Signed by AustLII

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

Not Restricted

S ECI 2019 0786

DANIEL RADMAN & ANOR — Plaintiffs

v

OPEN PLAN PTY LTD (ABN 98 117 973 903) & ANOR — Defendants

JUDGE:	Digby J
WHERE HELD:	Melbourne
DATE OF HEARING:	Decision made 'on the papers'.
DATE OF JUDGMENT:	15 June 2020
CASE MAY BE CITED AS:	Radman v Open Plan
MEDIUM NEUTRAL CITATION:	[2020] VSC 318

ADMINISTRATIVE LAW – Judicial review – Relief in the nature of *certiorari* – Whether Adjudication Determination under the *Building and Construction Industry Security of Payment Act 2002* (Vic) is vitiated by jurisdictional error – Proceeding resolved by consent orders without adjudication on the merits - Application for indemnity certificate for costs under the *Appeal Costs Act 1998* (Vic) – Whether an Adjudication Determination is an 'appeal' and whether the Adjudicator is a 'court' under s 3 of the *Appeal Costs Act 1998* (Vic) – Order allowing appeal by consent – Circumstances in which such an order can be made - Whether orders made by consent in the absence of any judicial determination result in the plaintiffs succeeding in their proceeding to review the subject Adjudication Determination within the meaning of s 4 of the *Appeal Costs Act 1998* (Vic) - Whether in the Court's discretion in the circumstances there should be the grant of an indemnity certificate – *Appeal Costs Act 1998* (Vic), ss 3, 4 and 5.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

HIS HONOUR:

Background

1 By Originating Motion filed 25 February 2019[1] the plaintiffs, inter alia, sought:

(a) an order or judgment in the nature of *certiorari* that the Adjudication Determination made by the second defendant (Adjudicator) on 11 February 2019 (Adjudication Determination) pursuant to s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act) be quashed;

(b) a declaration that the plaintiffs are not in the business of building residences;

(c) a declaration that the Adjudication Determination is void; and

(d) an order that the first defendant pay the plaintiffs' costs of this proceeding.

2 By email dated 25 February 2019 the second defendant (the Adjudicator) advised the Court he did not intend to take any active role in the proceeding and would abide the decision of the Court, save for any costs order being considered against him.

3 By Orders made 26 February 2019 the proceeding was fixed for trial and set down for hearing on 18 March 2019.

4 On 13 March 2019 the active parties emailed the Court and advised that the plaintiffs and first defendant had settled the proceeding, and proposed consent orders were submitted.

5 The plaintiffs' and first defendant's proposed consent orders were as follows:

> 1. The adjudication determination made by the Second Defendant on 11 February 2019 be quashed and declared to be void.
>
> 2. The monies paid into Court by the Plaintiffs under the orders of Justice Digby made on 26 February 2019 be paid to the Plaintiffs or their nominees forthwith.

[1] The proceeding was commenced with the filing by the plaintiffs of the Originating Motion, Summons and Affidavits in Support by each of the plaintiffs, Daniel Radman and Douglas Radmanic. Exhibit 'DR-1' to the Affidavit of Daniel Radman sworn 25 February 2019 deals with the parties' assertions as to the merits before the Adjudicator and the plaintiffs' case on the Originating Motion in Court. Further, the first defendant in its submissions of 19 March 2019 in this application relies upon the plaintiffs' affidavit material supporting its Originating Motion.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

3. The First Defendant shall pay the costs of the Plaintiffs, including all reserved costs, on the standard basis to be assessed by the Costs Court in default of agreement.

4. The First Defendant be granted an indemnity certificate pursuant to s 4 of the *Appeal Costs Act 1998* (Vic).

6 On 13 March 2019 consent orders were authenticated as follows:

(a) The Adjudication Determination made by the second defendant on 11 February 2019 be quashed and declared void.

(b) The moneys paid into Court by the plaintiffs pursuant to the Orders made 26 February 2019, and any interest allocated or received in respect of that amount, be paid to the plaintiffs or their nominees forthwith.

(c) The first defendant pay the costs of the plaintiffs, including all reserved costs, on a standard basis to be assessed by the Costs Court in default of agreement.

(d) The trial fixed for hearing on 18 March 2019 be vacated and the proceeding dismissed, without adjudication on the merits.

7 On 14 March 2019 the Court forwarded the authenticated Order made 13 March 2019 to the parties and advised that the Court was not at that point disposed to grant an indemnity certificate pursuant to s 4 of the *Appeal Costs Act 1998* (Vic) (the ACA) as sought by proposed paragraph [4], referred to above and, as outlined below, in substance advised the parties that the question of any entitlement to an indemnity certificate under the ACA was reserved.

8 The Court's communication of 14 March 2019 also conveyed to the parties that if the first defendant sought to further pursue the grant of an indemnity certificate, the Court required the first defendant to provide short submissions in relation to whether the Court has jurisdiction to make such an order and why in the circumstances such an order should be made.

9 On 19 March 2019 the first defendant filed and served submissions in support of the grant of an indemnity certificate pursuant to s 4 of the ACA.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

10 On 17 December 2019 and 28 February 2020, by email, the first defendant provided further limited material in relation to its application for the grant of an indemnity certificate.

First defendant's submissions

11 By submissions dated 19 March 2019, the first defendant[2] advanced its application for an indemnity certificate pursuant to s 4 of the ACA on the basis that:

(a) the subject proceeding for judicial review was an 'appeal' as defined by s 3 of the ACA;[3]

(b) the second defendant is a 'court' as defined by s 3 of the ACA, that is, the second defendant is an 'other body' from whose decision lies an appeal on a question of law;[4] and

(c) given the orders already made by the Court, the plaintiffs have identified questions of law in their Originating Motion which successfully demonstrate, via supporting affidavit material, that the second defendant committed a jurisdictional error in finding the plaintiffs were 'in the business of building residences';

(d) an award of an indemnity certificate in this proceeding would be consistent with the purpose of the ACA;[5] and

(e) in Orders made 23 November 2017 in proceeding number S ECI 2017 0178 Golets v Southbourne Homes Pty Ltd & Anor (Golets), in circumstances analogous to the present matter, Vickery J granted an indemnity certificate in respect of an Adjudication Determination which was quashed on review.

---

2 On 19 March 2019 the first defendant forwarded written submissions, the plaintiffs' solicitors advised they would not be filing any submissions in reply and the parties were advised a decision would be made 'on the papers'. Supplementary material was provided on 17 December 2019 and 28 February 2020.

3 See *Vinton v Sim* [2014] VSC 568 at [8] to [13].

4 Ibid [14] and [15].

5 Ibid [12], applying Brooking J in *Pickford v Incorporated Nominal Defendant* [1981] VR 583.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

12 The first defendant observed that, save where an indemnity certificate was granted by Vickery J in Orders made 23 November 2017 in Golets, it had been unable to locate any decision of the court in which a defendant to a proceeding brought under the SoP Act has been granted an indemnity certificate.

13 The first defendant also relied upon a determination of the Appeal Costs Board on 4 June 2019, whereby the Appeal Costs Board determined that Southbourne Homes Pty Ltd be paid $50,000 pursuant to s 5 of the ACA in respect of the Adjudication review proceeding before Vickery J in Golets.

The Appeal Costs Act 1998 (Vic)

14 The ACA re-enacts, with amendments, the *Appeal Costs Fund Act 1964* (Vic) (the 1964 ACFA) and replaces it with a new Act which simplifies and makes more consistent the basis for granting an indemnity certificate.[6]

15 Section 3 of the ACA includes the following relevant definitions:

> '*appeal*' includes an appeal by way of re-hearing, an application for a new trial and any proceeding in the nature of an appeal, but does not include a case stated.
>
> '*case stated*' means—
> (a) a case stated for the opinion or determination of a superior court on a question of law; or
> (b) a question of law reserved in the form of a special case for the opinion of a superior court.
>
> '*costs*', in relation to an appeal or case stated, includes the costs of an application for an indemnity certificate in respect of the appeal or case stated but does not include costs incurred in a court of first instance except where otherwise expressly provided.
>
> '*court*' includes any tribunal or other body—
> (a) from whose decision there is an appeal to a superior court on a question of law; or
> (b) which may state a case for the opinion or determination of a superior court on a question of law or reserve any question of law in the form of a special case for the opinion of a superior court.
>
> '*indemnity certificate*' means an indemnity certificate granted under Part 2, 3 or 4.

[6] Second Reading Speech, 8 October 1998.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

16 The first defendant seeks to invoke s 4 of the ACA which provides:

> **Application by respondent for indemnity certificate in respect of appeal**
>
> (1) If an appeal against a decision of a court in a civil proceeding—
>
> (a) to the Trial Division of the Supreme Court; or
>
> (b) to the Court of Appeal, including an appeal to the Court of Appeal from a decision of the Trial Division of the Supreme Court; or
>
> (c) to the High Court of Australia from a decision of the Supreme Court—
>
> succeeds, a respondent to that appeal may apply to the Supreme Court for, and the court may grant, an indemnity certificate in respect of costs.
>
> (2) If an appeal to the County Court against a decision of a court in a civil proceeding succeeds, a respondent to that appeal may apply to the County Court for, and the court may grant, an indemnity certificate in respect of costs.

17 Section 5 of the ACA provides:

> **Certificate entitles respondent to payment of costs**
>
> (1) Subject to subsection (2), a respondent granted an indemnity certificate under section 4 is entitled to be paid by the Board, on an application made to it by the respondent in the approved form—
>
> (a) an amount equal to the appellant's costs (if any)—
>
> (i) of the appeal in respect of which the indemnity certificate was granted; and
>
> (ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and
>
> (iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—
>
> that the respondent has been ordered to pay and has actually paid; and
>
> (b) an amount equal to the respondent's own costs—
>
> (i) of the appeal in respect of which the indemnity certificate was granted; and
>
> (ii) if the court makes an order for a new trial—of any new trial that is held as a consequence of that order; and
>
> (iii) if the appeal in respect of which the indemnity certificate was granted is an appeal in a sequence of appeals—of any appeal or appeals in the sequence that preceded that appeal—
>
> that have not been ordered to be paid by any other party, as assessed by the Board on a standard basis, or as agreed to by the Board and the respondent; and
>
> (c) if the costs referred to in paragraph (b) are assessed, an amount equal to the costs incurred by the respondent in connection with the assessment.
>
> (2) The maximum amount payable to a respondent pursuant to an indemnity certificate granted under section 4 is $50 000 or any other

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

amount that is prescribed.

Issues to be decided on this application

18 The first defendant's application gives rise to the following issues for determination:

(a) Issue 1

Is the underlying proceeding by Originating Motion filed 25 February 2019, *an appeal, or a proceeding in the nature of an appeal,* under s 3 of the ACA.

(b) Issue 2

Was the Adjudicator to whom the authorised nominating authority referred the plaintiffs' adjudication application, a '*court*' within the meaning of s 3 of the ACA.

(c) Issue 3

Do the consent orders of the Court made 13 March 2019 quashing and declaring void the second defendant's Adjudication Determination of 11 February 2019, in the circumstances, constitute success in the underlying proceeding by Originating Motion against the Adjudication Determination, within the meaning of s 4(1) of the ACA.

(d) Issue 4

In the proper exercise of the Court's discretion is the first defendant entitled to be granted an indemnity certificate, pursuant to s 4(1) of the ACA.

Issue 1 - Is the underlying proceeding by Originating Motion filed 25 February 2019, an appeal, or a proceeding in the nature of an appeal, under s 3 of the ACA

19 The plaintiffs' underlying proceeding is in the nature of a judicial review, initiated by Originating Motion and prosecuted under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (the Rules).[7]

20 Order 56.01 of the Rules provides:

56.01 Judgment or order instead of writ

[7] Originating Motion, 25 February 2019, [2] and Grounds.

Retrieved from AustLII on 10 December 2021 at 14:11:35
Verify version

Signed by AustLII

> (1) Subject to any Act, the jurisdiction of the Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with these Rules.
>
> (2) The proceeding shall be commenced by filing an originating motion in Form 5G naming as defendant—
>
> (a) a person, if any, having an interest to oppose the claim of the plaintiff; and
>
> (b) the court, tribunal or person in respect of whose exercise of jurisdiction or failure or refusal to exercise jurisdiction the plaintiff brings the proceeding.
>
> (3) A person named as defendant in accordance with paragraph (2)(b) who is sued in the capacity of a judicial or public authority or as the holder of a public office shall be described in the originating motion by the name of that authority or the name of that office.

21 The question as to whether the plaintiffs' proceeding by Originating Motion for judicial review is an appeal, or a proceeding in the nature of an appeal within the meaning of s 3 of the ACA, is to be answered on the proper construction of the text of the definition of 'appeal' in s 3 of the ACA, bearing in mind the context in which that provision is placed and having regard to the purpose of the ACA.

22 I observe that the approach outlined in the last preceding paragraph is to be adopted in arriving at the proper construction of each of the definitions and other provisions of the ACA referred to in Issues 1 to 4 above. Similarly, the interpretation of each of those definitions and provisions is to be undertaken bearing in mind the remedial nature of the ACA.

23 In general an appeal is the right of entering a superior court or tribunal to redress the error of the court below.[8]

24 The term 'appeal' is one of wide import and may encompass a number of different litigious processes which vary in the extent to which the appeal court or tribunal may address and alter the result below.[9]

---

8 *Attorney-General v Sillem* (1864) 10 HL Cas 704 at 724; *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 92; *Musgrove v McDonald* (1905) 3 CLR 132 at 147–8; *Commonwealth v Bank of New South Wales* (Bank Nationalisation Case) (1949) 79 CLR 497 at 625.

9 *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297–8; *Traut v Faustmann Bros Pty Ltd* (1983) 48 ALR 313 at 322; *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

25 The right of appeal is commonly established by specific enactment and the particular enactment will usually determine the scope and effect of an appeal.[10]

26 The clear intent of the definition of the word 'appeal' in s 3 of the ACA is to encompass appeals, including appeals of the type specifically mentioned in the definition of appeal, and also proceedings analogous to appeals in the strict sense of that term at law. So much is expressly evident from the inclusive text of s 3 of the ACA which provides that an 'appeal', for the purposes of the ACA, includes any proceeding in the nature of an appeal.

27 The context in which the definition 'appeal' is found in the ACA includes that formed by other related definitions and provisions in that Act. In this regard the definition of 'court' in s 4 of the ACA includes a body from whose decision there is an appeal to a superior court on a question of law.

28 Accordingly s 4 of the ACA, which forms part of the context in which the definition of 'appeal' in s 3 of the ACA is also located, informs the meaning of 'appeal' by expressly providing that an appeal includes the process whereby the decision of a body is reviewed in a superior court on a question of law.

29 The plaintiffs' underlying proceeding by way of Originating Motion pursuant to r 56.01 of the Rules sought review and decision by this court, as the relevant superior court, on a question of law concerned with the jurisdiction of the Adjudicator in proceedings under the SoP Act. In this regard it is to be observed that the scope of legitimate grounds for judicial review in relation to an adjudication determination under that SoP Act are confined to species of error of law including jurisdictional error, want of procedural fairness, and in Victoria, material error of law on the face of the record.

---

10 Appeals from an order of VCAT on a question of law pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*; appeals from a final order of the Children's Court on a question of law pursuant to s 329 of the *Children, Youth and Families Act 2005*; referrals for the determination of a question of law under s 33 of the *Charter of Human Rights and Responsibilities Act 2006*; *Commercial Arbitration Act 2011* (Vic); *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297–8; *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 294–7.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

30 Furthermore, as alluded to above, the ACA is legislation of a remedial nature and for that reason the construction of its provisions, including the definitions in s 3 of the ACA, of which the definition of 'appeal' is one, should be construed broadly and beneficially so as to achieve the objects and purposes of that Act.

31 Accordingly, the ACA is to be construed so as to promote the principal purpose of that Act which, in addition to re-enacting with amendments the 1964 ACFA, is to implement a policy substantially as referred to by Brooking J (with whom the other members of the Full Court agreed) in *Pickford v Incorporated Nominal Defendant*,[11] (*Pickford*) in relation to the 1964 ACFA, namely:

> The consideration of policy which underlies s13(1) is that an error of law occurring in a court may ordinarily be attributed to a fault of the administration of justice rather than of the parties, so that the costs of having the error rectified ought ordinarily not to be borne by the unsuccessful respondent to the appeal but to be paid from a public fund established for that purpose. [footnotes omitted]

32 In my view the abovementioned policy also informs the object and purpose of the ACA which replaced the 1964 ACFA.[12]

33 It is however to be noted that the policy and purpose of the ACA differs from the 1964 ACFA in that the ACA is not confined to alleviating the effect of errors of law alone, but is of potential application to any appeal which succeeds within the meaning of s 4 of the ACA.

34 Because the ACA is for the above reasons remedial in nature and purpose, the term 'appeal' in s 3 of the ACA should be given a broad and beneficial construction and one which promotes the purpose of the Act. That purpose is to empower the court, when in the exercise of its discretion the court considers it just and appropriate, to grant certain indemnity in relation to the costs of having an erroneous adjudicative decision made in contested proceedings below, corrected on appeal or in a proceeding in the nature of an appeal, so that such costs are not borne by the

---

11 [1981] VR 583.

12 Refer: Appeal Cost Bill, Second Reading Speech, 8 October 1998; 1964 ACFA, s 13; and ACA, s 4. Refer *Civil Aviation Safety Authority v Illingworth* [2009] TASSC 57 at [10]–[11].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

unsuccessful respondent to the appeal but may be paid from a public fund established for that purpose.

35 In *Vinton v Sim*[13] (*Vinton*) parties sought orders to set aside a medical panel's determination and the Court invited submissions from the State of Victoria (the fourth defendant) on two questions:

(a) is an application for judicial review pursuant to r 56.01 of the Rules an appeal within the meaning of the ACA; and

(b) is a medical panel a 'court' as defined by the ACA.

36 In relation to the first question, Mukhtar AsJ considered that an appeal can be '…something that might not strictly be regarded as an appeal; that is, a procedure for the correction of error'[14] and that an appeal 'should be construed to include judicial review because it is in the nature of an appeal'.[15]

37 Further, it is clear from the outcome that in Golets Vickery J considered that a proceeding in the nature of a judicial review of an adjudication determination under the SoP Act came within the meaning of 'appeal' as defined in s 3 of the ACA.[16]

38 In *Dawson & Ors v Bethonga Wholesale Foods Pty Ltd & Anor,*[17] Cavanough J concluded that the ACA was of application to a proceeding under r 56.01 of the Rules for an order in the nature of *certiorari* to quash orders of a Magistrate.[18]

39 Accordingly, I consider that the broad encompassing and inclusive language and context of the term 'appeal' in s 3 of the ACA, considered together with the underlying policy and purpose of the ACA, reflects a legislative intent that the term

13 [2014] VSC 568.
14 Ibid [8].
15 Ibid [12].
16 Decisions in other jurisdictions in *Walton Construction (Qld) Pty Ltd v Plumber by Trade Pty Ltd & Ors (No 2)* [2012] QSC 280, [27]-[28].
17 [2009] VSC 172.
18 Ibid [27]; see also *Gatto v Felstead* [2012] VSCA 14, [32] ff [10]; *Celsius Fire Services Pty Ltd v Magistrates Court of Victoria (No 2)* [2020] VSC 120, [9]; *PRA v MA & VCAT & Anor; PRA v MA & State Trustees (No 2)* [2004] VSCA 50, [3].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

'appeal', which expressly incorporates a proceeding in the nature of an appeal, should include a proceeding in the nature of judicial review of an adjudication determination in the Supreme Court of Victoria.

Conclusion – Issue 1

40 For the above reasons I consider the underlying proceeding by Originating Motion to quash the Adjudication Determination in issue to be in the nature of an appeal within the meaning of s 3 of the ACA.

Issue 2 - Was the Adjudicator to whom the authorised nominating authority referred the plaintiffs' adjudication application, a 'court' within the meaning of s 3 of the ACA

41 Section 3 of the ACA defines a relevant 'court' under that Act to include any tribunal or other body from whose decision there is an appeal to a superior court on a question of law.

42 The definition of 'court' in s 3 of the ACA is expressly inclusive in nature.

43 Consistent with the approach outlined above, the ACA, and each of the defined terms in s 3 of that Act including the definition 'court', should be given a broad and beneficial construction so as to promote the abovementioned object and purpose of the Act.

44 Further, as earlier noted in relation to the meaning of 'appeal' in s 3 of the ACA, because s 4 of the Act defines a 'court' as including a body from whose decision there is an *appeal* to a superior court on a question of law, each of these definitions informs the meaning of the other in that respect.

45 In my view this aspect of the context in relation to s 3 of the ACA supports a construction of the term 'court' which includes a body which is amenable to an appeal, and also to a proceeding in the nature of an appeal, by a superior court on a question of law.

46 For the reasons earlier outlined, the underlying judicial review proceeding by way of

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

Originating Motion falls within the meaning of 'appeal' in s 3 of the ACA and, in the interrelated manner in which s 3 of the ACA defines terms including 'appeal' and 'court', each of those defined terms elucidate the meaning of the other and support the construction that 'court', including a tribunal or other body in s 3 of the Act, extends to an adjudicator under the SoP Act.

47 I consider that, for the same reasons, it is unlikely that Parliament intended that the definition of 'court' in s 3 of the ACA should be confined to apply only to a 'court tribunal or other body' from which there is an express right of statutory appeal on a question of law. There is also no warrant on the terms of the definition of 'court' for such a conclusion and further such a construction appears to be inconsistent with the simpler operation of s 4(1) of the ACA which no longer requires that the subject appeal succeed on a question of law.

48 In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture [No. 2]*[19] (*Grocon*) Vickery J did not consider the issues addressed by an adjudicator to be private in nature. Rather, Vickery J referred to the adjudicator as a 'statutory arbitrator'.[20] His Honour concluded that the 'character of the decision-making of an adjudicator is quasi-judicial'.[21]

49 In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[22] (*Chase Oyster Bar*) the New South Wales Court of Appeal held that determinations of adjudicators were amenable to orders of *certiorari* for jurisdictional errors of law. In the lead judgment, delivered by McDougall J, his Honour stated:

> It follows that the test to determine whether a tribunal is one exercising governmental powers… is whether it has legal authority – authority conferred by legislation – to determine, or affect, the common law or statutory rights or obligations of individuals or groups of individuals …[23]

50 McDougall J also observed that 'adjudicators are vested with legislative authority to

---

19 (2009) 26 VR 172.
20 Ibid [65].
21 Ibid [41].
22 [2010] NSWCA 190.
23 Ibid [256].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

decide legal rights and obligations'[24] and that determinations by adjudicators have a 'real and present effect on legal rights of the claimant and respondent'.[25]

51 In *Chase Oyster Bar*, McDougall J referred to the judgment of Vickery J in *Grocon* and agreed with Vickery J's conclusion that an adjudicator constituted a tribunal which exercised governmental powers.[26] In *Chase Oyster Bar*, Spigelman CJ also considered the process of adjudication to be 'a public, relevantly a statutory, dispute resolution process' rather than a species of consensual, private arbitration.[27]

52 In *Ozkan v Leitch & ors (Ruling No 2)*,[28] (*Ozkan*) Kaye J held that an appeal in relation to a medical panel's opinion was an appeal which satisfied the purposes of s 4 of the ACA and his Honour was also of the view that a panel was a 'court' as defined under the ACA.

53 In *Vinton*, Mukhtar AsJ also held that the availability of judicial review from a decision of a medical panel led to the conclusion that an indemnity certificate was available from a decision of the panel.[29] In so holding his Honour followed two other decisions in which an indemnity certificate had been granted in respect of a medical panel decision.[30] His Honour stated:

> Debate could take place on whether the panel is a tribunal. By ordinary conceptions and judging by the process by which it comes to make a determination, I take leave to doubt that it is. But the authorities assume, and for my part I think there should not be a real doubt, that a Medical Panel constituted to perform a statutory function and exercise powers that determine a person's possible rights or entitlements arising out of a compensable injury, falls within the words of the definition that say 'or other body'. The question to my mind was whether it was a body '… from whose decision there is an appeal to a superior court on a question of law'. That language brings to mind well known appeal provisions on a question of law from the Magistrates Court or VCAT to this Court. But they are also amenable to judicial review. There is no (statutory) right of appeal on a

24 Ibid [257].
25 Ibid [259].
26 Ibid [256]; refer also Basten JA at [63] and [66].
27 Ibid [5]-[6].
28 [2012] VSC 17.
29 [2014] VSC 568, [15].
30 *Ozkan v Leitch* [2012] VSC 17; *Moore v Barton* [2014] VSC 78.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

question of law from a determination of the Panel.[31]

54 Accordingly, his Honour decided that an entity would fall within the words 'other body' of the ACA when it is 'constituted to perform a statutory function' and exercises 'powers that determine a person's possible rights or entitlements…'.[32]

55 In *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)*[33] Basten JA stated:

> 28. The second element of the scheme is to be found in s 69 of the Supreme Court Act which provides a modern statutory basis for the historical jurisdiction of the Supreme Court to grant relief by way of prerogative writs, that is, the court may now make orders without issuing such writs. It has been accepted (and was not challenged in these proceedings) that the supervisory jurisdiction identified in s 69 extended, in principle, to determinations of adjudicators under the Security of Payment Act on the basis that they were exercising statutory powers under a scheme which did not permit contracting out and were therefore to be aligned with inferior courts and tribunals, rather than private arbitrators and domestic tribunals established, for example, by voluntary associations (*Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [5] (Spigelman CJ); [68]–[70] and [84] (Basten JA); [260] (McDougall J)).
>
> 29. Section 69(3) expressly declares that the jurisdiction to make orders in the nature of certiorari "includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings." Further, s 69(4) provides that, by way of extension of the general law principles, "the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination." Again, it was accepted that the determination and award of the adjudicator was relevantly the determination of a tribunal and, although it might be described as having an interim quality, because the amount awarded could be adjusted in proceedings after the completion of the contract, it was an "ultimate determination" because it resulted in an award which could be registered as a judgment of a court with the relevant monetary jurisdiction.

<u>The SoP Act and role of the adjudicator</u>

56 An Adjudicator making a determination under the SoP Act, is one of a body of

---

31 [2014] VSC 568, [14].

32 Ibid[14].

33 [2016] 95 NSWLR 157, [28]-[29].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

adjudicators eligible to be appointed by an authorised nominating authority established under the SoP Act.

57 Pursuant to ss 18(7), 42 and 43A of the SoP Act, the authorised nominating authority refers adjudication applications to one of the body of eligible adjudicators and upon acceptance the adjudicator to whom an adjudication is referred undertakes the adjudication of the subject adjudication application in accordance with the SoP Act.

58 In this way the Victorian Building Authority, the Authorised Nominating Authority, and the Adjudicator, upon acceptance of a referral from the authorised nominating authority, are all empowered by the SoP Act to exercise certain legal authority, and in the case of the adjudicator, legal authority to make an interim determination of disputes between a claimant and respondent as to the amount of progress payments payable to a claimant under the applicable construction contract.

59 In that way the SoP Act clearly vests an adjudicator with authority derived from legislation to determine legal rights and obligations in relation to the amount of the progress payment payable by a respondent to the claimant in respect of a payment claim made under that Act.

60 Further, the SoP Act imposes a mandatory scheme of adjudication in respect of parties to applicable construction contracts and s 48 of that Act prohibits contracting out of the statutory scheme of adjudication.

61 In these respects it is also clear that, subject to certain exceptions specifically excluded by the provisions of the SoP Act, the Act is of application to any construction contract.[34]

62 Although adjudication under the SoP Act is interim in nature, in that in any subsequent proceedings before a Court or Tribunal in relation to any matter arising under the relevant construction contract, that Court or Tribunal must allow for any amount paid as a result of an earlier adjudication determination and must also make

[34] SoP Act, s 7.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

such orders as it considers appropriate for restitution of any amount earlier paid by force of the SoP Act, having regard to that Court's or Tribunal's subsequent decision in those proceedings, an adjudication determination is an 'ultimate determination' in the sense that it can be registered as a judgment of the court and enforced in the interim.[35]

63 Similarly, in any subsequent arbitral proceeding under the construction contract the arbitral tribunal must allow for any amount paid pursuant to an adjudication determination.[36]

64 An adjudication determination is otherwise binding upon the parties and, by mechanisms established under the SoP Act, has the effect of a judgment of the Court and is enforceable as such.[37]

65 Additionally, the SoP Act prescribes the scope of the Adjudicator's jurisdiction and obligations. The Act also empowers the adjudicator to determine an adjudication application on an interim basis, including where necessary for the subject adjudication, the statutory and contractual rights and obligations of the parties. Furthermore, in doing so the Adjudicator must act judicially.[38]

66 Consequently, in my view an Adjudicator is in the nature of a tribunal or analogous body and in that capacity exercises power derived from the SoP Act to determine the amount of a progress payment (if any) to be paid to the claimant in the adjudication, by the respondent, together with the date on which such amount became or becomes payable and the rate of interest payable on such amount.

67 For the above reasons, in my view an Adjudicator under the SoP Act falls within the meaning of both 'tribunal' and 'other body' within the meaning of the term 'court' in s 3 of the ACA and is amenable to judicial review in the nature of an appeal to the

---

35 *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* [2016] 95 NSWLR 157, [29].

36 SoP Act, s 47.

37 Ibid s 28R.

38 *R v Electricity Commission; ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 205 per Atkin LJ and *Ridge v Baldwin* [1964] AC 40 at 47-49, per Lord Diplock.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

Supreme Court of Victoria on and in relation to a question of law, as contemplated by sub-paragraph (a) of the definition of 'court' in s 3 of the ACA.

Conclusion – Issue 2

68 I consider that the Adjudicator, to whom the authorised nominating authority referred the plaintiffs' adjudication application, comes within the meaning of 'court' in s 3 of the ACA as a 'tribunal' or 'other body'.

Issue 3 - Do the consent orders of the Court made 13 March 2019 quashing and declaring void the second defendant's Adjudication Determination of 11 February 2019, in the circumstances, constitute success in the underlying proceeding by Originating Motion against the Adjudication Determination, within the meaning of s 4(1) of the ACA

69 In *Pickford*,[39] the Full Court of the Supreme Court of Victoria considered an application for the grant of an indemnity certificate pursuant to s 13 of the 1964 ACFA, the appeals costs legislation which was replaced by the ACA.

70 Section 13(1) of the 1964 ACFA provided as follows:

> (1) Where an appeal against the decision of a court--
> (a) to the Supreme Court;
> (b) to the High Court of Australia from a decision of the Supreme Court;
> (c) to the Queen in Council from a decision of the High Court of Australia given in an appeal from a decision of the Supreme Court;
> (d) to the Queen in Council from a decision of the Supreme Court -
>
> on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.
>
> (2) Where an appeal is determined by the Queen in Council or the High Court of Australia the power conferred upon the Supreme Court by the last preceding sub-section may be exercised by a judge of the Supreme Court sitting in chambers.

71 Section 13(1) of the 1964 ACFA is in substance to the same effect as s 4 of the ACA. Significantly s 13(1) of the 1964 ACFA and s 4 of the ACA both employ the

39 [1981] VR 583.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

qualifying verb 'succeeds' in relation to the outcome of the relevant appeal. However, as noted above, s 13(1) of the 1964 ACFA provides that if an appeal against a decision of a Court (to the specified court's hierarchy) *on a question of law succeeds*, the Supreme Court may, upon application, grant an indemnity certificate in respect of the appeal, whereas s 4 of the ACA does not qualify the basis upon which the subject appeal succeeds.

72 The 1964 ACFA is also distinguishable from the ACA in that the former, by s 13(2), permitted the Supreme Court to exercise the power to grant or refuse an indemnity certificate sitting in chambers, where the appeal referred to in s 13(1) is determined by the Queen in Council or the High Court of Australia.

73 In *Pickford*, the respondent's application for the grant of an indemnity certificate under s 13(1) of the 1964 ACFA was advanced in circumstances where the appellant sought to overturn judgment entered at the conclusion of a jury trial in which the plaintiff sought to recover damages for personal injuries sustained in a motor vehicle collision. The plaintiff's case at trial failed because the jury found that the plaintiff had appreciated that the deceased, who was intoxicated and who had died in the subject collision, was incapable of properly controlling the motor car involved and the plaintiff had voluntarily assumed the risk of travelling as a passenger in that vehicle.

74 The plaintiff appealed on grounds which were in substance that the jury's findings were not open on the evidence; that the trial judge should have withdrawn the issue of *volenti* from the jury; and that the trial judge had also misdirected the jury on the law relating to the defence of *volenti non fit injuria*.

75 At the commencement of the appeal the Full Court was informed that the parties had settled the appeal and that they sought consent orders allowing the appeal, setting aside judgment for the respondent and in lieu thereof giving judgment for the appellant, together with certain orders as to costs. The Full Court made the consent orders sought and thereupon the respondent applied for an indemnity

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

certificate under s 13(1) of the 1964 ACFA.

76 In his reasons for judgment in *Pickford*, Brooking J (with whom the other members of the Full Court agreed) observed that:

> The expression "succeeds" in s13(1) is ambiguous. It may denote no more than a successful outcome; or it may signify a successful outcome by virtue of an adjudication by the appellate court. S13(2) seems to proceed upon the basis that all successful appeals will have been "determined". That expression is itself ambiguous: it may mean simply "brought to an end", or it may mean "resolved by an adjudication". The latter meaning seems to me to be the more natural one in s13(2), and it is to be noted that Dixon, CJ appears to have considered that the determination of an appeal within the meaning of similar legislation in force in New South Wales would always be by way of "a decision given inter partes".
>
> The consideration of policy which underlies s13(1) is that an error of law occurring in a court may ordinarily be attributed to a fault in the administration of justice rather than of the parties, so that the costs of having the error rectified ought ordinarily not to be borne by the unsuccessful respondent to the appeal but to be paid from a public fund established for that purpose. To give effect to this policy it is necessary that the Court should be able to say whether an error of law has occurred in the decision under appeal. The Court should not grant a certificate under s13(1) unless it is of opinion that there was error of law in that decision. If an appeal on a question of law is heard and then determined by way of being allowed, this requirement is of course satisfied, and the Court may if it sees fit proceed to grant a certificate. The requirement is not satisfied if, the appeal having been called on, it is simply allowed by consent of the parties. The respondent's consent to the allowing of the appeal may well not flow from a view formed by him or his advisers that the appeal will probably succeed, and in any event the view formed by the respondent or his advisers concerning the prospect of success of the appeal may not be sound. An appeal on a question of law cannot be said to succeed within the meaning of s13(1) if all that occurs is that the appeal is allowed by consent. (references omitted)

77 After discussing the various points at which a proceeding may be compromised and allowed by consent his Honour stated that:

> If the court allows the appeal by consent at a time when it has not formed even a tentative view on whether the appeal should succeed, then in my opinion the allowance of the appeal does not mean that the appeal has succeeded with the meaning of s13(1), for the court is unable to say whether the case falls within the scope of the section, having regard to the policy underlying the section, as a case in which the lower court erred as to the law. The question of more difficulty is occasioned by cases in which the court has formed a provisional or concluded view that the appeal should succeed but does not give effect to that view by way of judicial determination. The question is whether it is possible for the court, having allowed an appeal by way merely of consent order, without adjudicating upon it, to say that the

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

view which the court formed on the prospects of success of the appeal enables the court to regard the allowance of the appeal as resulting from error of law in the court below.

In my opinion this approach is not permissible. I can see no satisfactory half-way house between the absence of any adjudication (where all that occurs is that the appeal is allowed by consent) and the adjudication which does occur where the court decides the appeal by determining it in the usual sense. While it has been suggested that an appeal against the decision of a judge should not be simply allowed by consent, on the ground that to do so is to reverse the judgment under appeal without hearing the appeal (*Lees v Motor Insurers' Bureau*, [1953] 1 WLR 620, at p. 621 per Denning, LJ), it is, I believe, in cases like the present not uncommon for the Full Court to do what was done when this appeal was called on for hearing, that is, by consent to allow the appeal, without hearing argument. An order allowing the appeal in such circumstances in no way impairs the authority of any ruling, direction or other decision given by the trial judge and called in question by the appeal. The appellate court must adjudicate by way of determining the appeal before the impugned ruling or direction or decision will cease to have the authority to be attributed to a ruling or direction or decision of a single judge: cf. *Khan v Golechha International Ltd.*, [1980] 1 WLR 1482, at pp. 1490-2; [1980] 2 All ER 259. If the Court is to be asked (as in the present case) to allow an appeal by consent and then to form the opinion that the appeal, had it proceeded to adjudication, would probably have succeeded, the consequences will be mischievous. In deciding whether the compromised appeal would have succeeded had it run its course, the court will be giving a kind of advisory opinion upon incomplete argument and after what will often necessarily be inadequate consideration. In order to determine the relatively unimportant question whether the power to grant an indemnity certificate has arisen, the court will be called upon to pronounce on whether the appeal would have succeeded had it not been compromised. The decision of a judge may be called in question by exercising the right of appeal; but it is not to be thought that the authority of a judicial decision may be sapped by obtaining from the appellate court its informal evaluation or even impression of the prospects of success of an appeal that was not heard and determined.

To say this is not to say that the appellate court may not be induced, in a clear case, to allow an appeal by way of adjudicating upon it after hearing only short submissions. If the respondent concedes that the court below has erred, the appellate court may in a given case require little persuasion. Mr Winneke relied upon what Walsh, J said in *Reeve v Fowler*, [1965] NSWR 110, at p. 112; "It does not follow, in my opinion, that a certificate may never be granted in a case in which the parties have agreed that the appeal will succeed, and in which the actual appeal itself has not been fully argued. There may be a case in which it appears that counsel on both sides have agreed that there was an error of law, and the Court before which the appeal comes is told of that, and what the suggested error of law was. Then, in a proper case, the Court might well act in the matter and allow the appeal without itself hearing full argument on it. If that was the course taken, then the question of the grant or refusal of the certificate could also arise in these circumstances."

78 Ultimately his Honour concluded that '… an appeal does not succeed within the

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

meaning of s 13(1) unless the court has adjudicated upon it. Since the present appeal has been allowed without any adjudication, there is no power to grant an indemnity certificate, and the application must be refused'.

79 Brooking J held that an indemnity certificate should not be granted unless the Court is of the view that there was an error of law in the decision, and an appeal on a question of law cannot be said to succeed if all that occurs is that the appeal is allowed by consent.

80 However, Brooking J acknowledged that if the respondent concedes that the court or tribunal below has erred then the appellate court may require little persuasion and may, in an appropriate case, allow the appeal without itself hearing full argument.

81 In the earlier cited case of *Ozkan*,[40] Kaye J expressed reservations as to whether a consent order amounted to an appeal having 'succeeded', as required in s 4 of the ACA. Ultimately however, after considering the parties' arguments in *Ozkan*, Kaye J granted an indemnity certificate.

82 In *Ozkan*, the Court had been presented with consent orders in the form of *certiorari*, quashing the findings of a medical panel. In that matter Kaye J was persuaded that it was sufficiently arguable that the case under review exhibited a procedural error. His Honour was also persuaded that without hearing any detailed argument, one of the relevant panels may have made an error on the face of the record, although his Honour had not formed a concluded view on those matters. Ultimately his Honour was satisfied the plaintiff had succeeded in obtaining the relief she sought in her Originating Motion and that the appeal had in that way succeeded for the purposes of s 4 of the ACA, justifying the grant of an indemnity certificate.

<u>Proper construction of s 4(1) of the ACA</u>

83 The legislative policy and purpose of the ACA outlined above at [31] to [34] can only be reliably achieved if the appeal court substantially allows the appeal concerned,

---

40 [2012] VSC 17.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

thereby in an applicable case resulting in a successful outcome for the appellant on the appeal.[41]

84 The threshold requirement in s 4(1) of the ACA that '... an appeal against a decision of a court in a civil proceeding … succeeds …' should be given its natural meaning. The natural meaning of *succeeds* in the context of an appeal against a decision of a court, to one of the specified hierarchy of courts in s 4(1)(a) to (c) of the Act, is that the court substantially allows the appeal. In my view the application of a broad and beneficial approach to the interpretation of this part of s 4 of the Act also supports this construction.

85 Accordingly, the policy and purpose of the ACA support the above construction of s 4 of the Act, permitting the exercise of the court's discretion to grant indemnity, and thereby potentially providing access to public funds, where the appeal court allows the subject appeal. In such circumstances the Court is able to be satisfied, to the extent necessary an any particular case, that the appeal succeeded due to a fault in the administration of justice.

86 In *Eureka Funds Management Ltd v Freehills Services Ltd (No 2)*[42] (*Eureka*) Cavanough AJA, with whom Neave and Redlich JJA agreed, stated:

> 7. The grant of a certificate will usually lead to the expenditure of public money. In my view it is not enough that a case merely falls within one of the descriptions in s 4. The Court needs to be satisfied that it is appropriate in all the circumstances that a certificate should be granted. It is a discretion to grant, not a discretion to refuse, a certificate. On the other hand, a relatively generous approach to the exercise of the discretion is supported by the remarks of the then Attorney-General in her second reading speech for the 1998 bill for the Act, as follows:
>
> > The bill repeals the current Appeal Costs Act 1964 and replaces it with a new, simpler and clearer act. In so doing, the bill implements the government's justice policy objective of reforming the justice system so that it is accessible and efficient.
>
> …
>
> 8. Under the Appeal Costs Act 1964, a certificate was only available

41 *Civil Aviation Safety Authority v Illingworth* [2009] TASSC 57, [10]–[11].
42 [2008] VSCA 177.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

when the appeal succeeded on a question of law. In *Pascon Pty Ltd v San Marco In Lamis Co-operative Social Club Ltd*, Kaye J (speaking for the Full Court) endorsed what had been said by Brooking J (with whom the other members of the Full Court had agreed) in *Pickford v Incorporated Nominal Defendant*, namely:

> The consideration of policy which underlies s13(1) is that an error of law occurring in a court may ordinarily be attributed to a fault of the administration of justice rather than of the parties, so that the costs of having the error rectified ought ordinarily not to be borne by the unsuccessful respondent to the appeal but to be paid from a public fund established for that purpose.

9. The coverage of the legislation now extends to appeals which succeed on any ground at all. In the present case it is not necessary to decide whether the policy of the current legislation is that where an appeal is allowed for any reason at all this may ordinarily be attributed to a fault of the administration of justice, so that the costs of having the matter rectified ought ordinarily be paid from a public fund. In my view it is enough to note that this appeal involved questions of construction of the lease, being questions at least closely analogous to questions of law. It cannot be said that any of the arguments which succeeded at trial or any of the arguments which failed on appeal should not have been put or that the need for the appeal was generated by any inappropriate conduct of the respondent. (citations omitted) [43]

87 The Court of Appeal in *Eureka* specifically noted that in that particular matter it was not necessary to decide whether the policy of the ACA is that where an appeal is allowed for any reason at all this may ordinarily be attributed to a fault of the administration of justice so that the costs of having the matter rectified ought ordinarily be paid from a public fund.

88 In *Eureka* the Court considered that it was sufficient, in the circumstances of that matter, that it could identify that the appeal involved questions at least closely analogous to questions of law and that there were no circumstances below which amounted to the respondent either putting arguments which it should not have put or conducting itself in any way inappropriately.

89 Accordingly, I consider that an appeal may be allowed and thereby succeed within the meaning of s 4(1) of the ACA by reason of adjudication and resultant orders allowing the appeal, or in other appropriate circumstances, including where the

43 Ibid [7]-[9].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

court is sufficiently satisfied as to appellable error justifying the setting aside or quashing of the decision of the court or tribunal below and makes orders by consent to that effect, or where the appeal court is otherwise satisfied that the relevant appeal succeeds within the meaning of the ACA.

90 It would however be improbable that s 4 of the ACA is intended to apply in such a way as to provide access to public funds via the grant of an indemnity certificate in circumstances where, absent necessary court consideration and satisfaction as to appellable error or at least arguable error,[44] it is the parties to a proceeding which have agreed that an appeal is to be compromised in a particular way and those parties then, by consent orders, seek to quash or set aside the decision below so as to implement the terms of their settlement of the appeal.

91 Such a construction would amongst other anomalous outcomes, potentially expose the ACA to capricious exploitation, for example by parties resolving an appeal in relation to the decision of a court, tribunal or other body on certain terms and also drafting proposed consent orders directed to maximising the prospect of the respondent being granted an indemnity certificate. Such a possibility would also potentially enable the benefit of access to public funds without the parties in fact genuinely forming the view that the appeal was likely to succeed, or as a result of views of the parties or their advisers which were ill-informed.

92 I consider it to be improbable that the provisions of the ACA under consideration intended that an 'appeal' in relation to the decision of an inferior court, tribunal or other body, could relevantly succeed solely as a result of the parties to the appeal resolving their differences and, by consent, proffering to the appeal court, such orders as they desired, including consent orders setting aside or quashing the decision appealed against.

93 If s 4 of the ACA was engaged by such circumstances, there would be no necessary connection between fault of the administration of justice in the court, tribunal or

---

44 *Bellman v Peters* [2020] VSCA 143, [2]-[3].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

other body under appeal, and the grant of an indemnity certificate and potential resultant access to public funds by the respondent to the appeal.

94 In this matter as outlined above:

(a) On 13 March 2019 the parties emailed the Court and advised that the active parties had settled the proceeding and proposed consent orders were submitted.

(b) The proposed orders sought:

(i) the adjudication determination made by the Second Defendant on 11 February 2019 be quashed and declared to be void;

(ii) the monies paid into Court by the Plaintiffs under the orders of Digby J made on 26 February 2019 be paid to the Plaintiffs or their nominees forthwith;

(iii) the First Defendant shall pay the costs of the Plaintiffs, including all reserved costs, on the standard basis to be assessed by the Costs Court in default of agreement;

(iv) the First Defendant be granted an indemnity certificate pursuant to s 4 of the *Appeal Costs Act 1998* (Vic).

(c) On 13 March 2019 consent orders were authenticated as follows:

(i) the Adjudication Determination made by the second defendant on 11 February 2019 be quashed and declared void;

(ii) the moneys paid into Court by the plaintiffs pursuant to the Orders made 26 February 2019, and any interest allocated or received in respect of that amount, be paid to the plaintiffs or their nominees forthwith;

(iii) the first defendant pay the costs of the plaintiffs, including all

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

reserved costs, on a standard basis to be assessed by the Costs Court in default of agreement;

(iv) the trial fixed for hearing on 18 March 2019 be vacated and the proceeding dismissed, without adjudication on the merits.

(d) On 14 March 2019 the Court forwarded the authenticated Order made 13 March 2019 to the parties and advised that the Court is not at that point disposed to grant an indemnity certificate pursuant to s 4 of the ACA as sought by the proposed consent orders, referred to above and, in substance advised the parties that the question of any entitlement to an indemnity certificate under the ACA was reserved.

95 On 19 March 2019 the first defendant provided submissions, and on 17 December 2019 and 28 February 2020 further limited material, in support of a grant of an indemnity certificate pursuant to s 4 of the ACA. The plaintiffs have not sought to contradict or contest the first defendant's submissions or material.

96 By the consent orders proffered in the present matter both the first defendant, which had succeeded in the adjudication below, and the plaintiffs sought orders quashing and setting aside the Adjudication Determination of 11 February 2019.[45]

97 The plaintiffs' Originating Motion of 25 February 2019 clearly articulated the bases upon which the plaintiffs argued that the Adjudicator had fallen into jurisdictional error, including by:

> The ground for judicial review/declaratory relief is jurisdictional error, in that the Plaintiffs are not in the business of building residences, and the contract the subject of the adjudication determination was not entered into in the course of, or in connection with, any such business: s 7(2)(b) of the *Building and Construction Industry Security of Payments Act 2002*.
>
> Accordingly, the Act did not apply to the contract and the adjudicator lacked

45 The proceeding was commenced with the filing by the plaintiffs of the Originating Motion, Summons and Affidavits in Support by each of the plaintiffs, Daniel Radman and Douglas Radmanic. Exhibit 'DR-1' to the Affidavit of Daniel Radman sworn 25 February 2019 deals with the parties' assertions as to the merits before the Adjudicator and the plaintiffs' case on the Originating Motion in Court. Further, the first defendant in its submissions of 19 March 2019 in this application relies upon the plaintiffs' affidavit material supporting its Originating Motion.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

> jurisdiction: *Golets v Southbourne Homes & Anor* [2017] VSC 705.
>
> Further, the First Defendant issued the final payment claim on 25 October 2018. The Fist Defendant then issued a second final payment claim on 7 December 2018. The second final payment claim was the payment claim the subject of the Adjudication Determination. The second final payment claim was invalid: s 14(6) of the Act. It follows that the Adjudication Determination is likewise invalid.

98 The materials filed by the plaintiffs in the judicial review, were directed to substantiating the Adjudicator's errors referred to above. Those materials were not responded to in this judicial review as a result of the proceeding being resolved by consent before any responses were filed and served.

99 However, the first defendant's agreement to the consent orders sought clarified that it supported the outcome and orders sought by the plaintiffs in its substantive case in the proceedings, namely orders which impugned the validity of the Adjudication Determination dated 11 February 2019 and which quashed that determination.

100 Neither did the plaintiffs seek to contest or contradict the first defendant's submissions or material in support of the grant of an indemnity certificate.

101 Further, in general the making of orders by consent of the parties allowing an appeal in proceedings which involve setting aside the decision of another court, tribunal or relevant body, ordinarily requires that the appellate court satisfies itself as to the existence of appellable error, or at least arguable appellate error, justifying the decision below being set aside.

102 In *Irwin v Military Rehabilitation & Compensation Commission (Irwin)*[46] the Full Court of the Federal Court of Australia in substance observed that when a court is dealing with a challenge to an administrative decision of a tribunal which represents an exercise of the executive power of the Commonwealth, the orders made on that challenge are not simply orders resolving a dispute between litigants and should be the subject of the court's own satisfaction as to the basis upon which the orders are made.

---

46 [2009] 174 FCR 574, [13]; per French J in *Kovalev v Minister for Immigration and Multicultural Affairs*(1999) 100 FCR 323 at 342.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

103 In *Irwin* the Full Court of the Federal Court of Australia, citing French J in *Kovalev v Minister for Immigration and Multicultural Affairs*,[47] (*Kovalev*) observed that a court hearing a challenge to an administrative decision of a tribunal which represents the exercise of judicial power to set aside that tribunal's exercise of the executive power of the Commonwealth is more than an order resolving a dispute between litigants and cannot depend upon the consent of the parties, including because in the case of a tribunal (like the Military Rehabilitation and Compensation Tribunal in *Irwin*), Parliament has conferred executive power relating to the relevant decision, including the power to remake the decision.

104 In *Kovalev* French J said:

> It is important therefore that the Court itself addresses and is satisfied of the basis upon which its order is to be made and in particular where the order sets aside the decision of an official decision-maker or a tribunal.[48]

105 In *Irwin* the Full Court of the Federal Court of Australia went on to state:

> 13. … In *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 42 ALR 209 at 221 Sheppard J, in a passage subsequently approved by the High Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 356, 357, identified the task involved in the exercise of judicial power on appeal from the Tribunal as follows:
>
> > "The error of law alleged has to be isolated out, a decision made on this question of law, and such order made and directions given as are appropriate only to the decision of this question of law … ."
>
> 14. To use the words of French J in *Kovalev* (at 326) there will be "a purported, but not an actual exercise of judicial power" if a court acts upon an asserted error of law or even a prima facie error of law, even where the parties are agreed, without satisfying the requirements set out by French and Sheppard JJ.
>
> 15. It is accordingly necessary for this court, where the question whether the Tribunal has erred in law is before it, to address the matter for itself. That is not to say that the court may not deal with the matter more briefly in its reasons than it otherwise would, or that it may not specifically state that there has been no real contradictor, so that courts subsequently considering the decision may take that into account.

---

47 (1999) 100 FCR 323.

48 Ibid at 324.

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

106 In *Bellman v Peters*[49] the Victorian Court of Appeal observed as follows in relation to an appellate court dealing with an application for orders by consent of the parties which included setting aside orders of a Judge of the Trial Division:

> 2. Allowing an appeal by consent is not a mere exercise in 'rubber stamping'.[50] The Court has a duty to be satisfied, as a condition of its power to allow an appeal by consent, that there was an appellable error, or at least an arguable error.[51]
>
> 3. There are good reasons for this approach. Allowing an appeal involves setting aside a decision of another court or tribunal, the processes and decisions of which are entitled to due respect and will ordinarily be matters of public record. In any substantive case, the decision is likely to form part of the body of non-statutory law having value as binding or persuasive authority, by virtue of the doctrine of precedent. To set aside such decisions is a serious matter with consequences beyond the immediate parties. Moreover, allowing an appeal may involve remitting a matter for rehearing, with resource implications for the administration of justice.[52]http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2020/143.html - fn3

107 In this matter I have considered the plaintiffs' materials in support of their case that the Adjudicator erred in his Adjudication Determination of 11 February 2019 and I have also considered the uncontested submissions and materials of the first defendant in support of its application for the grant of an indemnity certificate under s 4 of the ACA. Further, I note again that the consent orders sought in this matter by the active parties endorsed the plaintiffs' position that, in the matter under review the Adjudicator erred and that his Determination should be quashed.

108 In the circumstances referred to above I am satisfied that in obtaining the relief which it has in this proceeding, the plaintiffs and the first defendant have sufficiently identified a cogent and persuasive case of appellable error by the Adjudicator, as outlined in the plaintiffs' Originating Motion, which justifies the

---

49 [2020] VSCA 143, [2]-[3].

50 *Melbourne Water Corporation v Caligiuri* [2020] VSCA 16, [19]; *Hennes v Hobsons Bay City Council* [2012] VSCA 215, [7]; *Kovacic v Transport Accident Commission* [2016] VSCA 139.

51 *Telstra Corporation Ltd v Minister for Broadband, Communications and the Digital Economy* (2008) 166 FCR 64, 77–8 [51]–[54]; [2008] FCAFC 7; *Commonwealth Bank of Australia v Walker* [2012] FCAFC 68; (2012) 289 ALR 674, 675 [3]–[5]; *Smits v Lillas & Loel Lawyers Pty Ltd* [2016] FCAFC 143, [10].

52 *Newton v Geelong Ethnic Communities Council Inc* [2011] VSCA 59, [17]; *Loftus v Australia and New Zealand Banking Group Ltd [No 2]* [2016] VSCA 308, [3].

Retrieved from AustLII on 10 December 2021 at 14:11:35 Verify version

Signed by AustLII

making of the orders sought by those parties by consent which were authenticated by the Court on 13 March 2019.

Conclusion – Issue 3

109 For the above reasons I consider the plaintiffs' judicial review has succeeded within the meaning of s 4(1) of the ACA.

Issue 4 - In the proper exercise of the Court's discretion is the first defendant entitled to be granted an indemnity certificate, pursuant to s 4(1) of the ACA

Discretionary considerations

110 In this matter I can identify no factors, nor were any such factors raised by the parties, which contradict the grant of an indemnity certificate to the first defendant pursuant to the discretion provided for in s 4(1) of the ACA.

111 I am satisfied that the discretion arising from s 4(1) of the ACA should, in the circumstances of this matter, be exercised in the first defendant's favour.

Decision

112 For the above reasons the first defendant's application for an indemnity certificate under s 4 of the ACA is granted.

Order

113 Accordingly, the Court orders that:

(a) Pursuant to Rule 36.07 of the *Supreme Court (General Civil Procedure) Rules 2015* paragraph [4] of the orders made on 13 March 2019 is varied to delete the words 'and the proceeding is dismissed, without adjudication on the merits'.

(b) The first defendant be granted an indemnity certificate pursuant to s 4 of the *Appeal Costs Act 1998* (Vic).

Retrieved from AustLII on 10 December 2021 at 14:11:35
Verify version