Claim was invalid and an invitation to resubmit MSE's 20 October 2016 Payment Claim "contained the covering letter to SSE's 30 October 2016 payment schedule"

- (a) MSE contends that at [201] to [206] of the Adjudicator's Determination, the Adjudicator wrongfully determined that the essential elements for an estoppel had not been met.
- (b) MSE contends that the Adjudicator's findings in this regard also contained

errors of law on the fact of the record, were contrary to the evidence before the Adjudicator, and were so unreasonable that no Adjudicator acting properly could have arrived at that result.

Ground 4 - Finding that the payment claim is the second payment claim in respect of the same reference date and therefore invalid pursuant to s 14(8) of the *SOP Act*

- (a) MSE contends that at [227] of the Adjudication Determination the Adjudicator wrongfully determined that the Payment Claim was invalid because it contravened s 14(8) of the *SOP Act* in that it amounted to service of more than one payment claim in respect of the same reference date.
- (b) MSE contends that the Adjudicator's finding in this regard amounted to jurisdictional error and/or error of law on the fact of the record.

Ground 5 - Taking into account an irrelevant consideration

- (a) MSE contends that at [157] of the Adjudication Determination, the Adjudicator determined that MSE's 20 October 2016 Payment Claim was a valid payment claim within the meaning of the *SOP Act* despite SSE having taken the position at the relevant time to the contrary effect.
- (b) MSE contends that in this regard the adjudicator has taken into account an irrelevant consideration⁵ amounting to an error of law and/or jurisdictional error.

The Adjudicator's Determination

9 The key parts of the Adjudicator's Determination are contained in the following paragraphs of that Determination referred to below.

10 After summarising the history of the application and identifying the matters and the parties' submissions, the Adjudicator identified that SSE in its Adjudication Response submitted that the MSE Payment Claim dated 1 December 2016, in the

⁵ MSE's Originating Process, [15] and Submissions, 10 May 2017, [29] identify as the matter taken into account which is submitted to be irrelevant.

amount of \$3,595,362.04 is the second payment claim in respect of the same reference date. The previous payment claim having been Payment Claim No 21 made on 20 October 2016.

11 The Adjudicator noted that in SSE's submission the Adjudication Determination was invalid by reason of s 14(8) of the *SOP Act* because the Payment Claim is the second Payment Claim in respect of the same reference date and is the second final payment claim, and for that reason invalid pursuant to s 14(6) of the *SOP Act* (Adjudication Determination [46]).

12 The Adjudicator correctly recognised that he had jurisdiction to determine the above question of his jurisdiction raised by SSE in its Adjudication Response (Adjudication Determination [48]). The parties before me did not argue to the contrary.

13 Insofar as the Adjudicator's Determination was the focus of this proceeding, the following parts were the subject of particular attention:

153. I am satisfied that MSE's 20 October 2016 payment claim sufficiently identified the work the subject of the claim, such that SSE could within reason understand the claim and be able to respond to it. I consider SSE's detailed written response provided with SSE's 31 October 2016 payment schedule to be evidence that SSE understood the claims made by MSE and were able to respond to them.

165. I do not accept MSE's submissions that MSE's 20 October 2016 payment claim was withdrawn by agreement of the parties following an invitation from SSE to resubmit the payment claim.

166. I consider based on a plain and ordinary reading of the covering letter to SSE's 31 October 2016 payment schedule, that it contained no more than an invitation from SSE for MSE to submit a properly formulated payment claim, made pursuant to the Act.

167. I consider that invitation was a qualified invitation. This is, it was qualified by MSE's ability to do so under the Act. This was referenced twice in the covering letter to SSE's 31 October 2016 payment schedule.

168. I do not accept MSE's submissions that the covering letter to SSE's 31 October 2016 payment schedule contained an invitation from SSE for MSE reissue or resubmit MSE's 20 October 2016 payment claim or that it forms the basis of an agreement or consent to withdraw MSE's 20 October 2016 payment claim.

169. The words "withdraw", "reissue" or "resubmit" are not present in the

covering letter to SSE's 31 October 2016 payment schedule and there is no mention of any agreement or consent by SSE for MSE to withdraw MSE's 20 October 2016 payment claim and issue a fresh payment claim.

170. I agree with SSE's submission that there was no offer to reissue or resubmit MSE's 20 October 2016 payment claim in the covering letter to SSE's 31 October 2016 payment schedule.
171. It is simply not open in my view to construe the covering letter to SSE's 31 October 2016 payment schedule in the manner MSE seeks to construe it.
172. Further, there was no subsequent correspondence from MSE which suggests that it had read the covering letter to SSE's 31 October 2016 payment schedule as being an invitation by SSE to reissue or resubmit MSE's 20 October 2016 payment claim. Nor was there any communication or confirmation from MSE that MSE was withdrawing MSE's 20 October 2016 payment claim.
173. If MSE had read the covering letter to SSE's 31 October 2016 payment schedule as being an invitation by SSE to reissue or resubmit MSE's 20 October 2016 payment claim, I would have expected that MSE would have written back to SSE confirming that MSE's 20 October 2016 payment claim was withdrawn and that it would be reissuing or resubmitting a fresh payment claim in its place. The fact that MSE did not do this, I consider to be consistent with the view that MSE was not proceeding on the basis that there was any consent or agreement to the withdrawal of MSE's 20 October 2016 payment claim.
174. I agree with SSE's submissions that even if the covering letter to SSE's 31 October 2016 payment schedule could be construed to be an offer to withdraw and resubmit SSE 20 October 2016 payment claim, that there was no communicated acceptance of that offer from MSE, without which I agree with SSE's submission that there can be no agreement.
175. Further, if MSE by submitting the Payment Claim was intending to withdraw MSE's 20 October 2016 payment claim, I would not have expected MSE's covering letter to the Payment Claim to have included a refusal to concede the validity of the payment schedule and for it to have included a statement to the effect that MSE's 20 October 2016 payment claim was withdrawn, which it did not.
176. I agree with SSE's submissions that if MSE genuinely sought to withdraw MSE's 20 October 2016 payment claim with the submission of the Payment Claim, that it would not have included a refusal to concede the validity of SSE's 31 October 2016 payment schedule in the covering letter, as this would have been superfluous as the payment schedule issued by SSE would have been void and of no effect because of the withdrawal of MSE's 20 October 2016 payment claim and MSE would have stated in the covering letter that it was withdrawing MSE's 20 October 2016 payment claim, which it did not.
177. I consider by MSE's refusal to concede the validity of the payment

schedule, MSE was not conceding that MSE's 20 October 2016 payment claim was invalid, I consider this to also be consistent with the view that MSE was not proceeding on the basis that there was any consent or agreement to the withdrawal of MSE's 20 October 2016 payment claim.

178. Further, if MSE had read the covering letter to SSE's 31 October 2016 payment schedule as being an invitation by SSE to reissue or resubmit MSE's 20 October 2016 payment claim, I would have expected that MSE:

- (a) would have made noticeable changes to the Payment Claim to address the concerns raised by SSE in the covering letter to SSE's 30 October 2016 payment schedule. I agree with SSE's submissions that MSE's 20 October 2016 payment claim and the Payment Claim are almost identical and do not differ in any material sense; and
- (b) would have reissued or resubmitted the payment claim well before MSE did on 1 December 2016, almost one month after MSE received SSE's 31 October 2016 payment schedule.

179. I consider the withdrawal of MSE's 20 October 2016 payment claim was not made clear to SSE and that there was nothing that was said or done by MSE, from which SSE could have understood that MSE was not relying upon MSE's 20 October 2016 payment claim, but was instead relying on the Payment Claim.

181. I find therefore that the covering letter to SSE's 31 October 2016 payment schedule:

- (a) was not an invitation either express or implied from SSE for MSE to revise or resubmit MSE's 20 October 2016 payment claim; and
- (b) did not constitute either consent or an agreement by SSE to the withdrawal of MSE's 20 October 2016 payment claim.

183. I find therefore that MSE's 20 October 2016 payment claim was not withdrawn by consent or agreement between the parties following an invitation from SSE revise or resubmit the payment claim.

191. For the reasons set out above, I have found that:

- (a) the covering letter to SSE's 31 October 2016 payment schedule;
 - (i) was not an invitation either express or implied from SSE for MSE to revise or resubmit MSE's 20 October 2016 payment claim; and
 - (ii) did not constitute either consent or agreement by SSE to the withdrawal of MSE's 20 October 2016 payment claim; and
- (b) MSE's 20 October 2016 payment claim was not withdrawn by

consent or agreement between the parties following an invitation from SSE to revise or resubmit the payment claim.

192. I do not agree therefore with MSE's submission that the facts in this adjudication are distinguishable the facts in Kitchen Xchange. I consider the observations of McDougall J in Kitchen Xchange to be relevant to the issue of unilateral withdrawal of a payment claim and I have had regard to those observations in determining this issue.
193. There is no correspondence from MSE confirming that it would withdraw MSE's 20 October 2016 payment claim and submit a fresh payment claim prior to it serving the Payment Claim.
194. As stated above, if MSE by submitting the Payment Claim was intending to withdraw MSE's 20 October 2016 payment claim, I would not have expected MSE's covering letter to the Payment Claim to have included a refusal to concede the validity of the payment schedule and for it to have included a statement to the effect that MSE's 20 October 2016 payment claim was withdrawn, which it did not.
195. I agree with SSE's submissions that it is clear from MSE's refusal to concede the validity of the payment schedule in the correspondence enclosing the Payment Claim, that MSE was not conceding MSE's 20 October 2016 payment claim was invalid and was not proceeding on the basis that MSE's 20 October 2016 payment claim was withdrawn.
196. As stated above, I consider the withdrawal of MSE's 20 October 2016 payment claim was not made clear to SSE and there was nothing that was said or done by MSE, from which SSE could have understood that MSE was not relying upon MSE's 20 October 2016 payment claim, but was instead relying on the Payment Claim.
198. I find therefore MSE's 20 October 2016 payment claim was not unilaterally withdrawn by MSE.
198. Even if MSE could be said to have impliedly unilaterally withdrawn MSE's 20 October 2016 payment claim when it submitted the Payment Claim, I consider a unilateral withdrawal by MSE of MSE's 20 October 2016 payment claim on 1 December 2016, well after the time has passed for MSE to have MSE's 20 October 2016 payment claim adjudicated under the Act to be too late for MSE to overcome Sections 14(6) and 14(8) of the Act.

Building and Construction Industry Security of Payment Act 2002

14 The SOP Act provides relevantly:

PART 2 – RIGHTS TO PROGRESS PAYMENTS

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.

- (2) In this section, reference date, in relation to a construction contract, means –
 - (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –
 - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –
 - (A) construction work was last carried out under the contract; or
 - (B) related goods and services were last supplied under the contract.

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

12 Due date for payment

- (1) A progress payment under a construction contract becomes due and payable –
 - (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

Division 1 – Payment claims and payment schedules

14 Payment claims

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim –
 - (a) must be in the relevant prescribed form (if any); and

- (b) must contain the prescribed information (if any); and
 - (c) must identify the construction work or related goods and services to which the progress payment relates; and
 - (d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
 - (e) must state that it is made under this Act.
- (3) The claimed amount –
- (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
 - (b) must not include any excluded amount.

Note: Section 10(3) provides that a progress payment must not include an excluded amount.

- (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.
- (6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.
- (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

15 Payment schedules

- (1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule –
- (a) must identify the payment claim to which it relates; and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount); and
 - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
 - (d) must be in the relevant prescribed form (if any); and

- (e) must contain the prescribed information (if any).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If –
 - (a) a claimant serves a payment claim on a respondent; and
 - (b) the respondent does not provide a payment schedule to the claimant –
 - (i) within the time required by the relevant construction contract; or
 - (ii) within 10 business days after the payment claim is served;

whichever time expires earlier –

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

Division 2 – Adjudication of disputes

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
 - (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

PART 4 – MISCELLANEOUS

48 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement, whether in writing or not –
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act –is void.

Plaintiff's submissions

- 15 MSE's submissions are supported by the evidence filed by MSE in the affidavit of Marcellus Harold Delacroix sworn 3 March 2017 and the affidavit of Pei Chin Yau affirmed 3 March 2017.
- 16 The parties accept, for present purposes in the context of this application in relation to a potential interim Adjudication Determination, the form of contract found by the Adjudicator in the Adjudication Determination [80].
- 17 MSE recognises that it carries the onus on its present application to show that the Adjudicator, in reaching his Determination, fell into jurisdictional error and made certain errors of law.
- 18 In paragraph [6]⁶ in MSE's submissions dated 10 May 2017, MSE submits that the Court's jurisdiction to entertain proceedings such as that disclosed on the present application have been explained by the High Court in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*⁷ and by the Court of Appeal of the Supreme Court of Victoria in *Saville v Hallmarc Construction Pty Ltd*.⁸ In both of these decisions, the courts have recognised that findings of fact by an adjudicator, where they amount to jurisdictional facts, will be reviewable by a superior court, and

⁶ See also T28.4-8.

⁷ [2016] HCA 52.

⁸ [2015] VSCA 318.

further that where a jurisdictional error had been exposed which warrants the exercise of the court's discretion, the court may grant relief in the nature of certiorari.

19 Here in my view it is arguable that the Adjudicator's subject findings are jurisdictional facts, and although SSE has taken the position that the findings in question are simply findings of fact, unreviewable in proceedings such as these, it has argued the merits of those findings, and I have entertained broad argument by all parties in relation to such findings.

20 Ultimately, I do not consider it to be necessary to make a finding as to the character of the many facts and findings sought to impugned by MSE, because whether or not particular facts are jurisdictional or otherwise I find no merit in MSE's argument. I do not consider that the Adjudicator has been shown to be in error in respect of any of the grounds of review advanced by MSE in this proceeding.

In relation to Ground 1

21 MSE contends that the Adjudicator wrongly failed to find that MSE's Payment Claim No 21 dated 20 October 2016 was withdrawn by consent or agreement following SSE's invitation to MSE to revise or resubmit that payment claim.

22 MSE submit that a proper construction of Ezra Legal's letter of 31 October 2016⁹ is that it amounted to an invitation to withdraw MSE's 20 October 2016 Payment Claim No 21.

23 MSE also submit that following SSE's invitation to resubmit Payment Claim No 21 dated 20 October 2016, MSE did resubmit Claim No 21, and did so under cover of a letter dated 1 December 2016 stating that MSE had addressed the concerns raised by SSE by incorporating the changes that SSE required of MSE in the resubmitted Claim No 21 dated 1 December 2016.¹⁰

24 SSE submitted that MSE's communication via Ezra Legal's letter dated 31 October

⁹ Affidavit of Marcellus Harold Delacroix, 3 March 2017, Exhibit "MHD-6".

¹⁰ Ibid Exhibit "MHD-7".

2016 amounted to an unqualified offer to MSE which MSE expressly accepted “by issue of the Payment Claim”.¹¹

25 MSE also submit that by necessary implication its 20 October 2016 Payment Claim No 21 was withdrawn, with the effect that only MSE’s Payment Claim dated 1 December 2016 remained “alive”.

26 MSE submitted that it acted upon SSE’s invitation to MSE to resubmit Payment Claim No 21, and in that regard refers in its submissions to Mr Delacroix’ evidence at [24] and [25] of his affidavit purporting to establish the basis upon which MSE acted.

27 However, during the course of argument, Senior Counsel for MSE, quite properly and appropriately conceded that Mr Delacroix’ evidence about MSE’s belief and motivation was not relevant and that MSE’s assertions about the nature and effect of SSE’s communication via Ezra Legal dated 30 October 2016 and MSE’s response should be evaluated objectively on the relevant communications which passed between the parties.¹²

28 MSE also submits that the Adjudicator embarked on the irrelevant task of considering whether MSE’s Payment Claim No 21 dated 20 October 2016 was valid, principally because MSE contends that SSE had asserted before the Adjudicator that that same claim was invalid. MSE contend that the Adjudicator’s enquiry as to whether MSE’s claim of 20 October 2016 was valid or not involved a legal error on the part of the Adjudicator.¹³

29 SME submits on these bases that the Adjudicator’s finding that Payment Claim No 21 dated 20 October 2016 had not been withdrawn in response to SSE’s invitation to resubmit that Payment Claim resulted in an error of law on the face of the record, was contrary to the evidence before the Adjudicator and was so unreasonable that no Adjudicator acting properly could have arrived at that result.

¹¹ SME’s Submission, 10 May 2017, [11].

¹² T10.9; T11.4-9.

¹³ SME’s Submission, 10 May 2017, [11], [28]-[32].

In relation to Ground 2

30 MSE submits that the Adjudicator was wrong at [197] of the Adjudication Determination to find that MSE's 20 October 2016 Payment Claim was not unilaterally withdrawn by MSE.

31 MSE argue in this regard that the Adjudicator failed to properly construe Ezra Legal's letter of 31 October 2016 as an invitation to reissue or resubmit the 20 October 2016 Payment claim. MSE argues that in this regard the Adjudicator wrongly concluded that there was no correspondence from MSE confirming that it would withdraw its 20 October 2016 Payment Claim and resubmit a fresh Payment Claim and further wrongly concluded that MSE's asserted withdrawal of its 20 October 2016 Payment Claim occurred well after the time had passed for MSE to have that claim adjudicated, and that it was too late for MSE to overcome ss 14(6) and 14(8) of the *SOP Act*.

32 MSE contends that the above findings by the Adjudicator were not open to him and contained errors of law on the face of the record, were contrary to the evidence before the Adjudicator and were so unreasonable that no Adjudicator acting properly could have arrived at that result.

In relation to Ground 3

33 MSE contends that the Adjudicator erred in finding that SSE was not estopped from resiling from its assessment that MSE's October 2016 Payment Claim was invalid, and further that it made an invitation to resubmit by its solicitors' letter of 31 October 2016.

34 MSE contend that the Adjudicator's findings and conclusions at [201] to [206] wrongly determined that the essential elements for an estoppel had not been made out against SSE because SSE's solicitors' letter of 31 October 2016 and SSE's payment schedule did not amount to an invitation from SSE to MSE to revise or submit MSE's 20 October 2016 Payment Claim, and SSE had not relevantly resiled from any invitation to MSE to resubmit its Payment Claim No 21.

35 Finally MSE relies upon the Adjudicator's Determination at [203] and [204] where, in relation to the competing arguments about the validity of MSE's Payment Claim dated 20 October 2016, the Adjudicator considered that MSE, irrespective of SSE's position, should itself have been able to ascertain whether its 20 October 2016 Payment Claim was a valid final payment claim.¹⁴

36 Similarly MSE submit that the Adjudicator's above findings contained errors of law on the face of the record, contrary to the evidence before the Adjudicator, and were so unreasonable that no Adjudicator, acting properly could have arrived at those findings.

In relation to Ground 4

37 The fourth ground submitted by MSE is that at [227] of the Adjudication Determination the Adjudicator wrongfully determined that the Payment Claim was invalid because it contravened s 14(8) of the *SOP Act* in that it amounts to service of more than one payment claim in respect of the same reference date.

38 MSE submit that this is incorrect because it effectively withdrew its Payment Claim of 20 October 2016 and resubmitted that claim at the invitation of SSE.

39 Accordingly, MSE submit that the Adjudicator's findings in the above respects are contrary to authoritative judicial statements made in the cases which MSE cite at paragraphs [25] and [26] of its written submission of 10 May 2017.

In relation to Ground 5

40 The fifth ground argued by MSE is that at [157] of the Adjudication Determination, the Adjudicator wrongfully determined that MSE's 20 October 2016 Payment Claim was a valid payment claim despite SSE having submitted to the contrary "at the relevant time".¹⁵

41 MSE also criticises the Adjudicator for the statements and conclusions at [204] of the

¹⁴ MSE's Submission, 10 May 2017, [19.3].

¹⁵ SME's Submission, 10 May 2017, [28].

Adjudication Determination, to the effect that MSE itself should have been able to ascertain whether its 20 October 2016 was a valid final payment claim.

42 MSE submit that this conclusion or finding by the Adjudicator ignores the fact that “contemporaneously” SSE was contending that the MSE payment claim of 20 October 2016 was invalid.

43 MSE submits that the Adjudicator’s above findings fail to take into account binding authority to the effect that whether or not the Payment Claim has been submitted by reference to a particular reference date, even though valid, if the submitting party is invited to resubmit the Claim, the validity of the previously submitted Payment Claim is irrelevant.¹⁶

44 MSE submit on the above basis that the Adjudicator has taken into account an irrelevant consideration amounting to an error of law and/or jurisdictional error namely that the Adjudicator considered that MSE should have been able to work out for itself that its 20 October 2016 Payment Claim was a valid final Payment Claim.¹⁷

The first, second and third defendants’ Submissions

45 SSE submit that the Ezra Legal letter of 31 October 2016 does not support MSE’s contention that, in effect, that letter conveyed an unqualified open ended offer by SSE to MSE to resubmit Payment Claim No 21 of 20 October 2016, at any time and without notification of the withdrawal of that Payment Claim and after the time limit, which was running under the *SOP Act* for an application to adjudication in relation to its Payment Claim under s 18(1) of the *SOP Act*, had expired.

46 SSE submits that the Ezra Legal letter of 31 October 2016 was a request that MSE submit a Payment Claim which complied with the *SOP Act*. SSE also points out that the same invitation had been made in Ezra Legal’s earlier letter of 3 October 2016 in

¹⁶ MSE’s Submission, 10 May 2017, [31].

¹⁷ MSE also referred in Ground 5 to SSE’s alleged contention that Payment Claim No 21 of 20 October 2016 was invalid; see MSE’s Submissions, 10 May 2017, [30].

relation to payment claim No 20.¹⁸

47 SSE point out that MSE did not at any time suggest that it had interpreted Ezra Legal's letter of 3 October 2016 as an offer of the type it now asserts, nor did MSE seek to "re-issue" Payment Claim No 20.

48 SSE submits that the characterisation now sought to be placed upon the letter by MSE cannot be asserted from either the wording of the letter, correspondence and/or the contemporaneous conduct of MSE. SSE submits that the words "reissue" and "resubmit" are not present anywhere in the letter and further MSE does not address that the "invitation" was a qualified invitation. That is, it was qualified by MSE's ability to do so under the *SOP Act*. SSE point out that this was referenced twice in the letter.

49 SSE submits that MSE itself stated in its covering letter accompanying the 1 December 2016 Payment Claim No 21, the following:

Without conceding that the payment schedule received on 2 November 2016 is a valid payment schedule under the [Act] ...

SSE contends that the refusal to concede the validity of the payment schedule is inconsistent with MSE now asserting that there was "agreement" or "consent" to the withdrawal of that payment claim, as was recognised by the Adjudicator at [175]-[177] of the Determination. SSE submits that if the first Payment Claim No 21 had by this time been withdrawn, the letter accompanying the Payment Claim would have had a statement to that effect, instead of the refusal to concede as quoted above. SSE submit that rather, this conduct by MSE is consistent with the findings of the Adjudicator of no withdrawal of Payment Claim No 21.

50 SSE also submits that the findings of fact by the Adjudicator which are sought to be overturned pursuant to MSE's five grounds of review, are all findings properly made on the material before the Adjudicator and are not amendable to judicial review. At all events SSE submit that the Adjudicator was correct in his relevant

¹⁸ Affidavit of Marcellus Harold Delacroix, 3 March 2017, Exhibit "MHD-4".

factual findings, and including in relation his supporting findings.¹⁹

51 SSE submits that now, after the statutory period fixed under s 18(1) of the *SOP Act* has expired, MSE, in effect wishes to amend its hand by seeking to translate SSE's invitation to submit a valid claim under the *SOP Act* into an agreed payment claim withdrawal and reissue arrangement which it will then rely upon to try to bring itself within the statutory time constraints for adjudication and/or justify why it has issued its Payment Claim of 1 December 2016 outside the statutory framework of the *SOP Act*.

52 SSE submits that MSE sought to implement this strategy by issuing its Payment Claim of 1 December 2016 and then attempting to refer the issues in relation to that claim to adjudication on 23 December 2016.

53 SSE submits, identifying a large number of facts and circumstances, that the case of *NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd*²⁰ relied on by MSE was a very different case to the instant facts and circumstances.

54 In relation to Grounds 1 and 2 of MSE's application SSE principally relies on the matters outlined above in its submissions relating to Payment Claim No 21 and the Ezra Legal letter of 31 October 2016.

55 In relation to Grounds 3, 4 and 5 of MSE's application, SSE submits that MSE's:

- (a) failure to communicate any intention to withdraw Payment Claim No 21 or reissue Payment Claim No 21;
- (b) despite a direct and express request by SSE regarding the same; and
- (c) the absence of an invitation as contended for by MSE on a proper reading of the letter; and
- (d) concealment of critical information concerning the nature and character of

¹⁹ SSE's Submission, 24 May 2017, [18].

²⁰ [2013] NSWSC 842.

Payment Claim as a final claim;

(e) construction of the contract and intention to assert a right to extend the time for referral of the dispute it was on notice existed between it and SSE, from 10 November to 23 December 2016,

were all valid grounds upon which no estoppel could be found to exist against SSE's requirement that MSE comply with the requirements of the *SOP Act*.

56 SSE also submits that additionally the Adjudicator at [177] of the Determination has made a finding of fact that MSE did not act on the basis "there was any consent or agreement to the withdrawal" of Payment Claim No 21. SSE submits that this puts to an end any contention of estoppel and this finding of fact cannot be challenged.

57 SSE relies on MSE's failure, at any time, expressly or by implication, to withdraw Payment Claim No 21, the requirements of s 14(8) of the *SOP Act* and a proper application of the relevant authorities by the Adjudicator (see Adjudication Determination [217]-[236]) to establish that as a matter of fact and law, MSE issued a second payment claim in respect of the same reference date and as such, any referral to adjudication of a dispute based upon that second payment claim could not found jurisdiction in an adjudicator to make a determination.

58 SSE also submits that there was no unqualified invitation for MSE to resubmit Payment Claim No 21, MSE never acknowledged any invalidity of the first Payment Claim, Payment Claim No 21, nor withdrew it. In these circumstances, the Adjudicator had no basis upon which to find that the second Payment Claim was not a breach of s 14(8) of the *SOP Act* by MSE.

59 Finally, SSE also submits that MSE's suggested agreement in relation to the "re-issue" of Payment Claim No 21 and the withdrawal of Payment Claim No 21 of 20 October 2017, is unlawful and void by reason of s 14(8) of the *SOP Act*.

Analysis and Conclusions

Grounds 1 and 2

60 MSE's fundamental complaint in these proceedings is that the Adjudicator did not accept MSE's position which is that the 20 October 2016 Payment Claim No 21 was withdrawn by MSE in response to an invitation from SSE to issue a second Payment Claim No 21.

61 MSE in its arguments pointed to what it suggested was evidence that MSE, through its solicitors, Ezra Legal on 31 October 2016 invited MSE to withdraw MSE's 20 October 2016 Payment Claim.

62 MSE argue that Ezra Legal's letter of 31 October 2016 was an invitation amounting to an offer by SSE to MSE to resubmit its Payment Claim No 21 and do so in a way which addressed SSE's concerns outlined in Ezra Legal's letter of 31 October 2016. In my view, however this contention by MSE, is not made out on the facts of the key communications between the parties.

63 The Ezra Legal letter of 31 October 2016 states:

CHADSTONE SHOPPING CENTRE RETAIL DEVELOPMENT ST40 -
PAYMENT CLAIM NO: 21

As you are aware we act on instructions from Samaras Structural Engineers.

We refer to your purported payment claim number 21 issued 20 October 2016 and respond as follows:

1. The document you have issued is not a valid payment claim in that it cannot be readily ascertained from either the cover document or the attached schedule, exactly what amounts are said to be claimed in respect of the contract sum, what amounts have already been paid in respect of the contract sum and the specific amount which is sought in respect of the contract sum in the purported claim.
2. Furthermore, in relation to variations the purported claim does not identify those amounts claimed in respect of variations, which are sought in this document as opposed to having been sought and or paid in previous claims.
3. The complexity and difficulty of identifying precisely what amounts are specifically sought in the purported claim numbered 21 against individual items, (as opposed to a mere global sum claim), renders the purported payment claim invalid, both under the *Building and Construction Industry Security of Payments Act 2002 (Victoria)* ("the Act")

and by reference to the relevant authorities which have addressed this dilemma.

4. Accordingly, despite the insertion of formulaic words on the face of the document purporting to engender the jurisdiction of the *Building and Construction Industry Security of Payments Act 2002 (Victoria)*, the document provided does not bring itself within that Act.
5. We invite you to submit a properly formulated payment claim which:
 - a. identifies the contract sum sought to be paid by our client, along with reasons and or justification for the claimed amount;
 - b. Identifies the variation claims now sought, and specific amounts in respect of variation claims for which you make application and assert is payable by our client, along with an explanation/justification, with adequate substantiation for each such claimed amount.
6. Upon submission of a properly articulated claim(s), if made pursuant to the Act, the process provided for thereunder can commence and our client will accordingly respond to such properly formulated claim with a payment schedule in response to that claim.
7. In the interim, and without derogating from our position vis a vis the purported payment claim stated above, by reference to the purported payment claim schedule number 21 our client now provides herewith its detailed written response in which it clearly sets out those amounts which our client is prepared to pay MSE, those items and amounts previously claimed by MSE which our client rejects, along with detailed reasoning and substantiation of the reasons for which it rejects those claims and has identified amounts which it considers are presently payable to you. To the extent that the purported payment claim 21 is deemed to be a valid payment claim then this reply is provided as a payment schedule pursuant to the Act.
8. As you will note our client's assessment of the net position between itself and MSE is that it has overpaid MSE substantial amounts and is entitled to recover sums from you.

We look forward to receipt of a properly formulated valid claim made under the Act.

Yours faithfully,

EZRA LEGAL

64 I do not consider that Ezra Legal's letter of 31 October 2016, reasonably construed, conveys:

- (a) an unqualified invitation by SSE to MSE to withdraw MSE's 20 October 2016 payment claim;

- (b) an offer by SSE to agree with MSE that it withdraw Payment Claim No 21 and re-submit that claim;
- (c) an offer by SSE to consent to MSE's withdrawal of its Payment Claim No 21 of 20 October 2016;
- (d) an other relevant offer.

65 Ezra Legal's communication of 31 October 2016 (in the parts underlined above) in fact conveyed to MSE that:

- (a) MSE's purported Claim No 21 of 20 October 2016 was not a valid claim;
- (b) MSE's purported Claim No 21 was not a properly articulated claim under the *SOP Act*;
- (c) SSE invited MSE to submit a properly formulated payment claim, specifying generally what MSE should identify;
- (d) if MSE submitted a compliant Payment Claim under the relevant Act, the claim process under the *SOP Act* would commence and SSE would then respond with a payment schedule;
- (e) in the interim, while maintaining SSE's criticism of Payment Claim No 21, SSE provided certain responses to MSE's claims setting out amounts which SSE would be prepared to pay MSE, and which MSE claims SSE rejected and SSE's reasons for those rejections. SSE also identified amounts it claimed were payable to it by MSE;
- (f) to the extent that Payment Claim No 21 was deemed to be a valid payment claim, SSE's reply of 31 October 2016 was provided as its payment schedule under the *SOP Act*;
- (g) SSE looked forward to receiving a properly formulated valid claim made under the *SOP Act*.

66 In my view, Ezra Legal's letter of 31 October 2016 was not an "unqualified" invitation or "unqualified offer" to MSE to withdraw its Payment Claim of 20 October 2016. Nor did that letter from Ezra Legal in my view offer, on behalf of SSE, that it would agree to a resubmitted payment claim from MSE and in that event accept or consent to MSE's Payment Claim of 20 October 2016 being withdrawn. Ezra Legal's letter of 31 October 2016 does not say so.

67 In substance and detail Ezra Legal's said letter was an expressly qualified invitation to MSE to submit a compliant Payment Claim, effectively reserving SSE's position if Payment Claim No 21 was deemed to be a valid payment claim. That letter also more than once reminded MSE that the relevant Act and its requirements must be considered and complied with.

68 Furthermore, subsequent to the Ezra Legal letter of 31 October 2016, MSE did not relevantly communicate with SSE until it submitted its Payment Claim dated 1 December 2016. In my view at no time did MSE accept what it asserts was SSE's "unqualified offer" of 31 October 2016.

69 Between the date of the Ezra Legal letter of 31 October 2016 and MSE's subsequent Payment Claim of 1 December 2016, there appears to be no correspondence or communication from MSE to SSE seeking to confirm what MSE now contends was an unqualified offer or invitation conveyed by Ezra Legal's letter of 31 October 2016 to the effect argued by MSE in its submission in this proceeding.

70 Furthermore, at no time did MSE communicate that it was withdrawing or abandoning its payment claim dated 20 October 2016.

71 Although MSE now argues that its Payment Claim No 21 dated 1 December 2016 was MSE's acceptance of the offer asserted to be contained in Ezra Legal's letter of 31 October 2016, in my view there is no basis established for such a conclusion.

72 In my view it is not probative or at all sufficient that MSE's Payment Claim of 1

December 2016²¹ was accompanied by a covering communication which referred to that Payment Claim as “resubmitted Payment Claim No 21” or that the Schedules to that Payment Claim refer to “Payment Claim Schedule No 21 updated” or that the Payment Claim revises various of the sums claimed by MSE.

73 Furthermore, in the letter covering MSE’s Payment Claim of 1 December 2016²² MSE sought in effect to maintain the validity of its early Payment Claim No 21 of 20 October 2016, and in effect to preserve its arguable entitlements under the “payment schedule” issued by SSE and referred to in [7] of Ezra Legal’s letter of 31 October 2016. MSE sought to do so by adding to its 1 December 2016 Payment claim:

without conceding that the payment schedule received on 2 November 2016 is a valid payment schedule under the [Act] ...²³

74 In my view, at the date of issue of MSE’s Payment Claim No 21 dated 1 December 2016, MSE’s Payment Claim dated 20 October 2016 remained extant.

75 Furthermore, for the reasons I have referred to above, I am unpersuaded that the Adjudicator fell into jurisdictional error, or made any error of law in relation to the Adjudicator’s findings in the Adjudication Determination at [166]-[169], [172], [178]-[181], [183], [193]-[197], [201]-[206] and [227].²⁴

76 Further, I consider that it was both sufficiently in issue between the parties before the Adjudicator and open to the Adjudicator to find as he did at [157] of his Adjudication, that MSE’s 20 October 2016 Payment Claim No 21 was a valid payment claim within the meaning of the *SOP Act*.

77 The validity of MSE’s Payment Claim of 20 October 2016 was from a point as early of 31 October 2016 when SSE, via Ezra Legal’s letter of that date, qualified and reserved its position as to the validity of that payment claim, a matter in issue and an issue which it was wholly legitimate for the Adjudicator to determine, including because

²¹ Affidavit of Marcellus Harold Delacroix, 3 March 2017, Exhibit “MHD-7”.

²² Ibid.

²³ Ezra Legal’s letter of 31 October 2017 at [7] recognised MSE’s 20 October 2017 payment claim may be deemed to be valid, and thereby qualified SSE’s position.

²⁴ Including paragraphs identified in MSE’s Originating Process.

of the context in which the Adjudicator was called upon to consider and decide, for the limited purposes of his Adjudication, which, if any, of the October and December 2016 MSE Payment Claims were extant.

Grounds 3, 4 and 5

78 In relation to Grounds 3, 4 and 5, Senior Counsel for MSE in substance acknowledged in argument that MSE's claims in Ground 3 were subsidiary to Grounds 1 and 2 and in reality dependent on MSE's succeeding on Grounds 1 and 2.²⁵

79 Similarly in relation to Ground 4 and 5 it was acknowledged by MSE that Ground 4 was subsidiary to Grounds 1 and 2 and would not be of assistance to MSE if Grounds 1 and 2 were unsuccessful on MSE's part.²⁶

80 Likewise, in substance, Senior Counsel for MSE acknowledged that if the Adjudicator's finding about the validity of the 20 October 2016 Payment Claim and his finding that the 1 December 2016 payment claim was the second payment claim to be served by MSE within three months of the reference date, then Ground 5 could not avail MSE.

81 Further, in relation to Grounds 3, 4 and 5, I consider that MSE has, in any event, no basis for relief. In relation to Grounds 3 and 4 this is because the Adjudicator found that MSE did not have the benefit of the asserted agreement with SSE in respect of the subject Payment Claims (both numbered 21) and MSE did not act on the basis of any such agreement or consent from SSE, and further because the Adjudicator found that Payment Claim No 21 of 20 October 2016 remained on foot and therefore s 14(8) (and s 14(6)) of the *SOP Act* were engaged. Therefore the Payment Claim of 1 December 2016 could not support the Adjudication. The above finding rendered Grounds 4 and 5 unarguable.

82 Finally, as to Ground 5, because the contentions in Grounds 1 and 2 must fail for the

²⁵ T53.9-14.

²⁶ T53.24-T54.5.

reasons I have explained, and because MSE at no time acknowledged the invalidity of its 20 October 2016 Payment Claim, or withdraw that claim, the Adjudicator correctly found that the 1 December 2016 Payment Claim was in breach of s 14(8) of the *SOP Act*. Therefore, the Adjudicator's view that MSE should have been able to work out for itself that MSE's 20 October 2016 payment claim was a valid final payment claim, is not material and SSE's qualified statements as to the invalidity of that payment claim could not have amounted to a material irrelevant consideration.²⁷

83 In reaching the conclusions I have in this judicial review, I consider it to be unnecessary to deal specifically with the authorities cited to me in argument. That is because each of the cited decisions said to be relevant to the dispositive issues in this proceeding, turned on its own facts,²⁸ and because I consider that this proceeding turns on its own particular facts addressed herein.

84 I also consider that it is unnecessary to make any findings I relation to SSE's contentions as to the application of s 48(2)(a) of the *SOP Act* given that I have rejected MSE's assertion that any relevant agreement existed which might be said to exclude modify or restrict the application of the *SOP Act*.

Decision

85 For the above reasons the Adjudicator has not been shown to have erred in any relevant respect in finding that the Payment Claim dated 1 December 2016, contravened s 14(8) and also s 14(6) of the *SOP Act*, and that therefore the Adjudicator did not have jurisdiction under the *SOP Act* to determine any dispute in respect of the Payment Claim.

86 Accordingly I dismiss MSE's Originating Process dated 3 March 2017.

87 Given my conclusions and findings above, no question of remitter arises.

²⁷ MSE reserved its position as to the validity of its 20 October 2016 payment claim as explained in [73] of these Reasons.

²⁸ This was acknowledged by Senior Counsel for MSE (T52.29-31).