

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

Not Restricted

S ECI 2019 4246

1155 NEPEAN HIGHWAY PTY LTD (ACN 630 087 428)

Plaintiff

v

PROMAX BUILDINGS PTY LTD (ACN 630 303 801) & ANOR

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 20 September 2019, 14 and 18 October 2019 and 5 March 2020
DATE OF JUDGMENT: 7 July 2020
CASE MAY BE CITED AS: 1155 Nepean Hwy v Promax Buildings
MEDIUM NEUTRAL CITATION: [2020] VSC 398

ADMINISTRATIVE LAW – Judicial review – Injunction enjoining the Adjudicator from making any adjudication determination – Injunction enjoining first defendant from making any further adjudication application – Compliance with service requirements of s 18(5) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether service required as soon as practicable or within a reasonable time under s 18(5) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Validity of new adjudication application under s 28 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Time for service of adjudication application – *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 18(5), 20 , 22, 28.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M Robins QC with Mr A Rollnik	Arnold Bloch Leibler
For the First Defendant	Mr J Twigg QC with Ms J Gregory	MinterEllison

HIS HONOUR:

General summary of overall background

- 1 In July 2019 the first defendant Promax Buildings Pty Ltd (Promax) issued a payment claim pursuant to s 14 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act) in the sum of approximately \$2 million (July 2019 Payment Claim) in relation to construction work and related goods and services to be provided pursuant to a Contract entered into on 2 January 2019 (Contract) between Promax and 1155 Nepean Highway Pty Ltd (plaintiff) in relation to building works at 1155–1157 Nepean Highway, Highett in the State of Victoria (Highett Project). No payment schedule was provided by the plaintiff, pursuant to s 15 of the SoP Act, in respect of Promax’s July 2019 Payment Claim.
- 2 Promax has not been paid any of the sum which formed part of the July 2019 Payment Claim.
- 3 On 15 August 2019, Promax filed with the authorised nominating authority, and on 16 August 2019 served on the plaintiff, its adjudication application dated 15 August 2019 (August 2019 Adjudication Application), pursuant to s 18 of the SoP Act in relation to the outstanding July 2019 Payment Claim.
- 4 The plaintiff asserts that Promax has failed to compliantly serve its August 2019 Adjudication Application pursuant to s 18(5) of the SoP Act.
- 5 On 23 August 2019 Promax sought to serve a further copy of the August 2019 Adjudication Application on the plaintiff. Promax ultimately withdrew the August 2019 Adjudication Application on 5 September 2019.
- 6 On 10 September 2019, pursuant to s 28(2)(b) of the SoP Act, Promax made a new Adjudication Application in relation to its July 2019 Payment Claim and served the plaintiff with that adjudication application on 11 September 2019 (September 2019 Adjudication Application).

7 The second defendant, Mr John McMullan (Adjudicator),¹ delivered his Adjudication Determination dated 29 September 2019 (September 2019 Adjudication Determination) to the parties on 30 September 2019.

8 The plaintiff continues to assert that the adjudication applications are invalid and ineffectual and as a consequence that the September 2019 Adjudication Determination is void and should be quashed because:

- (a) the August 2019 Adjudication Application was not served on the plaintiff pursuant to s 18(5) of the SoP Act 'as soon as practicable';
- (b) as a result the August 2019 Adjudication Application was not a valid application;
- (c) further consequently because no valid adjudication application existed, Promax's September 2019 Adjudication Application pursuant to s 28(2) of the SoP Act was also invalid and ineffectual; and
- (d) as a consequence of the above, the Adjudicator lacked jurisdiction resulting in his September 2019 Adjudication Determination being invalid and void and should be quashed.

9 On 6 February 2020, Promax issued a payment claim for further payment for work done in connection with the Highett Project (February 2020 Payment Claim).

10 By Summons dated 3 March 2020 the plaintiff also sought injunctive relief against Promax to enjoin it from making an adjudication application to any authorised nominating authority under the SoP Act in respect of the February 2020 Payment Claim.

¹ By letter dated 18 September 2019 the second defendant advised the Court he does not intend to take any active role in the proceeding and will abide the decision of the Court, save for any costs order being considered against him.

The Plaintiff's proceeding

- 11 By Originating Motion and Summons dated 17 September 2019, the plaintiff sought an injunction restraining:
- (a) the Adjudicator from making an adjudication determination pursuant to s 28 of the SoP Act in connection with the September 2019 Adjudication Application in relation to the Highett Project;
 - (b) Promax from making any further adjudication application under s 28 of the SoP Act in relation to the Highett Project, and
 - (c) associated and ancillary orders.
- 12 Before the Originating Motion and Summons of 17 September 2019 came on for hearing the Adjudicator delivered his September 2019 Adjudication Determination on 30 September 2019. That Adjudication Determination was in Promax's favour in the amount of \$2,041,582.15 (incl GST) in relation to Promax's July 2019 Payment Claim issued on 15 July 2019 for works undertaken by it in connection with the Highett Project.
- 13 The Originating Motion and Summons came on for a brief hearing on 20 September 2019² wherein parties agreed to adjourn it to 30 September 2019. Orders and undertakings were made including:
- (a) the proceeding be adjourned for hearing on 30 September 2019 at 10.30am on an estimate of one day;
 - (b) by 4.00pm on 24 September 2019, the parties file and serve any further affidavits; and
 - (c) by 4.00pm on 26 September 2019, the parties file any further written submissions.

² T1-14 (20.9.2019).

- 14 The parties sought further orders by consent on 26 September 2019 adjourning the hearing to 3 October 2019.
- 15 On 1 October 2019, the plaintiff filed and served an Amended Originating Motion and Amended Summons seeking relief against Promax and the Adjudicator in relation to the September 2019 Adjudication Determination in the following terms:
- (a) a declaration that the September 2019 Adjudication Determination was tainted by jurisdictional error and is void in respect of specified paragraphs and referenced items;
 - (b) interlocutory and final injunctions restraining Promax from enforcing the September 2019 Adjudication Determination without severing the void findings and amounts;
 - (c) an order that the September 2019 Adjudication Determination is quashed in respect of the matters set out in the specified paragraphs and referenced items.

Plaintiff's Amended Originating Motion dated 1 October 2019

- 16 By its Amended Originating Motion of 1 October 2019 the plaintiff seeks:
- A. Further or alternatively to the relief claimed in paragraphs [1] to [6] below, on 30 September 2019 the second defendant delivered his purported Adjudication Determination (the purported Adjudication Determination).
 - B. Insofar as the purported Adjudication Determination expressed a conclusion or findings as to the jurisdictional matters raised by the plaintiff under sections 18 and 28 of the Act, then such conclusion or findings are in no way binding on this honourable Court or the parties and are of no effect.
 - C. Contrary to sections 11 and 23(4) of the Act, the 'findings' set out in paragraph [103] reference items [18.1] through to [18.9] of the purported Adjudication Determination fail to demonstrate any process of assessment by the second defendant of the value of the claim consistent with the Act or the Contract, and the process of reasoning followed by him, as disclosed in the purported Adjudication Determination, is not countenanced by the Act in that:
 - (i) The second defendant in every instance merely adopted the amount claimed by the first defendant in the purported trade

- breakdown and budget stated in the payment claim;
- (ii) The second defendant erroneously assumed, without any basis in fact or law that the purported 'trade breakdown' or 'budget' referred to in the payment claim somehow formed part of the Contract between the plaintiff and the first defendant, whereas the purported 'trade breakdown' or 'budget' were at best subjective internal working by the first defendant which were never adopted or agreed to by the plaintiff, nor referred to in the Contract;
 - (iii) The second defendant failed to undertake any independent assessment or valuation of the work, rates and percentages asserted by the first defendant in the purported 'trade breakdown' or 'budget' in respect of paragraph [103] reference items [18.1] through to [18.9] as required by sections 11 and 23(4) of the Act; and
 - (iv) The second defendant gave undue weight to the irrelevant fact that the plaintiff had failed to serve a payment schedule expressly disputing the said items, which fact did not relieve him of his obligation to undertake a proper determination of the value of the works claimed by the first defendant consistent with sections 11 and 23(4) of the Act.

- D. By reason of the matters in paragraph C above, the purported Adjudication Determination in respect of paragraph [103] reference items [18.1] through to [18.9] was tainted with jurisdictional error and is void to the extent of each of those items and the sums referable to those items ought to be severed from it.
- E. By reason of the matters in paragraph D above, the finding in paragraph [127] of the purported Adjudication Determination is tainted by jurisdictional error and is void, or alternatively constitutes an error of law on the face of the record.

THE PLAINTIFF SEEKS the following relief or remedy:

1. Dispense with the requirements of Rules 5.03(1) and 8.02.
2. The Plaintiff is authorised to commenced the proceeding by Originating Motion in Form 5C.
3. An injunction, both interlocutory and final, enjoining the second defendant from making any adjudication determination pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (Act) in connection with the adjudication application, dated 10 September 2019, made by the first defendant against the plaintiff under s 28 of the Act, in connection with the works carried out by the first defendant at 1155-1157 Nepean Highway, Highett Vic 3190 (Highett Project).
4. Further, an injunction both interlocutory and final, enjoining the first defendant from making any further adjudication application under s 28 of the Act in connection with the adjudication application, purportedly made by the first defendant in relation to the Highett Project, that was uploaded to Adjudicate Today's online lockbox

facility on 15 August 2019 (15 August Adjudication Application).

5. A declaration that the 15 August Adjudication Application is void and unlawful.
 6. Further or alternatively, a declaration that the first defendant is not entitled at law or under the Act to make any further adjudication application under s 28 of the Act, in connection with the 15 August Adjudication Application.
 - 6A. A declaration that the purported Adjudication Determination delivered on 30 September 2019 by the second defendant was tainted by jurisdictional error and is void in respect of:
 - (i) paragraph [103] reference item [18.1] through to [18.9];
 - (ii) paragraphs [105]-[109] to the extent that those paragraphs incorporate the sums set out in paragraph [103] reference items [18.1] through to [18.9]; and
 - (iii) paragraph [127] and the purported cost order made against the plaintiff.
 - 6B. Interlocutory and final injunctions restraining the first defendant from taking any step to enforce the purported Adjudication Determination delivered on 30 September 2019 by the second defendant without severing therefrom the void findings and amounts set out in paragraph [103] reference items [18.1] through to [18.9] and/or paragraph [127] thereof.
 - 6C. An order that the purported Adjudication Determination delivered on 30 September 2019 by the second defendant is quashed in respect of the matters set out in:
 - (i) paragraph [103] reference item [18.1] through to [18.9];
 - (ii) paragraphs [105]-[109] to the extent that those paragraphs incorporate the sums set out in paragraphs [103] reference items [18.1] through to [18.9]; and
 - (iii) paragraph [127] and the purported cost order made against the plaintiff.
 7. Costs (against the first defendant only).
 8. Such further or other orders as to this Honourable Court deems necessary or appropriate.
- 17 On 2 October 2019, the plaintiff paid \$2,041,582.15 into its solicitors controlled money account in accordance with an undertaking of Promax in the following terms:

By its Counsel, the first defendant undertakes that subject to the payment by the plaintiff into a controlled-interest-bearing account of any sum determined by the second defendant, upon his Adjudication Determination, to be due, and any costs determined by the second defendant, [Promax] will not take any step to enforce any such Determination until the hearing and determination of this proceeding. (Undertaking)

- 18 On 2 October 2019, the parties sought a further adjournment of the hearing of the plaintiff's Amended Summons dated 1 October 2019 to 14 October 2019.
- 19 On 6 February 2020, Promax issued the February 2020 Payment Claim for further payment for work done in connection with the Highett Project.
- 20 The plaintiff contends that the work identified and the amounts claimed in the February 2020 Payment Claim are substantially the same as the work described and the amounts claimed in the July 2019 Payment Claim. The plaintiff submits that the amount of new work claimed in the February 2020 Payment Claim is \$70,308.55 (excl GST) for 'Preliminaries', 'Structural Engineering Fees' and 'Nature Strip Maintenance'.
- 21 On 20 February 2020, the plaintiff issued a payment schedule to Promax pursuant to s 15 of the SoP Act in relation to the February 2020 Payment Claim, with a scheduled amount of \$Nil.
- 22 By Summons dated 3 March 2020 the plaintiff also sought injunctive relief against Promax to enjoin it from making an adjudication application to any authorised nominating authority under the SoP Act in connection with the February 2020 Payment Claim.
- 23 On 5 March 2020, at the hearing of the plaintiff's Summons dated 3 March 2020, a holding position was agreed between the plaintiff and Promax in relation to the February 2020 Payment Claim. That agreement is reflected in consent Orders which were made on 5 March 2020.³

Relief ultimately sought by the plaintiff

- 24 As a result of the September 2019 Adjudication Determination, the plaintiff no longer seeks interlocutory relief to restrain the Adjudicator. The plaintiff does however continue to seek orders setting aside and quashing the September 2019

³ Reasons, [59].

Adjudication Determination, or alternatively Items [18.1] to [18.9] of paragraph [103] of the Adjudication Determination which deals with the Adjudicator's valuations.

25 Furthermore, the plaintiff's claim that the August 2019 Adjudication Application was void and unlawful on the basis of non-compliant service under s 18(5) of the SoP Act and the plaintiff's related claims that as a result service of the August 2019 Adjudication Application on 23 August 2019 and the service by Promax of the new September 2019 Adjudication Application were also ineffective and void because the August 2019 Adjudication Application was not valid, are all pursued by the plaintiff.

Detailed Factual background

26 The plaintiff is a property development company incorporated for the purposes of developing land,⁴ and Promax is a large scale building company.⁵

27 The Adjudicator is nominated by Rialto Adjudications Pty Ltd (Rialto Adjudications), an authorised nominating authority under the SoP Act.

28 Prior to January 2019 the plaintiff (or its related company LDS Lifestyle Pty Ltd) and Promax (or related companies), had previously entered into contracts in relation to construction projects at 164-170 Manningham Road, Bulleen (Bulleen Project) and 135-137 Neerim Road, Glen Huntly (Glen Huntly Project) both in the State of Victoria.⁶

29 On 2 January 2019, the plaintiff and Promax entered the Contract, pursuant to which the plaintiff engaged Promax to carry out residential building works at the Highbury Project.

30 On 15 July 2019, Promax served the July 2019 Payment Claim on the plaintiff. The plaintiff failed to serve a payment schedule in respect of the July 2019 Payment

⁴ See Affidavit of Andrew Blyth, 17 September 2019 (First Blyth Affidavit), [4].

⁵ Ibid [5].

⁶ Ibid [7] and [8].

Claim, before the due date of 29 July 2019.⁷ As a result of that failure, pursuant to s 15(4) of the SoP Act, the plaintiff became liable to pay the claimed amount of \$2,017,382.15.⁸ The plaintiff also thereafter failed to pay the whole or any part of the claimed amount by the due date for payment, which was 5 August 2019.⁹

31 As a result of the above, Promax became entitled to either recover the unpaid amount as a debt due in a court of competent jurisdiction or make an adjudication application under the SoP Act.¹⁰ Promax adopted the latter course and made an adjudication application pursuant to s 18 of the SoP Act.

32 On 7 August 2019, Promax notified the plaintiff of its intention to apply for adjudication in respect of the July 2019 Payment Claim¹¹ and, pursuant to s 18(2)(b) and s 18(3)(e) of the SoP Act, gave the plaintiff an opportunity to provide a payment schedule to Promax. The plaintiff did not provide a payment schedule as provided for under s 18(2)(b) of the SoP Act.

33 On 15 August 2019, the solicitors for Promax (MinterEllison¹²) made an adjudication application to an authorised nominating authority, Adjudicate Today Pty Ltd (Adjudicate Today):

(a) in respect of the Highett Project, by the August 2019 Adjudication Application;

⁷ This date is 10 business days after the payment claim was issued as per s 15(4)(b)(ii) of the SoP Act and clause N5.1 of the Contract dated 2 January 2019. A copy of the contract is included as Exhibit 'AIB-6' to the First Blyth Affidavit.

⁸ SoP Act, ss 16(1)(a) and 18(1)(b).

⁹ Clause N9.1 of the Contract dated 2 January 2019. See First Blyth Affidavit, Exhibit 'AIB-6' and s 12(1) of the SoP Act.

¹⁰ SoP Act, s 16(2)(a).

¹¹ Affidavit of Andrew Blyth, 19 September 2019 (Supplemental Blyth Affidavit), [3], Exhibit 'AIB-27'.

¹² MinterEllison acts for Promax and two of its related entities in relation to three separate construction projects. More specifically, MinterEllison acts for:

- (a) Promax in relation to the construction of a building in Highett undertaken for the plaintiff (Highett Project);
- (b) Promax Developments Pty Ltd in relation to the construction of a building in Glen Huntly undertaken for LDS Lifestyle Pty Ltd (Glen Huntly Project); and
- (c) Promax Development and Construction Pty Ltd in relation to the construction of a building in Bulleen undertaken for LDS Lifestyle Pty Ltd (Bulleen Project).

- (b) for Promax Developments Pty Ltd in relation to the Glen Huntly Project (Glen Huntly Adjudication Application); and
- (c) for Promax Development and Construction Pty Ltd in relation to the Bulleen Project (Bulleen Adjudication Application).¹³

34 Each of the three applications was made by electronically uploading the application documents to an authorised lockbox facility accessible from the website of Adjudicate Today, the authorised nominating authority pursuant to s 4 of the SoP Act.¹⁴

35 On 16 August 2019, MinterEllison sought to serve the August 2019 Adjudication Application on the plaintiff, together with the application materials for the Glen Huntly Project and Bulleen Project.¹⁵

36 An employee of LDS Lifestyle Pty Ltd accepted service of the materials for all three applications and counter-signed the covering letters attached to those applications.¹⁶

37 The plaintiff and LDS Lifestyle Pty Ltd, the proprietor of the Glen Huntly Project, are related entities and share a registered office and principal place of business. The plaintiff describes LDS Lifestyle Pty Ltd as the 'owner of the Glen Huntly Project'.¹⁷ LDS Lifestyle Pty Ltd is also the proprietor of the Bulleen Project.

38 Seven folders of material were provided by Promax to the plaintiff on 16 August 2019. Two folders related to the August 2019 Adjudication Application in relation to the Highett Project.¹⁸ Two Highett Project documents were incorrectly included in

¹³ The application for the Highett Project was made at 10:59pm and the other two applications were uploaded around this time. See Affidavit of Duncan MacKenzie, 19 September 2019 (MacKenzie Affidavit), Exhibit 'DJM-04' (Highett Project), Exhibit 'DJM-02' (Glen Huntly Project) and Exhibit 'DJM-07' (Bulleen Project).

¹⁴ MacKenzie Affidavit, [5]-[17].

¹⁵ First Blyth Affidavit, [13] and [17]-[22].

¹⁶ MacKenzie Affidavit, [31], Exhibit 'DJM-12'; First Blyth Affidavit, Exhibit 'AIB-13', Statutory Declaration of Duncan MacKenzie, 22 August 2019, (MacKenzie Statutory Declaration) [8.1]-[8.3]. The statutory declaration appears on pages [13]-[18] of the exhibit.

¹⁷ T12.24-29 (14.10.2019); refer also First Blyth Affidavit, [8], Plaintiff Submissions, 19 September 2019, [6] and MacKenzie Affidavit, [14]/

¹⁸ First Blyth Affidavit, Exhibit 'AIB-9'.

the Glen Huntly Adjudication Application folders (a one page covering letter from MinterEllison and a one page Adjudicate Today application form). A Statutory Declaration relating to the Highett Project was also included in the Bulleen Project materials.¹⁹

39 The seven folders provided by Promax on 16 August 2019 were in hard copy,²⁰ together with an index²¹ and the Highett Project documents.²² Further Promax asserts that those materials could have been sorted into a single bundled folder by moving three documents.²³

40 On 17 August 2019, the plaintiff provided its solicitors (Arnold Bloch Leibler) with all documents which comprised the August 2019 Adjudication Application.²⁴

41 On 20 August 2019, Adjudicate Today communicated with both Promax and the plaintiff advising that Mr Kevin Moore (Adjudicator Moore) had accepted the August 2019 Adjudication Application as Adjudicator, and attached a notice of the Adjudicator's acceptance.²⁵

42 On 20 August 2019 Arnold Bloch Leibler also wrote to Adjudicator Moore, copying Promax into that communication, advising among other things that the August 2019 Adjudication Application served on it by Promax did not 'identify the payment claim ... to which it relates', and accordingly was not an adjudication application under the SoP Act. The plaintiff advised that it was therefore of the view that the Adjudicator had no jurisdiction to hear and determine the matter.²⁶

¹⁹ Statutory Declaration of Ozan Girgin, 15 August 2019; Exhibit 'AIB-3', exhibited at [7(b)] of Exhibit 'DJM-11' (Statutory Declaration of Andrew Blyth, 23 August 2019), in turn exhibited at Appendix A to the MacKenzie Affidavit.

²⁰ First Blyth Affidavit, [13].

²¹ A copy of the index is included as Exhibit 'AIB-10'.

²² An additional index of documents was provided by email from MinterEllison to ABL dated 21 August 2019. Exhibit 'DJM-02' MacKenzie Statutory Declaration, included in Exhibit 'AIB-13' to the First Blyth Affidavit).

²³ First Blyth Affidavit, Exhibit 'AIB-13', MacKenzie Statutory Declaration, [3.3], [4.3] and [5.3]. The statutory declaration appears on pages 13 to 18 of the exhibit.

²⁴ First Blyth Affidavit, [14].

²⁵ Ibid Exhibit 'AIB-11'.

²⁶ Ibid [25]; Plaintiff Submissions, 19 September 2019, [10].

- 43 On 21 August 2019, Arnold Bloch Leibler notified MinterEllison that it:²⁷
- (a) acted for the plaintiff in respect of the August 2019 Adjudication Application and for LDS Lifestyle Pty Ltd in relation to the Glen Huntly Adjudication Application and the Bulleen Adjudication Application; and
 - (b) had received copies of all three of the cover letters, Adjudicate Today application forms and submissions for each of the three applications.
- 44 On 21 August 2019, MinterEllison responded providing an index of the documents comprising the -August 2019 Adjudication Application to Arnold Bloch Leibler.²⁸
- 45 On 23 August 2019, MinterEllison served a further copy of the August 2019 Adjudication Application on the plaintiff.²⁹
- 46 Adjudicator Moore did not seek an extension of time from Promax within which to determine the application.³⁰ Section 22(4) of the SoP Act, required that Adjudicator Moore do so on or before 3 September 2019 (10 business days after 20 August 2019).
- 47 On 4 September 2019 Adjudicate Today sent an email to the parties advising that Adjudicator Moore had not made an adjudication determination within the time prescribed by the SoP Act.³¹ That email also stated as follows:

Dear Sirs

We refer to the above mentioned adjudication application and confirm that the adjudicator, Mr Kevin Moore, has not made a determination within the timeframe stipulated in s.28(1)(b) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the Act).

We confirm that the file is now closed with no fees incurred.

Without giving legal advice, we refer the claimant to section 28 of the Act with regard to making a new application under certain circumstances.

²⁷ MacKenzie Affidavit, [20] and Exhibit 'DJM-08'.

²⁸ First Blyth Affidavit, Exhibit 'AIB-13', email from Peter Wood to John Mengolian on 21 August 2019 at 7:57pm with attachments. The email appears at pages 78 to 84 of the exhibit.

²⁹ MacKenzie Affidavit, [22]; First Blyth Affidavit, [28].

³⁰ Adjudicators are entitled to seek an extension of time under s 22(4)(b) of the SoP Act.

³¹ First Blyth Affidavit, Exhibit 'AIB-14'.

Please do not hesitate to contact us should you have any questions.

48 On 5 September 2019 MinterEllison sent a notice pursuant to s 28(2)(b) of the SoP Act to Adjudicate Today advising that Promax had withdrawn its August 2019 Adjudication Application.³²

49 On 10 September 2019 pursuant to s 18 of the SoP Act, Promax made a fresh application for adjudication of the July 2019 Payment Claim to Rialto Adjudications by electronically uploading the documents comprising that application to the website of Rialto Adjudications.

50 On 11 September 2019 copies of the September 2019 Adjudication Application were hand delivered to both the plaintiff's principal place of business and to the offices of Rialto Adjudications.³³

51 On 11 September 2019 the Adjudicator sent an email to the parties attaching a notice of acceptance of the September 2019 Adjudication Application.³⁴

52 On 17 September 2019 the plaintiff commenced this proceeding.

53 In its submissions dated 19 September 2019 the plaintiff summarised its case on the above issues as follows:

... the 15 August Adjudication Application, was not served on 1155NH as required by the Act. The 6 business day delay between filing and service was not service as soon as practicable, as required by the Act. If the 15 August Adjudication Application was not an adjudication application under the Act, then it follows that any further (purported) adjudication application under s 28(2) must fail, because that section proceeds on the footing that there was a valid adjudication application in the first instance.

54 On 24 September 2019 the Adjudicator sent an email to the parties requesting that Promax agree to extend the time for making his determination by two business days pursuant to s 22(4)(b) of the SoP Act. Later that same day, MinterEllison confirmed

³² Ibid Exhibit 'AIB-15'.

³³ Ibid Exhibit 'AIB-13', MacKenzie Statutory Declaration, [8.1]–[8.3]. The statutory declaration appears on pages 13 to 18 of the exhibit.

³⁴ First Blyth Affidavit, Exhibit 'AIB-17'.

by email that Promax agreed to the proposed extension.

55 On 30 September 2019 the Adjudicator provided the parties his September 2019 Adjudication Determination.³⁵ Thereby the Adjudicator determined the September 2019 Adjudication Application and decided the adjudicated amount payable by the plaintiff to Promax was \$2,017,382.15 (incl GST). That adjudicated amount became payable on 5 August 2019.

56 The September 2019 Adjudication Determination also stated as follows in relation to the jurisdictional challenges raised by the plaintiff in these proceedings:

[74] For the reasons set out below, in my view, the Application for Adjudication is not invalid.

[75] Firstly, in my view, the Application for Adjudication was, in fact, made to Adjudicate Today on 15 August 2019. In my view, the service of a copy of the Application for Adjudication on the respondent is not, itself, a requirement for validity, but rather is a matter that goes to the timing of the Adjudication Response (if any). Section 18(5) expressly provides that a copy of the adjudication application must be served on the respondent, but does not provide that a failure to comply with the provision invalidates an Application for Adjudication, nor does Section 18(5) expressly provide the time within which a copy of the Application for Adjudication must be served on the respondent. In the absence of such express language, in my view, the failure to provide a copy of the Application for Adjudication to the respondent does not, on its own, have the effect that an Application for Adjudication is invalid.

[76] Secondly, in my view, the respondent did, in fact, receive a copy of the Application for Adjudication on 16 August 2019 (albeit that the cover letters in relation to the three Applications for Adjudication delivered to Adjudicate Today and to the respondent were not in the correct folders, and that two of the statutory declarations had been switched).

[77] Thirdly, in my view, the respondent, no later than after receiving the MinterEllison email dated 21 August 2019, was, in fact, aware of the filed copy of, and the correct attachments to, the Application for Adjudication. In my view, the delay between 15 August 2019, when the Application for Adjudication was lodged electronically with Adjudicate Today, and 21 August 2019, when the Index of the documents, the previously served documents on the respondent on 16 August 2019, comprising the Application for Adjudication, was confirmed in the email dated 21 August 2019 from MinterEllison to

³⁵ Affidavit of Isobel Carmody, 1 October 2019, Exhibit 'IJC-01'.

Arnold Bloch Leibler, meant that the delay (if any) in service of a copy of the Application for Adjudication on the respondent had no practical effect.

[78] Fourthly, if I am wrong in my view that the respondent is to be taken as having received a copy of the Adjudication Response on 16 August 2019, then the respondent received a copy of the Adjudication Response no later than 23 August 2019, when the fresh copy of the Application for Adjudication was delivered to the respondent. In my view, the delay between 15 August 2019, when the Application for Adjudication was lodged electronically with Adjudicate Today, and 23 August 2019, when the further, correctly collated, hard copy of the Application for Adjudication was served on the respondent, had no practical effect.

[79] Fifthly, in this instance, the respondent failed to deliver a payment schedule in response to, either, the Payment Claim dated 15 July 2019 or the Section 18(2) Notice dated 7 August 2019. Accordingly, the respondent was, pursuant to Section 21(2A) of the Act, the Act, not entitled to deliver an Adjudication Response. In that circumstance, in my view, the delay between 15 August 2019, when the Application for Adjudication was lodged with Adjudicate Today, and 23 August 2019, when the further, correctly collated, hard copy of the Application for Adjudication was served on the respondent, had no practical effect.

[80] For these reasons, in my view, the Application for Adjudication is not invalid.

Injunctive relief earlier sought by plaintiff no longer relevant

57 The September 2019 Adjudication Determination rendered the plaintiff's Originating Motion and Summons of 17 September 2019 and Amended Originating Motion of 1 October 2019 otiose insofar as that process sought to restrain the Adjudicator from providing his adjudication determination in relation to Promax's August 2019 and September 2019 Adjudication Applications.

58 Subsequent to the September 2019 Adjudication Determination, at the hearings and argument on 14 and 18 October 2019, in substance, the relief the plaintiff sought was that summarised in paragraph [16] above and in sub-paragraphs (5) to (8) of the plaintiff's Amended Originating Motion of 1 October 2019.

59 On 5 March 2020 a further hearing of this proceeding occurred as a result of the plaintiff issuing a Summons dated 3 March 2020 seeking an injunction restraining Promax from making a foreshadowed further adjudication application under the

SoP Act in respect of the February 2020 Payment Claim, including in relation to the subject matter of the September 2019 Adjudication Determination which is the subject of the proceeding.

60 In summary, the background to the application on 5 March 2020 was:

- (a) on 6 February 2020 Promax served a further payment claim (being the February 2020 Payment Claim);
- (b) the February 2020 Payment Claim is for the amount of \$2,094,721.53;
- (c) the plaintiff asserted that all but \$70,308.55 of the \$2,094,721.53 claimed in the February 2020 Payment Claim was the subject of the September 2019 Adjudication Determination. The plaintiff also noted that Promax had earlier undertaken to the Court not to take any step to enforce pending resolution of the reserved judgment;
- (d) the plaintiff served a payment schedule dated 20 February 2020 in response to the February 2020 Payment Claim, with a scheduled amount payable of '\$Nil';
- (e) Promax had indicated that it will apply for adjudication of its February 2020 Payment Claim; and
- (f) the plaintiff's position was that in these circumstances, where the work and the claimed amount have already been the subject of a binding Adjudication Determination, Promax is not permitted to make, and is issue estopped from making, a further adjudication application.

61 On about 5 March 2020 the plaintiff and Promax agreed, amongst other terms, consent orders, in summary that subject to certain undertakings and preservation of any rights Promax may have under s 28 of the SoP Act, in substance that Promax would not refer its February 2020 Payment Claim, or any other specified adjudication, to an adjudicator under the SoP Act, so as to preserve the present status quo and to avoid imposing the burden of engaging in an adjudication process,

for the time being, until after the delivery of judgment reserved in this proceeding in relation to the Amended Originating Motion and Summons dated 1 October 2019. Those consent orders also adjourned the plaintiff's Summons of 3 March 2020, sine die.

The remaining issues to be determined on the plaintiff's Amended Originating Motion and Summons dated 1 October 2019

- 62 The remaining issues to be determined on the plaintiff's applications are:
- (a) Was Promax's August 2019 Adjudication Application compliantly served pursuant to s 18(5) of the SoP Act on 16 August 2019 and/or 23 August 2019;
 - (b) Was Promax's September 2019 Adjudication Application a valid adjudication application pursuant to ss 18 and 28(2) of the SoP Act;
 - (d) Subject to the plaintiff's challenges referred to in the next sub-paragraph, is the September 2019 Adjudication Determination void and unlawful;
 - (d) Is the September 2019 Adjudication Determination void to the extent of the Adjudicator's valuations in paragraph [103] (Items [18.1] to [18.9]), and if so should Items [18.1] to [18.9] of the September 2019 Adjudication Determination be severed from that Adjudication Determination.

The Relevant Legislation

63 The SoP Act relevantly provides, in part, as follows:

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
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.
 - (3) An adjudication application –
 - (a) must be in writing; and
 - (b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and
 - (c) in the case of an application under subsection (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and
 - (d) in the case of an application under subsection (1)(a)(ii), must be made within 10 business days after the due date for payment; and
 - (e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates; and
 - (g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and
 - (h) may contain any submissions relevant to the application that the claimant chooses to include.
 - (4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.
 - (5) A copy of the adjudication application must be served on the respondent.
 - ...
 - (7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator as soon as practicable.
 - (8) An adjudicator to whom an application is referred under subsection (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

64 Section 20 of the SoP Act provides:

20. Appointment of adjudicator

- (1) An adjudicator accepts an adjudication application by causing notice of acceptance to be served on the claimant and the respondent.
- (2) The acceptance takes effect when the last of the notices is served under subsection (1).
- (3) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.
- (4) An adjudicator must give a copy of a notice of acceptance under subsection (1) to the Authority within 10 business days after accepting

an adjudication application under subsection (1).

65 Section 22 of the SoP Act provides:

22. Adjudication procedures

- (1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (2) An adjudicator must serve a written notice –
 - (a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and
 - (b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.
- (3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.
- (4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case –
 - (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
 - (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.
- (4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).
- (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator –
 - (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
 - (b) may set deadlines for further submissions and comments by the parties; and
 - (c) may call a conference of the parties; and
 - (d) may carry out an inspection of any matter to which the claim relates.
- (5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.
- (6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

66 Sections 23(2) and 23(4) of the SoP Act provide:

23. Adjudicator's determination

...

- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only-
 - (a) the provisions of this Act and any regulations made under this Act;
 - (b) subject to this Act, the provisions of the construction contract from which the application arose;
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
 - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- ...
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined-
 - (a) the value of any construction work carried out under a construction contract; or
 - (b) the value of any related goods and services supplied under a construction contract-the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

67 Section 28 of the SoP Act provides:

28. Claimant may make new application if previous application refused or not determined

- (1) This section applies if –
 - (a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or
 - (b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).
- (2) In either of those circumstances, the claimant –
 - (a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and
 - (b) may make a new adjudication application under section 18.
- (3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).
- (4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

The plaintiff's submissions

The service requirements of s 18(5) of the SoP Act have not been met

68 In outline summary the plaintiff:

- (a) Submits that pursuant to s 18(5) of the SoP Act the applicant must effect service on the respondent 'as soon as practicable thereafter' once the application is lodged with the authorised nominating authority pursuant to s 18(3) of the SoP Act.³⁶ The plaintiff relies upon the decision of Ryan J in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor*,³⁷ (*Niclin*);
- (b) Alternatively submits that if its submission that s 18(5) of the SoP Act requires service 'as soon as practicable' is not accepted, then service 'within a reasonable time', in this particular case, requires service on the same day as the adjudication application was filed with the authorised nominating authority or on the next business day;³⁸
- (c) Submits in relation to what it contends did not amount to service of the August 2019 Adjudication Application on 16 August 2019, that the plaintiff did not receive a fully intact and self-contained copy of the August 2019 Adjudication Application, but rather:

Instead, a folder, cover letter, and Adjudicate Today application form for the Hightett Project together with supporting documents (including the payment claim) for the Glen Huntly Project.³⁹
- (d) Submits that Promax has failed to 'strictly observe' the mandatory requirements of s 18(5) of the SoP Act in that it has failed to properly serve its August 2019 Adjudication Application on the plaintiff for six business days between 15 August 2019 and 23 August 2019 when Promax again provided the August 2019 Adjudication Application to the plaintiff;⁴⁰

³⁶ Plaintiff Submissions, 19 September 2019, [24] and [37].

³⁷ [2019] QSC 91.

³⁸ Plaintiff Submissions, 1 October 2019, [26].

³⁹ *Ibid* [28]-[29].

⁴⁰ *Ibid* [1].

- (e) Argues that Promax's failure to properly serve its August 2019 Adjudication Application for six business days between 15 August 2019 and 23 August 2019 amounts to a breach of a jurisdictional requirement for a valid adjudication under the SoP Act;
- (f) Recognises that on 16 August 2019 Promax made an initial attempt to serve hard copy documents within a day of making its August 2019 Adjudication Application to Adjudicate Today, but submits that this attempt by Promax to serve a hard copy of its Adjudication Application was manifestly deficient;
- (g) Submits that as a consequence of Promax's failure to compliantly serve its August 2019 Adjudication Application on 16 August 2019 that adjudication application and Promax's further new September 2019 Adjudication Application served on 11 September 2019 purportedly under s 28 of the SoP Act, were non-compliant with the Act and void;
- (h) Submits that as a consequence of the above the September 2019 Adjudication Determination was void and unlawful;
- (i) Submits that further, or alternatively, paragraph [103] Items [18.1] to [18.9] of the September 2019 Adjudication Determination have not been determined in compliance with ss 11 and 23 of the SoP Act and are void and unlawful.

Complaint service under s 18(5) of the SoP Act is a jurisdictional requirement

69 The plaintiff submits that the service of a copy of the August 2019 Adjudication Application by Promax pursuant to s 18(5) of the SoP Act is both a jurisdictional necessity which must be met for the establishment of the adjudicator's own jurisdiction under the SoP Act.

70 The plaintiff submits that its interpretation of the service requirements of s 18(5) of the SoP Act is supported by the text, context and purpose of the SoP Act and is consistent with the approach adopted by the Supreme Court of Queensland in *Niclin* and on appeal in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd &*

*Anor.*⁴¹ The plaintiff also submits that this interpretation is consistent with judicial observations that the observance of certain procedural steps and requirements provided for in the SoP Act are to be interpreted as requiring 'strict observance' on the part of the party required to undertake such procedure or step.⁴²

71 The plaintiff acknowledges that ordinarily where no time is stipulated for doing an act, the Court will imply an obligation to do the act within reasonable time.⁴³

72 The plaintiff submits that taking into account the purpose and provisions of the SoP Act, service of an adjudication application is required to be effected contemporaneously with filing, or as soon as practical thereafter, and that any other construction would cause dysfunction to the proper operation of the legislation.

73 Alternatively the plaintiff submits that if its submission that s 18(5) of the SoP Act requires service 'as soon as practicable' is not accepted, then service 'within a reasonable time', in this particular case, requires service on the same day as the adjudication application was filed with the authorised nominating authority or on the next business day.⁴⁴

If an adjudication application is required to be served 'as soon as practicable', did Promax satisfy that requirement

74 The plaintiff submits that Promax did not serve its August 2019 Adjudication Application as soon as practicable. Further the plaintiff observes that Promax could have served its August 2019 Adjudication Application on 15 August 2019, namely on the same day upon which MinterEllison, acting for Promax, electronically uploaded the August 2019 Adjudication Application to Adjudicate Today's online lockbox facility,⁴⁵ or Promax could have served its August 2019 Adjudication Application the next day, namely 16 August 2019.

⁴¹ [2019] QCA 177.

⁴² *Saville v Hallmarc Construction Pty Ltd* (2015) 47 VR 177 and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 at 437 [209].

⁴³ Plaintiff Submissions, 1 October 2019, [26].

⁴⁴ *Ibid* [26].

⁴⁵ Supplemental Blyth Affidavit, [2], Exhibit 'AIB-27' at [3.1.1].

75 The plaintiff submits that the contested service of a jumbled set of adjudication application material including not only material relating to the Hightt Project, but also the Bulleen Project and the Glen Huntly Project on 16 August 2019⁴⁶ and the asserted service of the August 2019 Adjudication Application again on 23 August 2019,⁴⁷ six business days after the application had been filed with Adjudicate Today on 15 August 2019, do not comply with the service requirement of s 18(5) of the SoP Act.

76 The plaintiff submits that if the Court holds that Promax failed to serve its August 2019 Adjudication Application as soon as practicable, in the circumstances of this case, that failure *extinguishes* Promax's right to adjudication. In this regard, the plaintiff submits that compliance by the applicant for adjudication within s 18(5) of the SoP Act amounts to a jurisdictional requirement with which Promax has failed to comply.⁴⁸

The September 2019 Adjudication Application also invalid and ineffective

77 The plaintiff also submits that the non-compliant service and resultant invalidity of the August 2019 Adjudication Application renders Promax's new September 2019 Adjudication Application, purportedly made pursuant to s 28 of the SoP Act, invalid and ineffective.

78 The plaintiff argues that because the initial August 2019 Adjudication Application was not served in accordance with the SoP Act, that adjudication application is 'null and void', and therefore the current September 2019 Adjudication Application brought under s 28(2) of the SoP Act is also null and void because the operation of s 28 of the SoP Act is predicated on the earlier adjudication application which 'fails' (here the initial August 2019 Adjudication Application), being a valid adjudication application.

⁴⁶ See First Blyth Affidavit, [13].

⁴⁷ Ibid [17]-[19], Exhibit 'AIB-9'.

⁴⁸ Plaintiff Submissions, 19 September 2019, [46].

- 79 The plaintiff submits that s 28(1) of the SoP Act requires a valid antecedent adjudication application which complies with the mandatory obligations borne by a claim under s 18 of the SoP Act. The plaintiff submits that only then do the rights under s 28(2) of the SoP Act arise.
- 80 The plaintiff submits that under s 28(3) of the SoP Act a claimant's right to make successive adjudication applications under s 28 of the Act only arises where there has been a valid adjudication application which complies with the mandatory obligations under s 18 of the Act, and there is no such preservation of rights by the claimant to make a new adjudication application pursuant to s 28 of the Act if there is a failure by the claimant to comply with any of ss 18(1), (2), (4) or (5) of the SoP Act.
- 81 The plaintiff submits that Promax's reliance upon *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd*⁴⁹ (*Olympia Group*) is of no assistance because the court in *Olympia Group* at [21] recognised that an applicant's entitlement to make a new adjudication application would not be permitted by a court unless the court was satisfied that an adjudicator had jurisdiction to determine the claim. The plaintiff submits that the decision in *Olympia Group* is predicated upon the relevant withdrawal of 'the application' made under the SoP Act.⁵⁰
- 82 The plaintiff also submits that Promax's reliance upon *Multiplex Constructions Pty Ltd v Luikens and Anor*⁵¹ (*Multiplex*) and *John Holland Pty Ltd v Made Contracting Pty Ltd*⁵² (*John Holland*) do not advance the matter or assist because it is to be accepted that the expression 'fails to determine' means 'does not' in the context of s 28 of the SoP Act, whereas the issue here is whether the August 2019 Adjudication Application was in fact an adjudication application at all.⁵³

49 [2011] NSWSC 165.

50 Plaintiff Submissions, 1 October 2019 [40].

51 [2003] NSWSC 1140.

52 [2008] NSWSC 374.

53 Plaintiff Submissions, 1 October 2019 [41].

83 The plaintiff submits that in *Multiplex*, the issue concerned an error by the adjudicator in making his determination. The adjudicator failed to take into account a matter he was required to take into account. The adjudication application itself was properly made, but the adjudication determination was not. It was in that context that Palmer J made the comments he did at [102] and [103], which the plaintiff submits do not assist Promax. Similarly, the plaintiff submits, in *John Holland*, the circumstances were that the applicant withdrew its adjudication application after the adjudicator indicated he was not going to consider some submissions apparently received out of time. The plaintiff submits that because the validity of the adjudication application itself was not in issue, that case also does not assist Promax.

84 The plaintiff submits that the decision of McDougall J in *Cardinal Services v Hanave*⁵⁴ is of assistance in this matter. In that case his Honour found that a void adjudication determination is not a determination at all. It is in law a nullity. The plaintiff submits that similar reasoning applies here.

85 On the plaintiff's submission, the August 2019 Adjudication Application was not an adjudication application under the SoP Act, but was a legal nullity because it was not ever served compliantly under s 18(5) of the SoP Act. The plaintiff submits that therefore Promax cannot withdraw the August 2019 Adjudication Application and submit a new adjudication application under s 28 of the SoP Act, (and thus sidestepping ss 18(3)(c), 18(3)(d) and 18(3)(e) of the Act), because there is no valid adjudication application to withdraw.

86 The plaintiff also submits that:

- (a) In relation to the September 2019 Adjudication Determination, irrespective of any 'findings' by the Adjudicator as to his or her jurisdiction under the SoP Act, such findings are of no utility and it is a matter for the Court to decide

⁵⁴ [2010] NSWSC 1367.

whether or not there was in fact jurisdictional error, as claimed by the plaintiff.⁵⁵

- (b) The mandatory obligation of the service of documents by the claimant under the SoP Act in relation to the initiation of the adjudication process is a matter which goes to the essential foundation of the Adjudicator's jurisdiction.
- (c) There is no 'materiality threshold' bearing upon the proper construction of s 18(5) of the SoP Act. The plaintiff submits that the proper construction of s 18(5) of the SoP Act, and the Act more generally, should be informed by the text, context and purpose of the SoP Act and its focus on strict time requirements and the effect of any non-compliance with the SoP Act which in respect of non-compliance with the mandatory service requirements of s 18(5) of the Act gives rise to non-establishment of jurisdictional fact.⁵⁶
- (d) The plaintiff argues, that any question of 'materiality' turns upon the proper construction of the relevant statute and the obligations imposed by the statute in question.⁵⁷ The plaintiff submits that s 18(5) of the SoP Act is a paradigm example of a mandatory obligation borne by the claimant under the SoP Act and is therefore required to be strictly observed in its terms.⁵⁸
- (e) The scheme of the SoP Act results in this case representing the exception to the ordinary rule requiring materiality of the type referred to in *Hossain v Minister for Immigration and Border Protection*.⁵⁹

87 The plaintiff submits, in response to Promax's submission that s 18(5) of the SoP Act requires service within 'a reasonable time' and its submission that the question of what is a reasonable time is always a question of fact, that Promax's reliance upon

⁵⁵ Plaintiff Submissions, 1 October 2019, [2].

⁵⁶ Ibid [21]-[25].

⁵⁷ *Minister for Immigration v SZMTA*; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* (2019) 264 CLR 421 at [44], [45]-[50] and 83].

⁵⁸ *Saville v Halmarc Construction Pty Ltd* [2015] VSCA 318; *SSC v Plenty Road Construction Engineering (Aust) Pty Ltd & Anor* [2016] VSCA 119 at [51].

⁵⁹ (2018) 264 CLR 123, [29]-[31].

*QC Communications NSW Pty Ltd v CivComm Pty Ltd*⁶⁰ (*QC Communications*) is of no application as the facts are distinguishable, particularly as *Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd*⁶¹ (*Falgat*), which is relied upon in *QC Communications*, involved a different factual setting to the present instance. In *Falgat* the respondent was served with a fully intact and self-contained payment schedule.

88 Further, the plaintiff submits that the cases relied upon by Promax to support the proposition that service of the adjudication application upon the respondent is not a precondition of a valid adjudication determination, are obiter comments and yield to the later ratio relied upon by the plaintiff in *Niclin* and the 'strict observance' requirements of the SoP Act in Victoria.⁶²

89 Further, the plaintiff relies upon Hammerschlag J's decision in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd*⁶³ (*Parkview Constructions*) in which his Honour refers to the service requirement in s 17(5) of the *Building And Construction Industry Security Of Payment Act 1999* (NSW), (equivalent in substance to s 18(5) of the Victorian SoP Act). In *Parkview Constructions* his Honour stated:

59 The Act contemplates that it is the same written words which are to be copied to the respondent and, for that matter, to be referred by the authorised nominating authority to an adjudicator. Compliance with this requirement is an essential preliminary for the decision making process for which the Act provides.

60 The Act confers jurisdiction on an adjudicator to determine only the application which was made and then referred to her or him, not some other application.

Promax's submissions

Service requirements of s 18(5) of the SoP Act have been met

90 Promax submits that upon its proper construction, compliance with s 18(5) of the

⁶⁰ [2016] NSWSC 1095, [27]-[29].

⁶¹ [2006] NSWCA 259.

⁶² Plaintiff Submissions, 1 October 2019, [32].

⁶³ [2017] NSWSC 194.

SoP Act requires a copy of the August 2019 Adjudication Application to be served on the plaintiff within a 'reasonable time'. Promax submits that what is a reasonable time there is always a question of fact and necessarily is and should be a matter for the adjudicator to decide.⁶⁴

91 Promax submits that effective service of its August 2019 Adjudication Application was effected on 16 August 2019 pursuant to s 18(5) of the SoP Act by the notice, document or material in question being established as having 'come to the attention of the authorised person'.

92 Further, Promax notes that the plaintiff's only argument advanced in relation to service of the August 2019 Adjudication Application on 16 August 2019 is that some pages of the material comprising its August 2019 Adjudication Application provided to the plaintiff were out of order and were different to the materials lodged with the authorised nominating authority on 15 August 2019.⁶⁵

93 Promax argues that the reliance by the plaintiff on the decision of the Supreme Court of Queensland in *Niclin*⁶⁶ to establish that the provisions of the *Building and Construction Industry Payments Act 2004* (Qld), which is equivalent to s 18(5) of the SoP Act, requires service on the respondent 'as soon as practicable', is not persuasive because the statutory setting and context of *Niclin* is distinguishable.

94 Further, Promax asserts that in addition to effecting compliant service of its August 2019 Adjudication Application on 16 August 2019, Promax again served the August 2019 Adjudication Application on the plaintiff on 23 August 2019 and that service was within a reasonable time of it making the August 2019 Adjudication Application.

95 Further, Promax relies on *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*⁶⁷

⁶⁴ Promax Submissions, 19 September 2019, [16].

⁶⁵ T14.25-T16.

⁶⁶ [2019] QSC 91.

⁶⁷ [2018] VSCA 294.

(*Ian Street*) in support of its submission that s 18(5) of the SoP Act does not give rise to a jurisdictional fact and that the legislature, including by s 23(2B) of the SoP Act (addressed in more detail below in these reasons), did not intend that any breach of s 18(5) of the SoP Act would render an adjudicator's decision invalid. Promax also rely on *Ian Street* in support of the proposition that in relation to the SoP Act the 'scheme is avowedly established for the benefit of claimants'.⁶⁸

96 Promax submits that the plaintiff did not provide a payment schedule and therefore had no right to serve an adjudication response and, consequently, any failure on its part to strictly comply with the requirements of s 18(5) of the SoP Act to serve a copy of its August 2019 Adjudication Application on the plaintiff could not have prejudiced the plaintiff or affected the outcome of the Adjudication Application. Promax submits that any failure in relation to the service requirements of s 18(5) of the SoP Act did not materially affect the plaintiff's rights and did not amount to a jurisdictional error.

The September 2019 Adjudication Application pursuant to s 28(2) of the SoP Act

97 Promax highlights the provisions of s 28 of the SoP Act, in the circumstances specified in that section, to establish an entitlement to withdraw an adjudication application pursuant to s 28(2) of the SoP Act and to make a new application pursuant to s 18 of and s 28(2)(b) of the Act.

98 Promax submits that the words '*fails to determine*' in s 28(b) of the SoP Act is to be interpreted in a manner which ascribes a broad operation to that sub-section and in that regard bears a meaning which includes where an adjudicator's decision is void for some reason.⁶⁹

99 Promax further submits that while the plaintiff makes highly technical arguments

⁶⁸ Ibid [73].

⁶⁹ Promax Submissions, 19 September 2019, [25]–[30]; *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165; *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140; *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374.

about how non-compliance with service under s 18(5) of the SoP Act gives rise to jurisdictional error, it has failed to provide evidence of the materiality required for jurisdictional error.⁷⁰

Considerations

Compliance with service requirements of s 18(5) of the SoP Act

The proper interpretation of s 18(5) of the SoP Act

The text of s 18(5) of the SoP Act

100 Section 18(5) of the SoP Act provides that a copy of the adjudication application must be served on the respondent.

101 Section 18(5) of the SoP Act does not expressly specify a time within which a copy of the relevant adjudication application must be served on the respondent to an application.

102 Ordinarily at common law, in the absence of any stipulation as to a statutory period for undertaking an act, that stipulation is interpreted as requiring performance within a 'reasonable time'.⁷¹ Further, the determination of what is in the circumstances 'a reasonable time' is a question of fact.⁷²

The object and the purpose of the SoP Act

103 The SoP Act, considered as a whole, reflects a scheme which has been judicially described as one containing 'brutally fast time-frames'⁷³ and which includes provisions which indicate, in many instances that strict observance of procedural

⁷⁰ *Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection* (2019) 264 CLR 421 at [45]–[50].

⁷¹ *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 573–574; *BTR PLC v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 34 FCR 246, 272–273.

⁷² See, for example, *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 567–568; *Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438, 444; *K & M Prodanovski Pty Ltd v Calliden Insurance Ltd* [2012] NSWCA 117, [48].

⁷³ *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91, 3 at [5]; and 18 at [20].

steps, and the time limits for such steps, is required.⁷⁴

104 In this regard, the object and purpose of the SoP Act include to ensure and secure entitlements to progress payments for persons who have carried out construction work and supplied related materials and services, and to achieve the payment of such entitlements, quickly and cheaply. These purposes inform the proper interpretation of the SoP Act.

The context of the SoP Act in which s 18(5) operates

105 I consider, for the following reasons, that the statutory context and operation of the interrelated provisions referred to below supports a construction of s 18(5) of the Act pursuant to which the applicant is to serve its adjudication application within a reasonable time of the applicant making its adjudication application under s 18(3)(b) of the SoP Act.

106 The text and operation of the following provisions of the SoP Act support the above construction of s 18(5) of the Act because:

(a) It can be inferred from the absence of an express stipulation of a time for service in s 18(5) of the SoP Act and the provisions of several other sections in the SoP Act which do circumscribe the period within which a notice or document is to be served under the Act, that it was not the intention of Parliament to fix or otherwise stipulate the date by which the claimant is to serve a copy of its adjudication application on the respondent.

The sections of the SoP Act which are, by contrast to s 18(5) of the Act, prescriptive in fixing tight times within which an act is to take place, include;

- (i) the claimant's notification of intention to apply for an adjudication application (s 18(2)(a) - 10 business day limit);
- (ii) the time within which the respondent may provide a payment

⁷⁴ *Saville v Hallmarc Constructions Pty Ltd* (2015) 47 VR 177.

schedule to the claimant after receiving the claimant's notice of intention to apply (s 18(2)(b) - two business days);

- (iii) the 10 business day limit under s 18(3)(a), (b) and (d) within which the claimant must make its adjudication application after a respondent provides a schedule (where the payment schedule is for less than was claimed) or the respondent fails to pay the whole or part of the scheduled amount in s 18(3) (s 18(3)(a), (b) and (d) - 10 business day limit);
- (iv) the five day limit under s 18(3)(e) in respect of an adjudication application initiated on the basis that the respondent has failed to provide a payment schedule and fails to pay the whole of the amount claimed in s 18(3)(e) (s 18(3)(e) - 5 business day limit);
- (v) the 10 business day limit for an adjudicator to give a copy of his or her notice of acceptance to the authority, pursuant to s 20(4), and s 28(3) and 28D(2) (s 20(4) and 28(3) - 10 business day limit);

(b) Similarly, it can be inferred that because no date for service is fixed or otherwise stipulated in s 18(5) of the SoP Act, the timing of service of the adjudication application on the respondent was not considered by the Parliament to be critical to the timing of the operation of the SoP Act, including the provisions which are interrelated with s 18 of the Act;⁷⁵

(c) It can also be inferred from the matters referred to in sub-paragraphs (a)-(b) above that Parliament intended that the time within which service under s 18(5) of the SoP Act was achieved should be flexible;

(d) It is also unlikely that the legislature would have intended to impose a strict or inflexible time limit in relation to the service of a copy of the adjudication

⁷⁵ SoP Act, including ss 21(1), 22(1) and 22(4).

application under s 18(5) of the SoP Act, given that s 18 itself provides elsewhere for specific times within which the claimant is to do certain things, including to notify its intention to apply for adjudication (s 18(2)(a) of the SoP Act). Similarly, s 18(3) of the Act prescribes several specific time limits for the time within which the claimant must make adjudication application;

- (e) In a number of provisions the SoP Act expressly seeks to limit time by specifying that matters be undertaken 'as soon as reasonably practicable' (ss 18(7), 23A(a), 24(3), 28D(5), 28H(2) and 28J of the SoP Act);
- (f) It is likely that if the legislature intended service under s 18(5) of the SoP Act to be effected 'as soon as practicable', after an adjudication application was made, those words, which are used in many instances elsewhere in the Act, would have been employed in s 18(5) of the Act;
- (g) There are many other sections of the SoP Act in addition to s 18(5) in relation to which no time limits are expressly provided within which an act is to take place.⁷⁶ The implication of a requirement of the SoP Act that they be done 'as soon as practicable' would be potentially problematic;
- (h) In an adjudication proceeding in which the respondent is entitled to make a response to the applicant's adjudication application that response is provided for by s 21 of the SoP Act. Significantly, it is to be noted that the time under s 21(1) of the Act for the respondent to lodge its response to the adjudication application is flexible;
- (i) The timing of service under s 18(5) of the SoP Act is inconsequential as a result of s 21(2A) of the Act precluding the respondent from lodging an adjudication response when it has not served a payment schedule pursuant to ss 15(4) or 18(2)(b) of the Act. In circumstances where a respondent is not entitled to lodge an adjudication response (as is the case in the instant matter),

⁷⁶ SoP Act, ss 12A(2), 16(2)(b), 17(2)(b), 20(1)&(2), 21(2B) and 21(3), 22(2), 28(2)(a), 28O(b), 32(1)(b).

the adjudicator will, in any event, only receive and consider the applicant's adjudication application;

- (j) Service of an adjudication application under s 18(5) of the SoP Act within a reasonable time accommodates both the desirability of the discipline of the requirement of a reasonable time for service when the respondent is entitled to lodge an adjudication response pursuant to s 21(1) of the SoP Act, and also when the respondent is not permitted to lodge an adjudication response because of the operation of s 21(2A) of the SoP Act.

It is to be observed that what might be a reasonable time in the scenario where the respondent cannot lodge an adjudication response would, amongst other factors be informed by:

- (i) the adjudication application provided via the authorised nominating authority to the adjudicator providing all relevant materials to the adjudicator;
- (ii) the adjudicator being allowed 10 business days to determine the adjudication application from the date he or she served the parties with a notice of acceptance under s 20 of the SoP Act;
- (iii) the ability of the claimant to agree to extend the time of up to five additional business days to the adjudicator to determine the adjudication application (s 22(4)(b)); and
- (iv) there being no likely denial of natural justice to the respondent caused by delayed service of the adjudication application where the respondent is not entitled to provide an adjudication response.⁷⁷

The scheme of the SoP Act

107 In addition to those features of the scheme of the SoP Act referred to in the

⁷⁷ *Pacific General Securities v Soliman and Sons Pty Ltd* (2006) 196 FLR 388, [48]-[50].

preceding paragraph, the scheme of the Act, as it operates in respect of the present circumstances, subsequent to the plaintiff failing to provide a payment schedule in response to Promax's July 2019 Payment Claim is that:

- (a) pursuant to s 18(2)(a) of the SoP Act, Promax notified the plaintiff that it intended to apply for adjudication of its July 2019 Payment Claim;
- (b) the plaintiff did not provide a payment schedule pursuant to either ss 15(4) or 18(2)(b) of the SoP Act in relation to Promax's 15 July 2019 Payment Claim;
- (c) as a result of (b) above, pursuant to s 21(2A) of the SoP Act, the plaintiff was not entitled to lodge an adjudication response.

108 Further, it is important to note that in circumstances where the respondent is permitted to lodge an adjudication response, the regime associated with the timing of adjudication applications and the required steps subsequent to the claimant making an adjudication application, highlight that the time at which the claimant serves the respondent with a copy of its adjudication application pursuant to s 18(5) of the SoP Act will not create any prejudice to the respondent or practical difficulties in relation to the statutorily prescribed procedures under the Act. This is principally because (omitting service of the adjudication application pursuant to s 18(5) of the Act for the purpose of the following summary):

- (a) an applicant for adjudication makes its adjudication application under s 18(3)(b) of the SoP Act to an authorised nominating authority;
- (b) an adjudicator who accepts an adjudication application causes his or her notice of acceptance to be served upon the claimant and the respondent pursuant to s 20(1) of the SoP Act.

At the point of the Adjudicator accepting service he or she is taken to have been appointed to determine the relevant application (s 20(3) of the SoP Act);

- (c) thereafter, pursuant to s 21(2) of the SoP Act a respondent who is entitled to

do so, may lodge a response to the claimant's adjudication application with the adjudicator;

(i) within five days after receiving a copy of the adjudication application; or

(ii) two business days after receiving notice of an adjudicator's acceptance of the adjudication application, whichever is later;

(d) under s 22(1) of the SoP Act, an adjudicator is not permitted to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response, that is within the times referred to above in relation to the operation of s 21(2) of the SoP Act, and further the adjudicator is not permitted to consider the adjudication response unless it is made within time (s 22(3) of the SoP Act);

(e) the adjudicator is obliged to determine the adjudication application as expeditiously as possible and, in any case, within 10 business days after the date on which acceptance by the adjudicator of the application takes effect in accordance with s 20(2) of the SoP Act, or within a further period not exceeding 15 business days after that date, providing the claimant agrees.

109 Accordingly, the scheme of the SoP Act in relation to service by the claimant on the respondent of the adjudication application is such that the timing of service of the adjudication application on the respondent under s 18(5) of the Act is of lesser significance and little materiality in the sense that the date on which service under s 18(5) of the Act occurs will not result in the respondent to the adjudication application being unaware of that application being made or prejudiced by delayed service of the adjudication application. This is because the respondent will have received pre-application notice from the applicant that it is intending to make an adjudication application (s 18(2)(a) of the SoP Act) and because after that application has been made the respondent will have received notice of the adjudicator's acceptance of the appointment as adjudicator.

110 Therefore the timing of service of the copy of the claimant's adjudication application on the respondent is most unlikely to have any material effect on any subsequent statutory required step or deadline under the SoP Act. Further, this is clearly so in the instant case because the plaintiff is not entitled to provide an adjudication response.

111 Further, to the above scenarios and critically, s 22(1) of the SoP Act ensures that the adjudicator cannot make a determination in the adjudication application until after the end of the period within which the respondent may lodge an adjudication response. Where the respondent may lodge a response the adjudicator is prohibited from making a decision in the adjudication before the end of the effluxion of five business days after the adjudication application has been served on the respondent.⁷⁸ It is to be noted that the five business days within which the respondent may lodge its adjudication response does not run until the respondent is served with the adjudication application.

Conclusion – s 18(5) of the SoP Act requires service of the adjudication application within a reasonable time of the application being made under s 18(3)(b)

112 Accordingly, for the reasons outlined above, the timing of the service of a copy of the adjudication application is not critical to the sequence of procedural steps leading up to the adjudication determination pursuant to s 22(4) of the Act, and it is likely that the intent of the SoP Act is that service under s 18(5) of the Act is required within a reasonable time of the making of the adjudication application and it is also unlikely that by implication s 18(5) the SoP Act was intended to require service of the adjudication application as soon as practicable, or on the day the application was made or on the next day after the application was made, as argued for by the plaintiff.

113 Further, in my view, the decision in *Niclin*,⁷⁹ which is relied on heavily by the

⁷⁸ SoP Act, ss 21(1)(a) and 22.

⁷⁹ *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91.

plaintiff, is of little or no assistance in this matter because the Court's interpretation of the relevant provision requiring service of an adjudication application in the Queensland security of payment legislation considered in *Niclin* was directly and materially informed by s 38(4) of the *Acts Interpretation Act 1954* (Qld) which provides, when not otherwise specified, for an act referred to in legislation to be done 'as soon as possible'. There was no such statutory provision which operates in relation to s 18(5) of the SoP Act.

114 Further, I observe that although Ryan J's judgment in *Niclin* was the subject of appeal it appears that the issue of the time for service of an adjudication application was not addressed or decided on appeal by the Queensland Court of Appeal.⁸⁰

115 Finally, I observe that in *Niclin*⁸¹ Ryan J notes that pursuant to the Queensland legislation under consideration, s 21(5) provided a reference point for critical time limits, specifically to establish the starting point for the deadline for an adjudication determination to be made under s 25A(4) and 25A(5) and (6) of the *Building and Construction Industry Payments Act 2004* (Qld). The position under the SoP Act is different. Under s 24(4) of the SoP Act the deadline for the adjudication determination is calculated from the date of acceptance by the adjudicator of the adjudication application.

116 Similarly, I do not consider that the decision in *Parkview Constructions* relied upon by the plaintiff impinges the present issue relating to time for service under s 18(5) of the SoP Act. In *Parkview Constructions* Hammerschlag J was concerned with whether the respondent to an adjudication application had received the same materials from the claimant as the adjudicator had received. His Honour did not focus on the time for service under the New South Wales equivalent of s 18(5) of the SoP Act, other than observing that under the New South Wales legislation, service of the adjudication application triggers the respondent's entitlement to respond to the

⁸⁰ Ibid [15].
⁸¹ Ibid, [20].

application.

117 I do however consider that the general statements of principle in relation to statutory construction in *Bermingham v Corrective Services Commission of New South Wales*⁸² (*Bermingham*), which was relied upon by Promax, is of assistance in this case. In *Bermingham* McHugh JA commented:⁸³

To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.

118 In my view if the words 'as soon as practicable' were read into s 18(5) of the SoP Act in relation to that section's requirement for service of the adjudication application, it would be likely to give rise to an unnecessary requirement, stricture and a risk of non-compliance by claimants where, given the requirements and operation of the interrelated provisions of the Act referred to above, there is no need for such a limitation on the time for service to be imported. In my view, for these reasons, the implication of the words argued for by the plaintiff are not required to achieve the purposes and objects of the SoP Act and would be likely to have the opposite effect.

Service on 16 August 2019 - compliant and effective pursuant to s 18(5) of the SoP Act

119 Further, for the reasons which follow, I find as a matter of fact that Promax's service of the August 2019 Adjudication Application on the plaintiff on 16 August 2019 was compliant with s 18(5) of the SoP Act and effective.

Factual summary - service on 16 August 2019 - compilation and composition of material served

120 On 16 August 2019, MinterEllison hand delivered seven folders which were received by Ms Bui at the address of the plaintiff's registered office.⁸⁴ The materials served on 16 August 2019 comprised:

⁸² (1988) 15 NSWLR 292.

⁸³ Ibid 302.

⁸⁴ First Blyth Affidavit, [13].

- (a) Two folders relating to the August 2019 Adjudication Application for the Highett Project,⁸⁵ two folders for the Glen Huntly Adjudication Application and three folders for the Bulleen Adjudication Application.

The seven folders, included three folders of legal authorities in relation to which there is no issue taken by the plaintiff.

- (b) Each set of folders was served with an index and an additional index was provided by MinterEllison by email on 21 August 2019.⁸⁶

The index for the August 2019 Adjudication Application lists that the 'Volume 1' folder includes:⁸⁷

- (i) a cover letter;
- (ii) an Adjudicate Today application form;
- (iii) the adjudication application submissions; and
- (iv) 31 tabs containing materials that make up the application.

- (c) The cover letter and one page Adjudicate Today application form were not part of the August 2019 Adjudication Application but were included in the served materials. They were however clearly marked to indicate that.

121 On 16 August 2019, Ms Bui, an employee of LDS Lifestyle Pty Ltd, accepted service of the materials for all three applications.⁸⁸

122 As earlier observed, the plaintiff and LDS Lifestyle Pty Ltd are related entities which

⁸⁵ A copy of the index is included as Exhibit 'DJM-02' to the MacKenzie Affidavit. An additional index of documents was provided by email from MinterEllison to ABL dated 21 August 2019. Exhibit 'DJM-02' MacKenzie Statutory Declaration, included in Exhibit 'AIB-13' to the First Blythe Affidavit).

⁸⁶ Blyth Affidavit, Exhibit AIB-13, MacKenzie Statutory Declaration, [3.3], [4.3] and [5.3]. The Statutory Declaration appears on pages 13 to 18 of the exhibit.

⁸⁷ MacKenzie Affidavit, Exhibit 'DJM-3'.

⁸⁸ MacKenzie Affidavit, Exhibit 'DJM-12', [31]; First Blyth Affidavit, Exhibit 'AIB-13', MacKenzie Statutory Declaration, [8.1]-[8.3]. The statutory declaration appears on pages 13 to 18 of the exhibit.

share a registered office and principal place of business.⁸⁹ In August 2019 both entities also have the same legal representation (Arnold Bloch Leibler). Further LDS Lifestyle is also the proprietor of the Bulleen Project and the Glen Huntley Project.

123 As part of the material served on 16 August 2019:

- (a) two Highett Project documents were incorrectly included in the Glen Huntly Project folders (a one page covering letter from MinterEllison and a one page Adjudicate Today application form);
- (b) one document related to the Highett Project was also included in the Bulleen Project materials (the Statutory Declaration of Ozan Girgin);
- (c) the cover page attached to the August 2019 Adjudication Application also incorrectly identified the claimant as being Promax Developments Pty Ltd;
- (d) the folders were served together with an index⁹⁰ and the Highett Project documents could have been sorted into a single bundled folder by moving three documents.⁹¹

124 In my view it would have been an easy and speedy exercise for the plaintiff's personnel, who were familiar with the sort of project claim documentation involved, which documentation was readily identifiable as to which construction project each misplaced document relates, to assimilate and separate out non-Highett Project related documents to consolidate the August 2019 Adjudication Application.⁹²

125 I consider that the following steps could readily and speedily have been undertaken by the plaintiff to put the August 2019 Adjudication Application into a consolidated form where its contents accorded with the Highett Adjudication Application Index and all Highett documents were placed together:

⁸⁹ First Blyth Affidavit, [3]-[4].

⁹⁰ First Blyth Affidavit, Exhibit 'AIB-13', MacKenzie Statutory Declaration, [3.3], [4.3] and [5.3].

⁹¹ MacKenzie Affidavit, [33].

⁹² Mr Duncan MacKenzie has prepared a table that shows which Highett Project comprising the First Application were provided in folders for the Glen Huntly Adjudication Application and the Bulleen Adjudication Application.

- (a) substitute the cover page located in the August 2019 Adjudication Application folder (incorrectly referencing 'Promax Developments Pty Ltd'), with the cover page located in the Glen Huntly Adjudication Application Volume 1 folder (incorrectly referencing 'Promax Buildings Pty Ltd');
- (b) substitute the one page covering letter from MinterEllison dated 16 August 2019 located in the August 2019 Adjudication Application folder (incorrectly for that folder referencing the 'Glen Huntly' project), with the one page cover letter from MinterEllison dated 15 August 2019 located in the Glen Huntly Adjudication Application Volume 1 folder (incorrectly for that folder referencing the 'Highett' project);
- (c) substitute the one page Adjudicate Today application form located in the August 2019 Adjudication Application folder (referencing the 'Glen Huntly' project), with the one page Adjudicate Today application form located in the Glen Huntly Adjudication Application Volume 1 folder (referencing the 'Highett' project). In the case of each application form the project to which it related was stated;
- (d) substitute the Statutory Declaration of Ozan Girgin dated 15 August 2019 located in the August 2019 Adjudication Application folder (referencing the 'Bulleen' project), with the Statutory Declaration of Ozan Girgin dated 15 August 2019 located in the Bulleen Adjudication Application Volume 1 folder (referencing the 'Highett' project). Each Statutory Declaration clearly identified the project to which it related.

126 This exercise becomes only more straightforward when one considers that the plaintiff had the assistance of the Index of documents included in the August 2019 Adjudication Application served on the 16 August 2019,⁹³ and the further index of documents provided to the solicitors for the plaintiff on 21 August 2019 under cover

⁹³ See First Blythe Affidavit, Exhibit 'AIB-10', Tab 1, page 3.

of email,⁹⁴ (which both identified the documents correctly) to enable the plaintiff to identify and relocate those documents applicable to the August 2019 Adjudication Application and relevant to the Highett Project.

127 For the above reasons, I consider the plaintiff's assertion that it was required to 'trawl through seven folders of voluminous documents to try and distil what papers went with which adjudication application' is unjustifiable and exaggerated.⁹⁵ This is particularly so given, as the plaintiff concedes, three of the folders provided to the plaintiff on 16 August 2019 were legal authorities.

128 Furthermore, the evidence in this application is that:

- (a) on 16 August 2019, Ms Rachael-Ann Ryan, the development manager for LDS Lifestyle Pty Ltd, reviewed the folders for the Glen Huntly Adjudication Application and noted that the materials included documents for another project, that is the Highett Project;⁹⁶
- (b) on 17 August 2019, Mr Andrew Blyth, solicitor for Arnold Bloch Leibler, was provided with the seven folders. He reviewed the folders on that day and identified that the August 2019 Adjudication Application materials were contained in the Glen Huntly Adjudication Application Volume 1 folder;⁹⁷ and
- (c) on 21 August 2019, Arnold Bloch Leibler also communicated to MinterEllison that they had received copies of all the cover letters, Adjudicate Today application forms and submissions for each of the three applications.⁹⁸ On the same day, Arnold Bloch Leibler was also provided an index of documents comprising the August 2019 Adjudication Application.⁹⁹

⁹⁴ MacKenzie Statutory Declaration, Exhibit 'DJM-02'.

⁹⁵ Plaintiff Submissions, 19 September 2019, [9].

⁹⁶ MacKenzie Affidavit, Exhibit 'DJM-12'.

⁹⁷ Blyth Affidavit, [15]-[23].

⁹⁸ MacKenzie Affidavit, [20]-[21].

⁹⁹ Blyth Affidavit, Exhibit 'AIB-13'; see email from Peter Wood to John Mengolian on 21 August 2019 at

129 Further, I consider that a fair and sensible reading by the plaintiff's personnel of the August 2019 Adjudication Application documents provided by Promax to the plaintiff on 16 August 2019 established that the documents served included the August 2019 Adjudication Application, notwithstanding that a very small number of documents forming part of that package of documents which related to other projects, being contemporaneously undertaken by companies which were part of both the plaintiff and Promax's corporate family.

130 Furthermore, I consider that my above findings are supported by circumstances in which the materials served by Promax on 16 August 2019 occurred. Relevantly, those circumstances included that the plaintiff is a commercial proprietor operating in the construction industry in the State of Victoria, and one conversant with Promax's claims, including because the plaintiff had received a number of earlier claims lodged by Promax in relation to the Highett Project prior to July 2019. As a result I infer that the plaintiff was familiar with the Promax payment claim format and documentation and also familiar with the way in which the Highett Project claim documentation identified the relevant project. From these same circumstances I also similarly infer that the plaintiff's personnel were familiar with Promax's project claim related documentation in respect of the Bulleen and Glen Huntly Projects.

131 For these reasons I consider that the plaintiff was readily able to appreciate on 16 August 2019, or very soon thereafter, that some limited documents relating to the August 2019 Adjudication Application had been intermingled with the adjudication application documents for other Projects by mistake.

132 Given the nature of the material constituting the August 2019 Adjudication Application, served on 16 August 2019 in relation to the Highett Project, and taking into account the circumstances referred to above and the plaintiff's and Promax's affidavit material detailing how the August 2019 Adjudication Application material

7:57pm with attachments appearing at pages 78 to 84 of the exhibit.

provided on 16 August 2019 was compiled, in my view the plaintiff was, informed by a perusal of those materials over a short period, readily able to understand that it had received an August 2019 Adjudication Application from Promax in relation to the Hihett Project and also appreciate that a very limited number of application documents had probably been mistakenly intermingled with the adjudication application folders in relation to other Projects served at the same time.

133 I also consider that in the circumstances, and notwithstanding a limited number of disordered pages relating to the August 2019 Adjudication Application, the plaintiff would, over a very short period of time have been able to identify the few claim documents which were out of order and commence to assimilate and prepare its responses to the August 2019 Adjudication Application.

134 Accordingly, I also find that it is both likely that the plaintiff would have appreciated that the body of materials it received on 16 August 2019 from Promax included the August 2019 Adjudication Application in relation to the Hihett Project being undertaken by Promax for the plaintiff and in my view the plaintiff was in a position on 16 August 2019, or very soon thereafter, to assimilate, understand and prepare its response to that Adjudication Application as provided for in the SoP Act.

135 Furthermore, it is clear from communications from the plaintiff in relation to the payment claim in issue professing confusion on its part and further asserting non-compliance with the SoP Act by Promax in relation to the August 2019 Adjudication Application material served on 16 August 2019, that on 16 August 2019 the plaintiff received the August 2019 Adjudication Application.¹⁰⁰

136 It is to be noted that the plaintiff did not take issue with the re-service of the August 2019 Adjudication Application and supporting materials on 23 August 2019. In relation to service of the August 2019 Adjudication Application on 23 August 2019, the plaintiff only complains that service of that Adjudication Application was not 'as

¹⁰⁰ First Blyth Affidavit, [25], Exhibit 'AIB-12'; Plaintiff Submissions, 19 September 2019, [10].

soon as practicable' namely on the plaintiff's case on 16 August 2019 or the next day and that the August 2019 Adjudication Application could and should have been served by email.

137 Further, service occurs when documents sought to be served come to the attention of the person to be served or a person with authority to deal with such a document on behalf of a person or corporation. In *Falgat*,¹⁰¹ Hodgson JA stated:¹⁰²

... in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty Limited v Leslie* [1996] NSWSC 314; (1996) 41 NSWLR 542; *Mohamed v Farah* [2004] NSWSC 482 at [42]-[44]. In such a case, there has been service, provision and receipt. (emphasis added)

138 In *QC Communications*,¹⁰³ Ball J cited the above passage and said further in relation to the New South Wales security of payment Act that:¹⁰⁴

A document will be served in accordance with the requirements of the SOP Act if it actually comes to the attention of the person to be served ... in this case, the application was served, although it appears that the supporting material was not. In my opinion, the failure to serve supporting material does not go to the jurisdiction of the Adjudicator. There is nothing in the SOP Act which requires an applicant to supply supporting material to the Adjudicator.

...

139 I also reject the plaintiff's submission that *Falgat* and *QC Communications* are distinguishable on the facts of this case and therefore of no assistance. Although there is nothing on the facts in *Falgat* to suggest that the payment claim or payment response in that case were incomplete or in issue, the statement above as to when service is effected is relevant and helpful on the facts of the present case. Similarly, although *QC Communications* does not consider the completeness of an adjudication application for the purpose of service, but rather the claimant there failed to serve supporting documentation in that there was no clear evidence that a complete copy

¹⁰¹ [2006] NSWCA 259.

¹⁰² *Ibid* [58].

¹⁰³ [2016] NSWSC 1095.

¹⁰⁴ *Ibid* [27]-[29].

of the adjudication application (including supporting materials) had been sent to QC Communications, Ball J's statement in that case are likewise relevant here in relation to the establishment of service upon the plaintiff on 16 August 2019.

140 Finally, I note that on its Amended Originating Motion and Summons it is the plaintiff which bears the onus of establishing that service of Promax's August 2019 Adjudication Application did not occur. There is no evidence that Ms Bui, who accepted service of the seven folders on 16 August 2019, did not have authority to deal with all documents received on behalf of the plaintiff and LDS Lifestyle Pty Ltd.

Conclusion - service effected on 16 August 2019

141 For the above reasons, I am satisfied that Promax's August 2019 Adjudication Application in relation to the Highett Project was compliantly served for the purposes of s 18(5) of the SoP Act on 16 August 2019.

Service on 23 August 2019 - within a reasonable time

142 I consider that the six business day period between 15 August 2019 and 23 August 2019 was a reasonable time within which Promax was to serve its August 2019 Adjudication Application on the plaintiff in the circumstances of this particular matter, taking into account that:

- (a) in relation to the August 2019 Adjudication Application, the plaintiff was not entitled to lodge an application response, by operation of s 21(2A) of the SoP Act;
- (b) on 20 August 2019 the authorised nominating authority, Adjudicate Today, notified both the plaintiff and Promax that Adjudicator Moore had accepted the Adjudication commenced by the August 2019 Adjudication Application;
- (c) on 20 August 2019 Arnold Bloch Leibler wrote to Adjudicator Moore and copied in Promax, in substance disputing that the plaintiff had been served with an Adjudication Application which complied with the requirements of

the SoP Act and also disputing Adjudicator Moore's appointment and jurisdiction to hear and determine the August 2019 Adjudication Determination;

- (d) by 20 August 2019 Promax and Adjudicator Moore were aware that the plaintiff argued that because of the form and order of the documents it received from Promax on 16 August 2019, the plaintiff disputed service under s 18(5) of the SoP Act and contested the appointment and jurisdiction of Adjudicator Moore;
- (e) subsequent to 20 August 2019 the lawyers for Promax were engaged in email correspondence and other communications in which Promax's lawyers amongst other things, sought to understand the plaintiff's complaints about Promax's service of the August 2019 Adjudication Application on 16 August 2019. Such enquiries by Promax's lawyers and the plaintiff's lawyers responses continued until at least 23 August 2019;¹⁰⁵
- (f) given the date of notice of the Adjudicator Moore's acceptance of the August 2019 Adjudication Application (20 August 2019) pursuant to s 22(4) of the SoP Act, Adjudicator Moore had until at least 3 September 2019 to determine the Adjudication;
- (g) Promax could extend the date by which Adjudicator Moore was required to determine the adjudication application to 15 business days after the date of Adjudicator Moore's acceptance of the application (10 September 2019);
- (h) due to the operation of ss 21(1), 22(1) and 22(4) of the SoP Act, no prejudice to the plaintiff was likely to arise by reason of service by Promax on 23 August 2019, as occurred;
- (i) both the plaintiff and Promax were represented by large law firms with

¹⁰⁵ MacKenzie Affidavit, [25], Exhibit 'DJM-10'.

specialties in SoP Act litigation;

- (j) the parties addresses for service were defined in the Contract and the Contract also permitted the service of documents by email.

143 Furthermore, in this matter, although the plaintiff argued that service under s 18(5) of the SoP Act should be contemporaneous with the making of an adjudication application or 'at worst' the next business day, the plaintiff did not alternatively or separately seek to argue that, in the circumstances, service by Promax of the August 2019 Adjudication Application on 23 August 2019 was after the effluxion of a reasonable time for service, save that the plaintiff noted that Promax could have served by email if it chose, and the plaintiff submitted that in the circumstances including that there was a contractually agreed address for service of notices and the availability of email communication which had been previously utilised by the parties, service of the August 2019 Adjudication Application, was required on the day of filing or the next business day.¹⁰⁶

Conclusion

144 I have earlier found that Promax effected compliant service of the August 2019 Adjudication Application on 16 August 2019. For the above reasons I also find that on 23 August 2019 Promax again effected service of its August 2019 Adjudication Application on the plaintiff within a reasonable time of making that application under s 18(3)(b) of the SoP Act, and in compliance with s 18(5) of the Act.

Section 18(5) of the SoP Act is not a jurisdictional fact

145 Given my above conclusion in relation to the proper construction of s 18(5) of the SoP Act and the findings referred to in the last preceding paragraph in relation to the fact of service by Promax on both 16 August 2019 and 23 August 2019, it is unnecessary for the disposal of the plaintiff's Amended Originating Motion and Summons of 1 October 2019 to decide whether the service requirement in s 18(5) of

¹⁰⁶ Plaintiff Submissions, 1 October 2019, [26] and [27].

the SoP Act is of a jurisdictional nature.

The effect of Promax's further application for adjudication pursuant to s 28 of the SoP Act

146 The plaintiff seeks to impugn the September 2019 Adjudication Determination on the basis that the September 2019 Adjudication Application upon which it is based was invalid. The plaintiff argues that the September 2019 Adjudication Application was an invalid Adjudication Application because the August 2019 Adjudication Application accepted by Adjudicator Moore, which Promax argues Adjudicator Moore failed to determine and sought to withdraw under s 28(2)(a) of the SoP Act, the plaintiff submits was always a nullity, and incapable of triggering the operation of s 28 of the Act.

147 The plaintiff also argues that because Adjudicator Moore did not at any point have jurisdiction to determine the August 2019 Adjudication Application, nor for the above reasons did Adjudicator McMullan have jurisdiction to determine the September 2019 Adjudication Application because it was always a nullity, the Court should declare that the September 2019 Adjudication Application is void and invalid.

148 Section 28 of the SoP Act provides as follows:

28. Claimant may make new application if previous application refused or not determined

- (1) This section applies if –
 - (a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or
 - (b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).
- (2) In either of those circumstances, the claimant –
 - (a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and
 - (b) may make a new adjudication application under section 18.
- (3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

- (4) This Division applies to a new application referred to in this section in the same way as it applies to an application under section 18.

149 Section 28 of the SoP Act permits a claimant to make a new application in certain circumstances including where an adjudicator ‘fails to determine’ the adjudication application within the time allowed by s 22(4) of the SoP Act.

150 In this case the adjudicator to whom the August 2019 Adjudication Application was initially referred had until 3 September 2019 to make his adjudication application, but failed to make his adjudication determination by that statutory deadline.

151 In the above circumstances, Promax asserts that it is entitled to lodge a fresh application pursuant to s 28(2) of the SoP Act. Promax relies in this regard on the following statement of Ball J in *Olympia*:¹⁰⁷

20. ... There is ample authority for the proposition that “fails” in this context simply means “does not”. So, for example, if the court holds that the adjudicator’s decision was void for some reason, then the adjudicator has failed to determine the application: see *Multiplex Constructions Pty Limited v Luikens* [2003] NSWSC 1140; *Emergency Services Superannuation Board v Sundercombe* [2004] NSWSC 405; *John Holland Pty Limited v Made Contracting Pty Limited* [2008] NSWSC 374; *Cardinal Project Services Pty Limited v Hanave Pty Limited* [2010] NSWSC 1367 at [22] per McDougall J.

21. It follows, in this case, that Olympia is entitled under s 26(2) of the Act to make a new adjudication application under s 17. However, the court would not permit it to do so unless the court was satisfied that an adjudicator had jurisdiction to determine the claim.¹⁰⁸

152 However in this matter, as I have found for the reasons outlined above, that:

- (a) Promax effected service of its August 2019 Adjudication Application under s 18(5) of the SoP Act, on 16 August 2019; and further
- (b) service by Promax of its August 2019 Adjudication Application on 23 August 2019 was also valid and effective service within a reasonable time of that Adjudication Application being made to the authorised nominating authority

¹⁰⁷ [2011] NSWSC 165.

¹⁰⁸ *Ibid* [20]-[21].

as required by s 18(5) of the SoP Act.

153 As a result of the above findings the application of s 28 of the SoP Act is now uncontroversial because the plaintiff's argument that the August 2019 Adjudication Application is non-compliant and void has been rejected. I have concluded that this adjudication application has been compliantly served as required by the SoP Act and is valid and effective.

154 It follows from the above that there is no remaining argument or other basis to support the plaintiff's assertion that Promax was not entitled to make a new adjudication application pursuant to s 28(2)(b) and s 18 of the SoP Act as it did in September 2019, ultimately resulting in the September 2019 Adjudication Determination. For the same reasons the authorities cited by the parties in support of their arguments relating to the operation of s 28 of the SoP Act require no further consideration.¹⁰⁹

Conclusion - validity of new September 2019 Adjudication Application

155 For the above reasons I reject the plaintiff's arguments as to the inapplicability of s 28 of the SoP Act and the asserted resultant invalidity of the September 2019 Adjudication Application and September 2019 Adjudication Determination. I consider that the September 2019 Adjudication Application was compliantly made pursuant to s 28 and s 18 of the SoP Act and was a valid adjudication application under the Act. There is no dispute as to the service of the September 2019 Adjudication Application.

Summary conclusions in relation to the plaintiff's s 18(5) service related grounds

156 For the above reasons, I conclude and find as follows:

(a) On 16 August 2019 Promax compliantly served its August 2019 Adjudication

¹⁰⁹ *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165; *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140; *John Holland Pty Ltd v Made Contracting Pty Ltd* [2008] NSWSC 374.

Application on the plaintiff as required by s 18(5) of the SoP Act;

- (b) On 23 August 2019 Promax again compliantly served its August 2019 Adjudication Application on the plaintiff pursuant to s 18(5) of the SoP Act, within a reasonable period of time making that application under s 18(3)(b) of the SoP Act;
- (c) Promax was in the circumstances which existed, entitled to make a fresh adjudication application pursuant to s 28 of the SoP Act;
- (d) On 11 September 2019 Promax compliantly served its new September 2019 Adjudication Application (dated 10 September 2019), on the plaintiff.

Plaintiff seeks to impugn the Adjudicator's valuation of Promax's payment claim

Plaintiff asserts jurisdictional error arising as result of the adjudicator failing to determine certain parts of the September 2019 Adjudication Application in accordance with ss 11 and 23 of the SoP Act

157 The plaintiff's Amended Originating Motion dated 1 October 2019¹¹⁰ seeks to impugn the Adjudicator's valuation of parts of the September 2019 Adjudication Determination, at paragraph [103] (Items [18.1] to [18.9]).

The plaintiff's submissions

158 The plaintiff in summary alleges that the Adjudicator, contrary to ss 11 and 23 of the SoP Act, has failed to demonstrate any process of assessment of the value of the Promax's claim or reasoning in relation to that assessment, as required by the SoP Act or the Contract.¹¹¹

159 The plaintiff submits that the method of determination employed by the Adjudicator to value the Promax claim failed to accord with the Adjudicator's obligations pursuant to s 23(2)(b) and ss 11(1)(a) and 11(1)(b) of the SoP Act.

¹¹⁰ Originating Motion filed 17 September 2019.

¹¹¹ T36.7-11.

160 The plaintiff asserts that the Adjudicator's above failures arise because:

- (a) the Adjudicator has merely adopted the amount claimed by Promax in the 'trade breakdown' and 'budget' referred to in Promax's payment claim;
- (b) the Adjudicator erroneously assumed that the 'trade breakdown' or 'budget' formed part of the Contract;
- (c) the Adjudicator failed to undertake any independent assessment or valuation of the work, rates and percentages asserted by Promax in the 'trade breakdown' or 'budget' in respect of paragraph [103] (Items [18.1 to [18.9]) of the September 2019 Adjudication Determination, as required by ss 11 and 23(4) of the SoP Act;
- (d) the plaintiff submits that rather than determining the September 2019 Adjudication Application as the Adjudicator was required to do pursuant to s 23(2)(b) of the SoP Act, subject to the SoP Act and the provisions of the Contract from which the application arose, the Adjudicator in substance treated the Promax 'trade summary' which he used in valuing Promax's July 2019 Payment Claim, as an agreed Contract document;¹¹²
- (e) the Adjudicator gave undue weight to the irrelevant fact that the plaintiff had failed to serve a payment schedule expressly disputing Items [18.1] to [18.9], which did not relieve the Adjudicator of undertaking a proper determination of value of the works claimed, consistent with ss 11 and 23(4) of the SoP Act.

161 As a consequence the plaintiff alleges that the September 2019 Adjudication Determination, at paragraphs [103], Items [18.1] to [18.9], is void for jurisdictional error and the sums referable to those Items should be severed from the Adjudication Determination.

162 The plaintiff also notes that the parties' Contract in this matter was ostensibly a lump

¹¹² T33.19-29; T34.18-28.

sum contract which did not specify individual rates or quantities for particular portions, work or goods required for the works. The plaintiff submits that the parties' Contract was not subject to any agreed 'trade breakdown' or 'budget'.

163 The plaintiff contends that the Contract made no provision for what (if any) part of the lump sum price was allocated to construction work or associated with either the preliminaries relevant to the works or the trade components of the lump sum price.

164 Nor, the plaintiff submits, did the Contract specify any provisional sums, rates, measurements or quantities expressed in the Contract as applicable to the above works or costs of construction.

165 Further, the plaintiff submits that Promax did not identify in its Adjudication Submissions dated 10 September 2019¹¹³ whether either a document known as a 'trade breakdown' or 'budget' referred to in Promax's July 2019 Payment Claim had any status under the Contract, or similarly whether the 'cost to comp' items in Promax's July 2019 Payment Claim were of contractual status.

166 The plaintiff submits that neither Promax in its Adjudication Submissions dated 10 September 2019, nor the Adjudicator in the September 2019 Adjudication Determination, identified a 'contractual' or 'agreed' 'trade breakdown', nor did the Adjudicator refer to a basis for finding any such materials supported the nine items [18.1] to [18.9] referred to by the Adjudicator at pages 27 to 32 (inclusive) of the September 2019 Adjudication Determination. The Adjudicator did, however, note that the nine Items [18.1] to [18.9] were not claims which the plaintiff disputed.

167 The plaintiff submits that the Adjudicator adopted Promax's claim based on asserted 'contractual' or 'agreed' 'trade breakdown' without any objective assessment, save for a passing reference to the limited photographic evidence supplied by Promax.

168 The plaintiff concedes that the Adjudicator was entitled to 'look at the *trade summary*'

¹¹³ Plaintiff Submissions, 1 October 2019, [60].

as a document advanced by Promax, however submits that the Adjudicator was not entitled to regard and utilise the trade summary as a contractual document which provided a basis for valuation pursuant to ss 11(1)(a) or 11(1)(b) and s 23(2)(b) of the SoP Act.¹¹⁴

169 The plaintiff submits that the *trade summary* should have been regarded by the Adjudicator as merely an assertive document, no better and no more reliable than submissions made by Counsel for Promax.¹¹⁵

170 The plaintiff submits that the Adjudicator evidently proceeded on the erroneous assumption that the 'trade breakdown' was part of the terms of the Contract and therefore a basis for valuation under s 11(1)(a) of the SoP Act.¹¹⁶

171 The plaintiff contends that by treating the 'trade breakdown' as a document of contractual effect the Adjudicator erred in his obligation under s 23(2)(b) of the SoP Act, to relevantly consider, subject to the stipulations of the Act, only the provisions of the Contract from which the application arose.

172 The plaintiff however concedes and accepts that in addition to the utilisation of the trade breakdown in his September 2019 Adjudication Determination of the value of construction work carried out and the related goods and services supplied, the Adjudicator also made reference to and relied on a number of site photographs of the works referable to certain specific Items to assess their state of completion.¹¹⁷

173 The plaintiff also concedes and accepts that in relation to the valuation obligation under the SoP Act there may be a level of informality permitted in the reasons an adjudicator expresses in his or her adjudication determination to explain the valuation reached. The plaintiff however submits that there nevertheless needs to be sufficient transparency in the reasoning of the Adjudicator to demonstrate that the

¹¹⁴ T33.13-21.

¹¹⁵ T33.23-25.

¹¹⁶ Plaintiff Submissions, 14 October 2019, [6].

¹¹⁷ T47.29-31, T48, T50.1-24.

Adjudicator has fulfilled his statutory task in accordance with the SoP Act.¹¹⁸

174 The plaintiff submits that although the Adjudicator can have regard to the absence of a contrary position taken by the respondent to a claimant's payment claim, or elements of it, the absence of a payment schedule provided by the plaintiff (as respondent in this matter) did not absolve the Adjudicator from discharging his statutory task under ss 23 and 11 of the SoP Act, nor did that circumstance reverse the onus on Promax (as claimant) to establish the plaintiff's obligation to pay or create a presumption in Promax's favour.¹¹⁹

175 The plaintiff relies upon the decisions of *Nuance Group v Shape Australia*¹²⁰ (*Nuance Group*), *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd*¹²¹ (*SSC Plenty Road*) and *Krongold Constructions (Aust) v SR & RS Wales*¹²² (*Krongold*) as persuasive judicial statements to the effect that determinations of value may fail to comply with the SoP Act if in substance they reverse engineer the valuation undertaken or fail to sufficiently substantiate the basis for valuation.

176 The plaintiff submits that the Adjudicator has not undertaken the task of valuing Promax's claim as he was required to do under either s 11 or s 23 of the SoP Act, but has instead in relation to claimed Items [18.1] to [18.9], impermissibly:

- (a) worked backwards from the amount claimed by Promax;
- (b) accepted uncritically, and with no contractual basis, that the 'contractual' or 'agreed' 'trade breakdown' as stated by Promax was somehow correct, and as a result the uncorroborated assertions made by Promax as to the supposed 'cost to complete' were apparently accepted; and
- (c) relied on there being no material from the respondent to dispute Promax's

¹¹⁸ T59.2-25.

¹¹⁹ T34.4-11; Plaintiff Submissions, 14 October 2019, [29]-[34].

¹²⁰ [2018] VSC 362.

¹²¹ [2015] VSC 631.

¹²² [2016] VSC 94.

calculations and claims in relation to claimed Items [18.1] to [18.9], in circumstances where it is common ground that the plaintiff did not submit a payment schedule under the SoP Act. The plaintiff's submissions of 1 October 2019 at [68] argue:

... The fact that a respondent has not filed material to dispute a calculation is not a matter listed in s 23(2) of the Act as one of the matters that an adjudicator is to consider in valuing a claim. This is especially so in this case, where, because it did submit a payment schedule, the respondent had no ability to submit material in response to the adjudication application.'

Promax's submission in support of the Adjudicator's valuations

177 Promax accepts that the Adjudicator, in undertaking a statutory obligation pursuant to s 23 of the SoP Act, must determine that the works were performed and value those works.

178 Promax also concedes that in carrying out his valuation obligations the Adjudicator cannot simply adopt the amount claimed by it, for example, in the payment claim or the adjudication application.¹²³ Promax also relies on Vickery J in *SSC Plenty Road*¹²⁴ where his Honour in the following passage stated:

The adjudicator must proceed to make the critical findings by:

- (i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
- (ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant.¹²⁵

179 Promax submits that what is required of an adjudicator in each case is to consider and assess the valuation information presented in the course of the adjudication, and arrive at a rational assessment of value on the basis of that evidence.

180 Promax submits that the Adjudicator can properly have regard to the circumstance

¹²³ T19-20.

¹²⁴ [2015] VSC 631.

¹²⁵ Ibid [101(j)].

that no payment schedule or other contradictory material has been provided by the respondent and the Adjudicator is entitled to draw any necessary inference from the absence of contradictory material from the respondent. Promax also points out that in *Iskra v MMIR Pty Limited*¹²⁶ the Court of Appeal in New South Wales, per Gleeson JA, adopted what was said by Hodgson JA in *Coordinated Construction Co Pty Limited v J M Hargreaves (NSW) Pty Limited*,¹²⁷ namely:

52. ... The adjudicator may very readily find in favour of a claimant on the merits of a claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without addressing its merits.
53. Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.¹²⁸

181 Promax submits that even if it were accepted that the Adjudicator adopted a formulaic approach to addressing each one of a number of items of claim in the September 2019 Adjudication Determination and to a degree adopted a cut and paste process which was repeated for different items, the adoption of such drafting approaches as would not in itself establish jurisdictional error.¹²⁹

182 Promax points out that the Adjudicator expressly had regard, as he was required to do pursuant to s 23(2) of the SoP Act, to the provisions of the Contract from which the application arose, Promax's payment claim, the claimant's submissions and relevant documentation, including site photographs of the works, which were provided to the Adjudicator.¹³⁰

¹²⁶ [2019] NSWCA 126, [41], [46], [47] and [49].

¹²⁷ [2005] NSWCA 228.

¹²⁸ The Court of Appeal in *Iskra* observed that to the extent that there was any disagreement in between Hodgson JA and Basten JA in *Coordinated Construction* as to whether an adjudicator is entitled to go beyond the terms of the adjudication response in rejecting part or all of the progress claims, it was not necessary to decide that question in *Iskra*. See *Coordinated Construction* [2005] NSWCA 228 at [52] per Hodgson JA cf [64]-[68] per Basten JA.

¹²⁹ T23.20-T24.-2.

¹³⁰ Adjudication Determination [17]-[37], [48], [50]-[57], [61]-[101]; and the payment claim and the provisions of the SoP Act; and the Adjudication Application and submissions which were set out in

- 183 Promax submits that the Adjudicator in his Adjudication Determination undertook an evidence-based exercise which drew on the material presented in the Adjudication including the 'trade breakdown' 'trade summary' relied upon by Promax and site photographs of the progress and completion of various Items of work the subject of its claim for payment.¹³¹
- 184 Promax notes that it was open to the Adjudicator to accept the evidence presented by Promax, and do so readily in the circumstance where the plaintiff had not provided a payment schedule and there was therefore no material to contradict, or weigh in the balance against, Promax's claim and the material put forward by Promax to support that claim.¹³²
- 185 Promax also submits that the Court should not be astute to criticise the Adjudicator's process of reasoning nor take a fine tooth comb to the September 2019 Adjudication Determination in that regard.
- 186 Promax submits that it is sufficient that the Adjudicator clothes his conclusions with at least bare reasons and that questions of construction of the relevant contract, questions as to whether the work in issue was in fact performed, and questions of how the task of valuation pursuant to s 23 of the SoP Act should be approached, all fall within the scope of the Adjudicator's jurisdiction under the SoP Act.¹³³
- 187 As to the 'trade summary', Promax notes that document sets out in relation to the components of trade and associated costs making up the contract price (referable as contract sum) the Contract budget amount; expenditure to date, as a percentage of the value of the item as part of the overall contract price. That document also identifies, in the 'Trade Summary' column, the previous expenditure in relation to each trade component, the expenditure for this month relevant to a 'Progress Claim' and identifies the cost to complete by trade and other components.

respect of each of the Items referenced in the Adjudication Determination.

¹³¹ Promax Submissions, 8 October 2019, [11]-[14], [20], [24] and [27].

¹³² Ibid [42]-[46].

¹³³ Ibid [25]; T26.

188 Promax submit that the abovementioned information provides a rational basis for the process of evaluation.¹³⁴ Promax also notes in relation to the Items claimed as 100% complete that the Adjudicator utilised the 'trade summary' and the 'budget' to identify those Items which were 100% complete and to determine the value of the works at the time of the relevant payment claim.

189 Promax observes that in relation to the Items valued at less than 100% complete, the Adjudicator identified the method of calculation applied and note his finding that Promax's claim calculation is reasonable.¹³⁵

190 Accordingly, Promax submits that relying upon the evidence provided by the 'trade breakdown' and the evidence provided by way of site photographs of the state of works on site (which were attached to Promax's claim), the Adjudicator has undertaken an evidence based valuation to determine the extent to which the works were complete, and to determine the value of the work and related goods and services supplied or undertaken.¹³⁶

191 Promax refutes that there is any basis for the plaintiff's assertion that the Adjudicator considered the 'trade breakdown' for the purposes of s 11(1)(a) of the SoP Act, that is that the Adjudicator valued assuming that the 'trade breakdown' was part of or a relevant term of the Contract.¹³⁷

192 Promax highlights in its submissions that the Adjudicator did not decide that the 'trade breakdown' formed part of the Contract between the parties.¹³⁸

193 Finally, Promax also submits that if the Court was to find that in respect of any one of the Items claimed by it, the Adjudicator has fallen into jurisdiction error, the Court

¹³⁴ T29.3-10; the Items which related to claims for 100% completion were Items [18.2], [18.3], [18.5], [18.6] and [18.9].

¹³⁵ Items [18.1] and [18.4] are examples of such incomplete Items.

¹³⁶ T37.

¹³⁷ T39.1-9 (18/10/19).

¹³⁸ Promax Submissions, 8 October 2019, [41].

should remit that particular item back to the Adjudicator.¹³⁹

Considerations in relation to the Adjudicator's valuations in the September 2019 Adjudication Determination pursuant to ss 11 and 23 of the SoP Act (Adjudication Determination [103], Items [18.1] to [18.9])

194 I am not satisfied that the plaintiff has established that the Adjudicator failed to determine the appropriate amount of the progress payment to be paid by the plaintiff to Promax in accordance with s 23 and s 11 of the SoP Act, and for the reasons which follow I reject the plaintiff's asserted grounds of error in the Adjudicator's valuations.¹⁴⁰

The Adjudication Determination - Valuation

195 The Adjudicator's valuation of works under the Contract is set out as follows in the September 2019 Adjudication Determination, at paragraph [103];

Preliminaries

Ref: 18.1

Claimant: \$407,000.00 (incl GST)

Respondent:

Adjudicator: \$407,000.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$407,000 (incl GST) covers the site manager's wage, all site set up costs including but not limited to building, contractual, work cover and public liability insurances, site office/lunch room and toilets.
2. The cost to complete as per the trade breakdown is \$180,000 (incl GST), (not including an allowance for profit which makes up the remaining balance to the amount claimed of \$180,000) which is required to cover the balance of the site manager's wage, toilet hire, site office and crane erection, dismantle and hire, calculated as follows:

Site Manager Wage (\$120,000 per year package - 10 months)	100000.00
Site Office (\$120 per week or \$6,240) per year - 10 months)	5200.00
Toilets (\$28 each per week or \$1,456 per year - 10 months x 2)	2426.67
Crane Install/Dismantle (\$5,000 each)	10000.00
Crane Hire (\$1,800 per week for 14 weeks)	25200.00
Total (incl GST)	142826.67
3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and there is sufficient cost to complete all works based on the above figures, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 69% of the trade summary amount for preliminaries out of a total preliminaries budget of \$533,836.35 (excl GST). It bases the

¹³⁹ Transcript 18.10.19: T39.28-T40.20.

¹⁴⁰ Amended Originating Motion, 1 October 2019 at [C(i)-(iv)] and [D].

calculation on the remaining amount required to cover the balance of the site manager's wage, toilet hire, site office and crane erection dismantle and hire. In my view, this method of calculation and the amount calculated looks reasonable.

2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$407,000.00 (incl GST).

Board Piers

Ref: 18.2

Claimant: \$542,300.00 (incl GST)

Respondent:

Adjudicator: \$542,300.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$542,300 (incl GST) is a claim for the full scope of bored piers. All bored piers are complete as per the contract documentation and plans.
2. The completed works can be seen in the attached photographs.
3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and there is sufficient cost to complete all works based on the above figures, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 100% of the trade summary amount for bored piers out of a total bored piers budget of \$493,000.00 (excl GST).
2. It bases this claim on the 6 photos attached to the Application for Adjudication. In my view, the photos confirm that the bored piers item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$542,300.00 (incl GST).

Capping Beam

Ref: 18.3

Claimant: \$166,100.00 (incl GST)

Respondent:

Adjudicator: \$166,100.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$166,100 (incl GST) is a claim for the full scope of capping beam works, namely the supply and install of the capping beam steel. The capping beam are complete as per the contract documentation and plans.
2. The completed works can be seen in the attached photographs.
3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and there is sufficient cost to complete all works based on the above figures, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 100% of the trade summary amount for capping beam out of a total capping beam budget of \$151,000.00 (excl GST).
2. It bases this claim on the 11 photos attached to the Application for Adjudication. In my view, the photos confirm that the capping beam item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of

this contract work item is \$166,100.00 (incl GST).

Shotcrete

Ref: 18.4

Claimant: \$171,600.00 (incl GST)

Respondent:

Adjudicator: \$171,600.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$171,600 (incl GST) is for the partial completion of shotcrete works as per the contract documentation and plans. The capping beam has been sprayed in full.
2. The works completed at the time of the Payment Claim are broken down as follows:

40MPA Spray Mix (148m3 @ \$290 + GST per m3)	42920.00
Silica Fume 40KG/M3 (148m3 @ \$60 + GST per m3)	8880.00
Cartage to site (148m3 @ \$8 + GST per m3)	1184.00
Xypex (148m3 @ \$120 + GST per m3)	17760.00
Shotcrete Labour (148m3 @ \$320 + GST per m3)	47360.00
Traffic Mgt 2 man crew (3 days x 8 hours @ \$91 + GST per m3)	2184.00
Concrete Pump (148m3 @ \$7 + GST per m3)	1036.00
Concrete Pump Travel Fee (1 hr per day @ \$330 per hr x 3 days)	990.00
Concrete Pump Hourly Rate (3 days x 8 hrs @ \$330 + GST per m3)	7920.00
Total Cost of Supply & Install Shotcrete (excluding GST)	130234.00
Margin - 20%	26046.80
Total Claim for Shotcrete (excluding GST)	156280.80
GST	15628.08
Total Claim for Shotcrete (incl GST)	171908.88
3. The works completed at the time of the Payment Claim are evidenced by the attached photographs.
4. 1155 has not disputed this claim. The relevant shotcrete works as per the above table and allow for a profit margin. The cost to complete is for the remaining walls requiring shotcrete. The remaining works will be conducted inside site so no traffic management will be required (and as a result, the amount remaining for costs to complete in Payment Claim 5 is substantially higher than the actual cost to complete). This item has been heavily underclaimed further supporting the position that the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 56% of the trade summary amount for shotcrete out of a total shotcrete budget of \$281,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of shotcrete works as per the contract documentation and plans, calculated on the basis of the capping beam having been sprayed in full, supported by the 16 photos attached to the Application for Adjudication. In my view, the method of calculation and the amount calculated looks reasonable.
2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$171,600.00 (incl GST).

Excavation

Ref: 18.5

Claimant: \$334,400.00 (incl GST)

Respondent:

Adjudicator: \$334,400.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$334,400 (incl GST) is a claim for the full scope of

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excavation works. The excavation is complete as per the contract documentation and plans.

2. The completed works can be seen in the attached photographs.
3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and all relevant works are complete as per the scope of works, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 100% of the trade summary amount for excavation out of a total excavation budget of \$304,000.00 (excl GST).
2. It bases this claim on the 11 photos attached to the Application for Adjudication. In my view, the photos confirm that the excavation item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$334,400.00 (incl GST).

Basement Footing

Ref: 18.6

Claimant: \$67,100.00 (incl GST)

Respondent:

Adjudicator: \$67,100.00 (incl GST)

The claimant says as follows:

1. The claimed amount of \$67,100 (incl GST) is a claim for the full scope of basement footing works. All basement footing works are complete as per the contract documentation and plans.
2. The completed works can be seen in the attached photographs.
3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and all relevant works are complete as per the scope of works, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 100% of the trade summary amount for basement footing out of a total excavation budget of \$61,000.00 (excl GST).
2. It bases this claim on the 2 photos attached to the Application for Adjudication. In my view, the photos confirm that the basement footing item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$67,100.00 (incl GST).

Civil

Ref: 18.7

Claimant: \$55,000.00 (incl GST)

Respondent:

Adjudicator: \$55,000.00 (inc GST)

The claimant says as follows:

1. The claimed amount of \$55,000 (incl GST) is based on the percentage of works completed to date and the percentage of works outstanding. To date, all aggies have been installed in the bored piers and retaining walls and the civil component of the stormwater detention tank has been completed. Trade breakdown item #9 'Basement Ritek' will be used to finish the detention tank.
2. The remaining civil works comprise of 6 pits and connecting pipes, costs broken down as follows:

Cost of Pits (6 pits @ \$7,500 excluding GST)	45000.00
Cost of Pipes to connect pits (excluding GST)	9000.00
Total Estimated Cost to Complete (excluding GST)	54000.00
GST	5400.00
Total Estimated Cost to Complete (incl GST)	59400.00

3. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and there is sufficient cost to complete all works based on the above figures, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

- The claimant claims 44% of the trade summary amount for civil works out of a total civil works budget of \$50,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of civil works, claiming that, to date, all aggies have been installed in the bored piers and retaining walls and the civil component of the stormwater detention tank has been completed. The claimant says that the Trade breakdown item #9 'Basement Ritek' will be used to finish the detention tank as per the contract documentation and plans, calculated on the basis of the capping beam having been spayed in full, supported by the photos attached to the Application for Adjudication. In my view, the method of calculation and the amount calculated looks reasonable.
- There is no material from the respondent to dispute this calculation.
- I determine the amount payable in respect of the progress claim in respect of this contract work item is \$55,000.00 (incl GST).

Electrical Services

Ref: 18.8

Claimant: \$38,500.00 (incl GST)

Respondent:

Adjudicator: \$38,500.00 (incl GST)

The claimant says as follows:

- The claimed amount of \$38,500 (incl GST) is for the delivery, hire and installation of all temporary power poles including running of cables and set up of site office and lunch room power.
- The cost to complete as per the trade breakdown is \$294,800 (incl GST).
- Promax's internal costing as per the trade breakdown is as follows and includes the profit margin:

Light & Power - Domestic	108000.00
Temp Power	35000.00
Light & Power - Commercial	39000.00
Switchboards & Main Power	45000.00
Communications & Data	58000.00
Fire Detection	18000.00
Total (ex GST)	303000.00

- The quotations being received on this project are falling between \$230,000 excluding GST and \$255,000 excluding GST for the remaining scope of electrical works on the job. The cost to complete as per the contractual breakdown is more than the cost to complete the full scope of works as per the quotations as shown in below breakdown:

Light & Power - Domestic	108000.00
Light & Power - Commercial	39000.00
Switchboards & Main Power	45000.00
Communications & Data	58000.00
Fire Detection	18000.00
Total (ex GST)	268000.00

- 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and there is sufficient cost to complete all works based on the above figures, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 12% of the trade summary amount for electrical services out of a total electrical services budget of \$50,000.00 (excl GST). It bases the calculation on the assessment of the partial completion of electrical services, based on the cost to complete the remaining electrical services, comprising delivery, hire and installation of all temporary power poles including running of cables and set up of site office and lunch room power. In my view, the method of calculation and the amount calculated looks reasonable.
2. There is no material from the respondent to dispute this calculation.
3. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$55,000.00 (incl GST).

Retaining Wall & Siteworks

Ref: 18.9

Claimant: \$72,600.00 (incl GST)

Respondent:

Adjudicator: \$ (inc GST)

The claimant says as follows:

1. The claimed amount of the \$72,600 (incl GST) is for the completion of the retaining wall at the rear of the property, where the soil levels were higher than the remainder of the site. The capping beam is higher and the piles 600mm diameter and longer in length in this section of site in order to create a retaining wall for the soil. These works are complete as per the contract documentation and plans. The completed works can be seen in the attached photographs.
2. 1155 has not disputed this claim. As the cost is established via the contractual trade breakdown and all relevant works are complete as per the scope of works, the above costing should be accepted.

I conclude as follows in respect of this claimed item:

1. The claimant claims 100% of the trade summary amount for Retaining Wall & Siteworks out of a total Retaining Wall & Siteworks budget of \$66,000.00 (excl GST).
2. It bases this claim on the 3 photos attached to the Application for Adjudication. In my view, the photos confirm that the Retaining Wall & Siteworks item is 100% complete.
3. There is no material from the respondent to dispute the completion of this claimed item.
4. I determine the amount payable in respect of the progress claim in respect of this contract work item is \$72,600.00 (incl GST).

196 It is clear from the September 2019 Adjudication Determination that the Adjudicator had regard to the Contract between the parties in arriving at his Adjudication Determination. The plaintiff does not argue otherwise. In addition to other references to the Contract at [50]-[57] the Adjudicator references at [53] and [54] Schedule 1 of the Contract and cl N3.2(d) in relation to the Contract progress payment claim.

197 It can be seen from the Adjudication Determination that in making his determination, the Adjudicator also addressed the fundamental requirements of SoP

Act, in particular ss 11 and 23(1) and 23(2)(a)-(c). The Adjudicator had regard to the Contract, the payment claim, the submissions which he received including relevant documentation and also considered the provisions of the SoP Act.¹⁴¹

198 The September 2019 Adjudication Application and attached information and materials, including Promax's payment claim submissions, formed part of the relevant documentation received by the Adjudicator pursuant to s 23(2)(c) of the SoP Act.¹⁴²

199 In relation to the Contract, the Adjudicator at [50]-[57] and [84] specifically referenced s 11(1)(b) of the SoP Act, and in paragraphs including [83] and [101] referred to his obligations in relation to valuing work the subject of the relevant progress claim under the SoP Act.

200 I am satisfied that in undertaking his valuation in relation to the September 2019 Adjudication Determination the Adjudicator turned his mind to, and took into account all required matters in undertaking his task pursuant to s 23 of the SoP Act.

201 Further, in relation to each Item in relation to which he undertook his valuation and determination¹⁴³ the Adjudicator makes reference to Promax's claim presentation and method of calculation and explains how he arrives at his determination of the amount payable in respect of each of Promax's progress claim components.

The adjudicator determined the amount of progress claim entitlements in accordance with ss 11 and 23 of the SoP Act

202 In relation to each of the following Items of claim the Adjudicator had regard to site photographs of the nature, scope and extent of completion of that claimed item of work at [103] of the Adjudication Determination: [18.2] (Bored Piers), Item [18.3] (Capping Beam Works), Item [18.4] (Shotcrete) Item [18.5] (Excavation), Item [18.6] (Basement Footings), Item [18.7] (Basement Ritek) and Item [18.9] (Retaining Wall at

¹⁴¹ Examples at Adjudication Determination [17]-[37], [48], [50]-[57] and [81]-[101].

¹⁴² Adjudication Determination [48], refer also [62(31)] Highett Project 'Trade Summary'.

¹⁴³ Adjudication Items [18.1], [18.4], [18.7], [18.8] and [18.9].

rear of property). In relation to Item 8.8 Electrical Services (\$38,500) the Adjudicator analysed contract estimates (allowances), and supporting quotations and the 'trade breakdown' in undertaking his valuation.¹⁴⁴

203 The Adjudicator also appropriately refers to the fact that there is no contradictory material or submission from the respondent in relation to each claim. In this regard I consider that the Adjudicator was entitled to draw an inference from the absence of any contradictory relevant documentation or material from the respondent, that no credible challenge was able to be made to the value of the claims made by Promax.¹⁴⁵ I also consider that the fact that the plaintiff has not provided a payment schedule under either ss 15(4) or 18(2)(b) of the SoP Act and is therefore, by force of s 21(2A) of the Act, not entitled to provide an adjudication response, is no impediment to the Adjudicator proceeding in this way as the determiner of fact.

204 The above approach is also supported by authority. In *SSC Plenty Road*¹⁴⁶ Vickery J observed:

- (j) The adjudicator must proceed to make the critical findings by:
- (i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
 - (ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;
 - (iii) arriving at a rational conclusion founded upon the evidence;
 - (iv) in so doing, is not called upon to act as an expert; and
 - (v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.¹⁴⁷ (emphasis added)

205 In *Iskra v MMIR Pty Limited*¹⁴⁸ the Court of Appeal in New South Wales, per Gleeson JA, adopted what was said by Hodgson JA in *Coordinated Construction Co Pty Limited*

¹⁴⁴ Adjudication Determination: Affidavit of Isobel Carmody, 1 October 2019, Exhibit 'IJC-01'.

¹⁴⁵ *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd*, [2015] VSC 631, [101].

¹⁴⁶ [2015] VSC 631.

¹⁴⁷ *Ibid* [101].

¹⁴⁸ [2019] NSWCA 126, [41], [46], [47] and [49].

v J M Hargreaves (NSW) Pty Limited,¹⁴⁹ namely:

52. ... The adjudicator may very readily find in favour of a claimant on the merits of a claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without addressing it its merits.
53. Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the task set by the Act as to render the determination void.¹⁵⁰

206 In my view the Adjudicator's above approach to his valuation task, as reflected by his September 2019 Adjudication Determination including in the ways highlighted above, does not support the plaintiff's submission that he merely adopts Promax's trade breakdown and the amount claimed by Promax. The Adjudicator explains how he arrives at his September 2019 Adjudication Determination and expresses his view that the amount calculated by Promax looks reasonable. Further the Adjudicator relies upon the site photographs with which he was provided to evaluate the nature, scope and extent of work completed and other documentation including quotations in relation to the works.

207 For the above reasons I am not persuaded, as the plaintiff submits, that the Adjudicator has either just accepted the Promax claims without undertaking an independent valuation or has in some way 'worked backwards' in arriving at his stated valuation.

208 In relation to the Items Bored Piers [18.2]; Capping Beam [18.3]; Excavation [18.5], Basement Footing [18.6], Civil [18.7] and Retaining Wall and Siteworks [18.9] the Adjudicator expresses his satisfaction in relation to the claims and supporting information presented and accepts the costs and state of completion established by

¹⁴⁹ [2005] NSWCA 228.

¹⁵⁰ The Court of Appeal in *Iskra* observed that to the extent that there was any disagreement in between Hodgson JA and Basten JA in *Coordinated Construction* as to whether an adjudicator is entitled to go beyond the terms of the adjudication response in rejecting part or all of the progress claims, it was not necessary to decide that question in *Iskra*. See *Coordinated Construction* [2005] NSWCA 228 at [52] per Hodgson JA cf [64]-[68] per Basten JA.

the trade breakdown provided by Promax and the nature, scope and level of completion also established by the photographs provided by Promax to substantiate the relevant item of work claimed. The Adjudicator also notes that there is no material from the respondent (plaintiff) to dispute the completion of the works claim.

209 Further, in relation to Item [18.4] (Shotcrete) the Adjudicator states that the completed works were evidenced by photographs included in Promax's claim and in relation to Item [18.8] (Electrical Services) the Adjudicator in part relied upon quotations in relation to the electrical services claimed.

210 The September 2019 Adjudication Determination at [103] specified, in relation to each Item claimed, the information in addition to the Promax trade breakdown relied on by the Adjudicator in his valuation, including which Items were supported by site photographs and quotations.¹⁵¹

The 'trade breakdown' is not a contractual document

211 The parties sought to rely upon a body of affidavit evidence in relation to the finalisation of the Contract in Bali, Indonesia in early January 2019,¹⁵² together with further evidence in relation to the utilisation of the Promax trade breakdown during the administration of the Hightett Project.

212 Ultimately I consider the above evidence, and associated exhibits, to be of no materiality because that material is not strictly relevant to a judicial review of the present nature including because the point these materials contest, namely that the Adjudicator was in error to treat the 'trade breakdown' as a contractual document,

¹⁵¹ In relation to each of the following Items of claim the Adjudicator had regard to site photographs of the nature, scope and extent of completion of the claimed items of work relied upon at [103] of the Adjudication Determination [18.2] (Bored Piers), Item [18.3] (Capping Beam Works), Item [18.4] (Shotcrete) Item [18.5] (Excavation), Item [18.6] (Basement Footings), Item [18.7] (Basement Ritek) and Item [18.9] (Retaining Wall at rear of property). In relation to Item 8.8 Electrical Services (\$38,500) the Adjudicator analysed contract estimates (allowances), supporting Quotations and the 'trade breakdown'.

¹⁵² Affidavit of Hayrettin Girgin, 8 October 2019, Exhibit 'HMG-1'; First Blyth Affidavit, Exhibit 'AIB-6'; Affidavit of Hayrettin Girgin, 8 October 2019, [4]; First Blyth Affidavit, [7], Exhibit 'AIB-6'; T64.21-27.

was not so decided by the Adjudicator, nor did Promax argue that the trade breakdown formed part of the Contract between the parties.

213 Furthermore, I both consider it would be inappropriate to attempt to decide this issue on untested affidavit evidence and also because, for the reasons outlined below, I consider it unnecessary to attempt to determine in this proceeding, such controversy as there may be between the parties as to the composition of the Contract documents. That course is unnecessary because the Adjudicator was entitled on other clear bases, including the operation of s 23(2)(b) and (c) of the SoP Act, and the terms of the Contract in Clause N3.4 and Schedule 1, Item 33(4) to have regard to and utilise (and if the Adjudicator considered justified, rely upon) Promax's 'trade breakdown' in evaluating Promax's progress payment entitlements. Pursuant to s 23(2)(c) of the SoP Act, the Adjudicator was obliged to have regard to the Hihett Project 'trade breakdown' as part of the information provided by the claimant in the Adjudication.

Contract recognition of the relevance of a 'trade breakdown' to evaluating the contracts payment claims

214 The information, including documentation before the Adjudicator comprised the materials identified by the Adjudicator in paragraph [48] of his Adjudication Determination. Promax's 'trade breakdown', site photographs of areas of the works expressly noted as relied upon by the Adjudicator in relation to many of the Items valued in the September 2019 Adjudication Determination and quotations were part of the claim information provided by Promax to the Adjudicator.

215 It is clear from the 'trade breakdown' that Promax developed that document to set out the amount or budget for the trade components described in the trade summary and to identify items which made the contract price and key expenditure information, both past and projected, to inform and support Promax's monthly contractual progress claims.

216 It is also manifest by reference to the 'trade breakdown' that it identifies and allows

Promax and those evaluating its payment claim to assess and determine the value of components of the contract price in relation to completed works, and also in relation to work completed in each relevant month, together with the cost to complete the contract works, by reference to each trade component and associated cost.¹⁵³

217 Accordingly, and relevantly for the purposes of s 11(1)(b)(i) of the SoP Act, the trade summary provides evidence of the estimated values of each of the Items comprising the overall contract price for the work. It identifies the trade components or Items which make up the overall lump sum contract price for the work. So much is clear on the face of the trade breakdown.

218 The trade breakdown which Promax placed before the Adjudicator self-evidently constitutes a Promax working document and record of the allocated value of the Items making up the overall contract price and Promax's trade breakdown document also constitutes a contemporaneous working document and record, produced by Promax, of the percentage of work completed, by reference to each Item in Promax's original calculation and allocation of the contract price for the work.

219 Furthermore, the Contract itself provides for a progress claim procedure in Clause N5 (page 63), and Clause N3 (Payment for the Works) paragraphs N3.2 to N3.4, in relation to progress claim - optional procedures for the Contractor.

220 The Contract requires that the contractor's payment claim be supported by the information shown in Item 33 of Schedule 1 to the Contract.¹⁵⁴ Schedule 1 Item 33 of the Contract mandates that the information to be included in a progress claim include '4. Trade Breakdown'.¹⁵⁵

221 Accordingly, it is clear on the uncontested terms of the Contract that the plaintiff and Promax agreed that the Promax 'trade breakdown' would be one of the prime

¹⁵³ First Blyth Affidavit, Exhibit 'AIB-10', Tab 4 Trade Summary.

¹⁵⁴ Contract N3, N3.1-4, pages 61-62.

¹⁵⁵ Contract Schedule 1 Item 33, cl N3, page 10.

materials required to support Promax's payment claims, and obviously for that reason the plaintiff and Promax agreed that document would be utilised to value Promax's payment entitlements under the Contract.

222 In *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors*,¹⁵⁶ Vickery J accepted as legitimate in the adjudicator's determination of the amount of a claimant's payment claim entitlement, reliance by the adjudicator upon a QS Trade Summary for the Project Financier which showed assessments of each trade, including a line item budget for previous trade expenditure, variance of expenditure to date, expenditure for the relevant month and cost to complete. The claimant in the adjudication application did not provide any information to challenge the validity of trade summary. The adjudicator accepted the trade summary as the only assessment on which he could rely as to the value of works completed up to date. Vickery J concluded that there was 'no error in this process'.¹⁵⁷

223 In my view the Adjudicator was obliged by s 23(2)(c) of the SoP Act to take into account, and was entitled to rely upon, the materials placed before him in the Adjudication, which included the Promax 'trade breakdown', the site photographs, quotations and other substantiating materials provided by Promax in support of its submission in relation to the value of its payment entitlement in the Adjudication.

224 In my view it was open to the Adjudicator to accept, or reject, as the resolver of facts and disputes and as the determiner of the value of Promax's claims, the value of the various Items referred to in paragraph [103] of the September 2019 Adjudication Determination and in doing so to rely upon material provided by Promax, including its 'trade breakdown'. Further, in my view it was also open to the Adjudicator to more readily accept the claimant's claims when there was no contradictory information from the respondent in relation to those claims.

225 I also note that in that regard it is not the adjudicator's task to find flaws which are

¹⁵⁶ [2010] VSC 300 at [58]-[62].

¹⁵⁷ Ibid [61].

not obvious or manifest in relation to the claimant's progress claim entitlements.¹⁵⁸

226 Accordingly, in referring to and relying upon the Promax trade breakdown in his evaluation and determination, the Adjudicator was in my view quite properly and legitimately able to rely upon a document which s 23(2)(b) and (c) of the SoP Act required the Adjudicator to consider and which the parties' Contract also required to be provided by Promax to support its payment claim.

227 The Adjudicator's consideration of and reliance upon the Promax trade breakdown, which identifies the contract price for the work and a logically relevant breakdown of that price into a 'Trade Summary', also I consider reflects both an approach sanctioned by s 11(1)(b)(i) of the SoP Act which directs the Adjudicator to have regard to the contract price for the work, and the requirements of the Contract in Clause N3.4 and Schedule 1, Item 33.

228 The plaintiff argues that the decisions of Vickery J in both SSC *Plenty Road*¹⁵⁹ and *Krongold*¹⁶⁰ point up errors in the Adjudicator's approach to the September 2019 Adjudication Determination.

229 In SSC *Plenty Road*¹⁶¹ Vickery J disallowed the adjudicator's valuation because the adjudicator adopted the amount claimed in the payment claim rather than undertaking an independent analysis and also because the adjudicator imposed an onus on the respondent to establish a sufficient basis upon which to withhold payment.¹⁶²

230 In *Krongold*¹⁶³ Vickery J found in a matter where the respondent had failed to provide a valid payment schedule in accordance with the SoP Act, which resulted in the payment claim being undefended, that simple acceptance by the adjudicator of

¹⁵⁸ *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1.

¹⁵⁹ [2015] VSC 631.

¹⁶⁰ [2016] VSC 94.

¹⁶¹ [2015] VSC 631.

¹⁶² *Ibid* [134].

¹⁶³ [2016] VSC 94.

the amount claimed by the claimant without the adjudicator demonstrating any sufficient process of assessment of the value, was not in accordance with the SoP Act and resulted in the adjudicator falling into jurisdictional error.

231 I do not consider that the subject September 2019 Adjudication Determination exhibits the deficiencies and errors which his Honour identified in either of the above decisions. For the reasons I have outlined above, I am not satisfied that there is any basis upon which to conclude that the Adjudicator in this instance has failed to consider and properly value in accordance with the SoP Act, and notwithstanding the absence of a payment schedule independently satisfied himself that Promax was entitled to the amounts of progress payment which it claimed.

232 Similarly I am not satisfied that there are any proper basis upon which to find that the Adjudicator has simply accepted Promax's claim without undertaking a process of assessment and valuation in accordance with the SoP Act.

233 For the reasons I have explained above I am also satisfied that the Adjudicator by his September 2019 Adjudication Determination sufficiently explained the process and bases upon which he has determined the Promax entitlements. In this regard the Adjudicator is not required to meet an exacting standard in relation to reasons for his Adjudication Determinations; bare reasons will ordinarily suffice.¹⁶⁴

234 For the above reasons I reject the plaintiff's case that the Adjudicator's findings at [103] in relation to Items [18.1] to [18.9] of the September 2019 Adjudication Determination are not in accord with ss 11 and 23(4) of the SoP Act and fail to demonstrate any process of reasoning and assessment by the Adjudicator of the value of the claim.

235 In this case for the reasons outlined above, I am not satisfied that the Adjudicator has failed to undertake a cogent, logical and evidence based valuation of the work

¹⁶⁴ *SSC Plenty Road v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [107] and *Nuance Group v Shape Australia* [2018] VSC 362, [52].

carried out by Promax in accordance with ss 11 and 23 of the SoP Act, so as to arrive at the amount of progress payment which Promax is entitled to be paid in accordance with that Act. Positively expressed, I find that the Adjudicator so proceeded in compliance with s 11(1)(b)(i) and s 23 of the SoP Act and in that way determined that Promax was entitled to be paid \$2,017,382.15 (incl GST) in relation to its July 2019 Payment Claim.

Conclusions

236 In summary, for the above reasons I conclude that:

- (a) the August 2019 Adjudication Application was compliantly served on 16 August 2019, pursuant to s 18(5) of the SoP Act; and
- (b) the new September 2019 Adjudication Application was validly issued, pursuant to ss 18 and 28 (2)(b) of the SoP Act, and compliantly served on 11 September 2019;
- (c) the September 2019 Adjudication Determination is valid and effective, including in respect of the Adjudicator's valuations at paragraph [103] in relation to each of the Items [18.1] to [18.9] thereof.

Decision

237 For the above reasons the plaintiff's application by Amended Originating Motion and Summons dated 1 October 2019, seeking to have the September 2019 Adjudication Determination quashed, alternatively set aside, should be dismissed.

Orders

238 Accordingly I shall order that the plaintiff's Amended Originating Motion dated 1 October 2019, Amended Summons dated 1 October 2019 and Summons dated 3 March 2020 be dismissed.

239 I will afford the parties the opportunity to make short written submission (limited to

two pages) in relation to the final form of proposed orders and any further necessary consequential orders, including as to the undertakings provided to the Court referred to in the Orders made 20 September 2019 and 5 March 2020, and as to orders for costs.

240 A party who wishes to provide short submissions shall do so by 4.00pm on Thursday 9 July 2020. In the event that no submissions are filed by the parties the Court will thereafter prepare and forward the authenticated order in this matter.