

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

Not Restricted

S ECI 2019 3626

BETWEEN:

RISE CONSTRUCTIONS PTY LTD (ACN 610 135 709)

Plaintiff

and

WALID EL-HAJJ (t/as Andary Excavation)

First Defendant

CHRISTOPHER HARRISS

Second Defendant

ADJUDICATE TODAY PTY LTD (ACN 109 605 021)

Third Defendant

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 11 November 2019
DATE OF JUDGMENT: 17 December 2019
CASE MAY BE CITED AS: Rise Constructions v El-Hajj
MEDIUM NEUTRAL CITATION: [2019] VSC 818

ADMINISTRATIVE LAW - Simple Works Contract - Adjudication - Seeking to quash the Adjudication Determination - Whether the Notice of Acceptance was properly served and effected - *Building and Construction Industry Security of Payment Act 2002 (Vic)*, ss 20(1), 21(1), 23(2), 23(2B) and 50 and *Evidence Act 2008 (Vic)*, s 160(1).

APPEARANCES:

Solicitors

Solicitor for the Plaintiff

Mr D Cain

KCL Law

The First Defendant appeared in person

HIS HONOUR:

Summary

- 1 In this proceeding Rise Constructions Pty Ltd (plaintiff) seeks to quash the second defendant's (Adjudicator)¹ Adjudication dated 6 August 2019 (Adjudication Determination)² made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (SoP Act).
- 2 The grounds upon which the plaintiff seeks to have the Adjudication Determination quashed are each based on the plaintiff's assertion that the Adjudicator erred in deciding the date of service of the Adjudicator's Notice of Acceptance on the plaintiff and was wrong in deciding the date of termination of the two business day period under s 21(1)(b) of the SoP Act within which the plaintiff could lodge its Adjudication Response with the Adjudicator.
- 3 As a result of the erroneous decisions referred to in the last preceding paragraph, the plaintiff contends that the Adjudicator wrongfully excluded from his consideration under the SoP Act the plaintiff's Adjudication Response dated 12 July 2019 (Adjudication Response),³ because in the Adjudicator's view the plaintiff's Adjudication Response was lodged out of time. The plaintiff also contends that this exclusion resulted in the plaintiff being deprived of natural justice in the adjudication.
- 4 The plaintiff submits that it in fact received the Adjudicator's Notice of Acceptance, served pursuant to s 20(1) of the SoP Act, on 10 July 2019, giving the plaintiff until 12 July 2019 to lodge its Adjudication Response and it also submits that it lodged its Adjudication Response within time pursuant to s 21 of the SoP Act, namely on 12 July 2019.

1 By email dated 27 August 2019 the second and third defendants advised the Court they do 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 them.

2 CB13-34.

3 CB218-444.

Plaintiff seeks the following relief

5 The plaintiff seeks the following:

- (a) a declaration that the Adjudication Determination was:
 - (i) unlawful and void;
 - (ii) demonstrated an error of law on the face of the record; and/or
 - (iii) was tainted by jurisdictional error;
- (b) further, or alternatively, an order quashing the Adjudication Determination;
- (c) an injunction, both permanent and interlocutory, restraining the first defendant, whether by itself, its servants, or agents, from relying upon the terms of the SoP Act to:
 - (i) seek an adjudication certificate under the SoP Act based on the Adjudication Determination;
 - (ii) seek judgment for the adjudicated amount (or any part of it) referred to in the Adjudication Determination;
 - (iii) enforce the Adjudication Determination; or
 - (iv) otherwise seek recovery of the adjudicated amount (or any part of it) referred to in the Adjudicated Determination; and
- (d) the first defendant pay its costs of the proceeding.

Plaintiff's case

6 The plaintiff argues that because the Adjudicator wrongfully failed to consider the Adjudication Response, which the Adjudicator found arrived outside the applicable time limit fixed by s 21 of the SoP Act, the Adjudicator fell into jurisdictional error as a result of non-compliance with s 23(2)(d) and by force of s 23(2B)(a) of the SoP Act, and also for want of procedural fairness and/or natural justice in not considering the

Adjudication Response.

- 7 Central to the plaintiff's case is the issue of whether or not, taking into account the relevant provisions of the SoP Act and insofar as may be relevant the subcontract between the plaintiff and the first defendant, Mr Walid El-Hajj (trading as Andary Excavation), the Adjudicator effectively served his Notice of Acceptance on 8 July 2019, as the first defendant asserts and as the Adjudicator found, or whether the Adjudicator's Notice of Acceptance was served on the plaintiff on 10 July 2019 as the plaintiff deposes was the fact.
- 8 The plaintiff asserts that it did not receive a copy of the Adjudicator's Notice of Acceptance until 10 July 2019 and, as a result, its Adjudication Response dated 12 July 2019 was lodged within time and therefore the Adjudicator was obliged to consider that Adjudication Response as part of his Adjudication Determination.

First defendant's case

- 9 The first defendant relies upon the Adjudicator's factual finding that service of the Notice of Acceptance was effected on 8 July 2019 in accordance with the operation of the SoP Act and the construction subcontract between the parties.
- 10 The first defendant submits that if the Adjudicator effectively served the plaintiff on 8 July 2019 pursuant to ss 20(1) and 21(1) of the SoP Act, and the plaintiff failed to lodge its Adjudication Response within either five business days of receiving a copy of the Adjudication Application, or two business days after receiving the Adjudicator's Notice of Acceptance of the application, then the Adjudicator was obliged under s 22(3) of the SoP Act to preclude the plaintiff's late Adjudication Response.
- 11 Section 21(1) of the SoP Act fixes the date of receipt by the plaintiff of the Notice of Acceptance and triggers time running under the SoP Act for the respondent to lodge its adjudication response.
- 12 In this matter the first defendant asserts that the plaintiff in this proceeding was

effectively served with and received the Notice of Acceptance on 8 July 2019.

Relevant factual chronology

- 13 By a subcontract dated 1 February 2019, the plaintiff engaged the first defendant to carry out excavation and concreting work at 254-256 Murray Road, Preston, in the State of Victoria, in the sum of \$210,000 (excl. GST) (subcontract).⁴ On 14 February 2019, the parties agreed to amend the subcontract to the sum of \$271,000 (incl. GST).⁵
- 14 On 12 June 2019, by email, the first defendant served a payment claim seeking a progress payment of \$139,942 (excl. GST) under the SoP Act (Payment Claim).⁶
- 15 On 19 June 2019, by email, the plaintiff served a payment schedule in response to the Payment Claim and scheduled a payment of \$Nil (Payment Schedule).⁷
- 16 On 2 July 2019, the first defendant applied to Adjudicate Today Pty Ltd (third defendant) for adjudication of the Payment Claim under the SoP Act (Adjudication Application).⁸
- 17 On 4 July 2019, the plaintiff received the Adjudication Application. The Adjudicator determined that the first defendant's entitlement was in the sum of \$66,950 (incl. GST).
- 18 By letter dated 5 July 2019, the Adjudicator sent to the plaintiff his notice of acceptance of his appointment pursuant to s 20(1) of the SoP Act (Notice of Acceptance).⁹ On its face this document is addressed to the plaintiff at Suite 5, 13-25 Church Street, Hawthorn, Vic 3122. The first defendant asserts and the Adjudicator has held that this Notice of Acceptance was served and received by the plaintiff on 8 July 2019.

4 CB36-60.

5 CB62.

6 CB245-261.

7 CB91-104.

8 CB106-203.

9 CB205-216.

- 19 On 10 July 2019, the plaintiff asserts that it received (via Express Post) the Notice of Acceptance of the Adjudicator of his appointment to determine the Adjudication Application.¹⁰
- 20 On 12 July 2019, the plaintiff lodged with the Adjudicator its adjudication response to the Adjudication Application (Adjudication Response).¹¹
- 21 On 6 August 2019 the Adjudicator delivered his Adjudication Determination, determining that an amount of \$66,950 (incl. GST) was payable by the plaintiff in respect of the Payment Claim (Adjudicated Amount).¹²
- 22 As part of the Adjudication Determination the Adjudicator:
- (a) determined that the plaintiff was served with and thereby received the Notice of Acceptance required by s 20(1) of the SoP Act on 8 July 2019; and
 - (b) determined that because the plaintiff's Adjudication Response was not lodged until 12 July 2019, it was non-compliant with the timing requirements of s 21(1)(b) of the SoP Act and was thereby precluded by s 22(3) from being considered.

The parties' affidavit evidence

The plaintiff's evidence in relation to service and receipt

- 23 In an affidavit filed in this proceeding, but not before the Adjudicator in the subject Adjudication proceeding, Mr Yi (David) Lin (Mr Lin) deposed he is the Director and Company Secretary of the plaintiff. In his Affidavit of 29 August 2019¹³ Mr Lin stated that:

Preliminary Matters - Relevant Rise Addresses

8. In relation to Rise's postal addresses, I note the following:

¹⁰ Supplementary Affidavit of Yi (David) Lin, 12 November 2019, [6], [11(b)]; CB454, [23]; see also Supplementary Affidavit of Yee (Elaine) Chai, 12 November 2019, [6], [10a], [11].

¹¹ CB218-444.

¹² CB13-34.

¹³ CB449-500.

- (a) since 27 July 2017, Rise's registered office has been (and remains) Tridant Financial Group Pty Ltd, Level 1, 21 Shierlaw Avenue, Canterbury VIC 3126;
 - (b) since 11 January 2016, Rise's principal place of business has been (and remains) '202' 865 Burke Road, Camberwell VIC 3124; and
9. The above (and other) details of Rise are set out in an ASIC Current Organisation Extract dated 18 June 2019 (ordered on 12 July 2019) ("Rise Extract"). Now produced and shown to me and marked YL-2 is a true copy of the Rise Extract.
10. Relevantly, Rise's address noted in 'Schedule A' of the Contract is Suite 5, 13-25 Church Street, Hawthorn VIC 3122 ("Contract Address").

...

Receipt of Adjudication Application

16. On 4 July 2019, Rise received the Adjudication Application via post at its Contract Address. A true copy of the Adjudication Application is exhibited to the Murray Affidavit (exhibit LJM-7).
17. At about 10.10am on 5 July 2019, Rise received a notice via e-mail from Adjudicate Today confirming that Adjudicate Today had received the Adjudication Application from Andary ("Adjudication Receipt Notice"). Now produced and shown to me and marked YL-3 is a true copy of the Adjudication Receipt Notice and e-mail serving same.

Meeting with KCL Law in relation to Adjudication Application

18. At about 11.30am on 5 July 2019, I attended the offices of Rise's solicitors, KCL Law of Level 4, 555 Lonsdale Street, Melbourne in the State of Victoria ("KCL Law") to provide instructions in relation to the subject matter of the Adjudication Application. During that meeting, I was verbally advised that:
- (a) I should immediately (and until the delivery of any determination in respect of the Adjudication Application) carefully monitor Rise's e-mail and regularly check Rise's letterbox at the Contract Address for any items received from Adjudicate Today, an adjudicator in respect of the Adjudication Application and/or Andary; and
 - (b) I should instruct any relevant Rise employees to also carefully monitor Rise's e-mail and regularly check Rise's letterbox at the Contract Address for any item as described in paragraph 18(a) immediately above.
(collectively, "KCL Advice")
19. In accordance with the KCL Advice, I immediately (on 5 July 2019):
- (a) began to carefully monitor Rise's e-mail and regularly check Rise's letterbox at the Contract Address (at least once each day) for any items received from Adjudicate Today, an adjudicator in respect of the Adjudication Application and/or Andary (and continued to do so until about 6 August 2019); and
 - (b) instructed the relevant Rise employee, Ms Yee (Elaine) Chai (Property Administrator and Accounts Officer) to carefully monitor Rise's e-mail and to check its letterbox each work day at the Contract Address for any item as described in paragraph 19(a) above.

Location and Ownership of Letterboxes at the Contract Address

20. As indicated in 'Schedule A' of the Contract, Rise's Contract Address comprises only one of 15 corporate suites (namely, 'Suite 5') located in the building at 13-25 Church Street, Hawthorn VIC 3122 (**Premises**).
21. Importantly, there are 15 letterboxes located together at the Premises, with each suite owning one such letterbox. These 15 letterboxes are shown in a photograph which, on 28 August 2019, I verbally instructed Ms Yee (Elaine) Chai to take ("Letterboxes Photograph"). Now produced and shown to me and marked YL-4 is a true copy of the Letterboxes Photograph.
22. As noted in 'Schedule A' of the Contract, Rise only occupies one suite (namely, Suite 5) at the Premises and so only owns one of the 15 letter boxes. It does not have (and cannot) access any other letterbox at the Premises.

Receipt of Adjudicator's Acceptance Notice

23. On 10 July 2019, Rise received notice (via registered post to its Contract Address) of the adjudicator's acceptance of his appointment to determine the Adjudication Application ("Acceptance Notice"). A true copy of the Acceptance Notice is exhibited to the Murray Affidavit (exhibit LJM-8).
24. To be clear, Rise did not receive the Acceptance Notice at any time, by any means, at any place, before 10 July 2019.
25. On 12 July 2019, Rise lodged its adjudication response to the Adjudication Application ("Adjudication Response"). A true copy of the Adjudication Response is exhibited to the Murray Affidavit (exhibit LJM-9).
26. At no time did the Adjudicator call for any further submissions in respect of any matters arising out of or in connection with the Adjudication Application and/or the Adjudication Response.
27. On 6 August 2019 the adjudicator delivered the Determination, determining that an amount of \$66,950 (including GST) was payable by Rise in respect of the June Payment Claim ("Adjudicated Amount").

24 In a further Affidavit filed in this proceeding, but not before the Adjudicator in the subject Adjudication proceeding, Ms Yee (Elaine) Chai (Ms Chai) deposed she is the Property Administrator and Accounts Officer employed by the plaintiff. In her Affidavit of 29 August 2019¹⁴ Ms Chai stated that:

2. Since the Adjudication Application was received by Rise on 4 July 2019, I have been intimately involved in the administrative matters in relation to the handling of the Adjudication Application and all related documents subsequently received in relation thereto.

...

Instructions to Monitor Rise E-mail and Letterbox

7. My role as Property Administrator & Accounts Officer at Rise is located at Suite 5, 13-25 Church Street, Hawthorn VIC 3122 ("Office").
8. On 4 July 2019, I became aware that the Adjudication Application had

¹⁴ CB501-519.

been received at Rise's Office.

9. On 5 July 2019, Mr. Yi (David) Lin (known to me as a director of Rise) instructed me to carefully monitor Rise's e-mail and to check the letterbox at Rise's Office each day for any items received by Adjudicate Today, an adjudicator in respect of the Adjudication Application and/or Andary (and continued to do so until about 6 August 2019).
10. On and from 5 July 2019 until about 6 August 2019, I proceeded to monitor Rise's e-mail and check Rise's letterbox at its Office at least twice each work day.

Location and Ownership of Letter boxes at the Contract Address

11. Importantly, there are 15 letterboxes situated together at the property within which Rise's offices are located, with each suite owning one such letterbox. These 15 letterboxes are shown in a photograph which I took on 28 August 2019 ("Letterboxes Photograph"). Now produced and shown to me and marked YC-1 is a true copy of the Letterboxes Photograph.

Receipt of Adjudicator's Acceptance Notice

12. On 10 July 2019, I retrieved from Rise's letterbox at the Office a notice of the Adjudicator's acceptance of his appointment to determine the Adjudication Application ("Acceptance Notice"). Now produced and shown to me and marked YC-2 is a true copy of the Acceptance Notice.
13. Having carefully monitored Rise's e-mail addresses and letterbox at its Office, the first date upon which I became aware of the Acceptance Notice was 10 July 2019.
14. To the best of my knowledge, Rise did not receive the Acceptance Notice at any time, by any means, at any place, before 10 July 2019.

25 Both Mr Lin and Ms Chai have provided subsequent Supplementary Affidavits in this proceeding, affirmed on 12 November 2019. As with the above materials, neither of these Supplementary Affidavits were filed in the subject Adjudication proceeding. Both the Supplementary Lin and Chai Affidavits, insofar as they are material, correct earlier descriptions of the receipt of the Notice of Acceptance as coming via Registered Post, and affirm that the Notice of Acceptance was received via Express Post.

26 The plaintiff also relies upon the Affidavits of Liam James Murray (Mr Murray), solicitor for the plaintiff.

27 Mr Murray's Affidavits of 13 August 2019 (First Murray Affidavit) and 11 November 2019 (Second Murray Affidavit) were filed in this proceeding, but not before the Adjudicator in the subject Adjudication proceeding.

28 The First Murray Affidavit contains no direct evidence in relation to the service or receipt by the plaintiff of the Adjudicator's Notice of Acceptance.

29 The Second Murray Affidavit also contains no direct evidence about the service or receipt by the plaintiff of the Adjudicator's Notice of Acceptance. The Second Murray Affidavit contains a good deal of subject matter about information received from Australia Post said to describe the difference between its 'Express Post' and 'Registered Post' services.

First defendant's affidavit material

30 The first defendant relies upon the following affidavits filed in this proceeding, but not before the Adjudicator in the subject Adjudication proceeding:

(a) Affidavit of Mr Walid El-Hajj affirmed 17 September 2019 (First El-Hajj Affidavit);¹⁵ and

(b) Affidavit of Mr Walid El-Hajj affirmed 10 October 2019 (Second El-Hajj Affidavit).¹⁶

31 In the First El-Hajj Affidavit, the first defendant, who is the principal of Andary Excavation, states, insofar as is related to the point in issue, that on 5 July 2019, at 3.42pm, he received an email from the third defendant notifying that the second defendant had accepted the appointment as Adjudicator. Beyond that, this affidavit contains argument and assertion material addressing the circumstances surrounding the forwarding of the Notice of Acceptance and describes Mr El-Hajj's understanding of parts of the Australia Post express post system.

32 The Second El-Hajj Affidavit contains argument and assertion material addressing the circumstances surrounding the forwarding of the Notice of Acceptance, Mr El-Hajj's understanding of parts of the Australia Post express post system and his view that there was no obstruction to make it difficult for the postal delivery officer to put

¹⁵ CB523-537.

¹⁶ CB942-951.

the envelope in the slot of the letterbox marked 'Suite 5', and also his view that there is no uncertainty as to which letterbox the postal delivery officer should put the express post envelope in. Mr El-Hajj states that the relevant letterbox is very clearly labelled 'Suite 5'.

First defendant's supplementary affidavit

33 The first defendant's Supplementary Affidavit affirmed 14 November 2019, (Third El-Hajj Affidavit) filed in this proceeding, but not before the Adjudicator in the subject Adjudication proceeding, in summary refers to:

- (a) Exhibit 'WEH-1' (pages 1/3 and 2/3), an email from Mr El-Hajj's personal assistant Ms Rania Zakharia to the third defendant seeking a copy of the Express Post envelope that enclosed the Adjudicator's Notice of Acceptance and confirmation of the address to which that envelope was sent;
- (b) Exhibit 'WEH-2', an email from Ms Andrea Crompton, Deputy General Manager of the third defendant, to Mr Liam Murray and Mr Darren Cain (solicitors for the plaintiff), the first defendant and the Court, attaching a copy of the Express Post envelope, in which the Adjudicator's Notice of Acceptance was mailed to the plaintiff. In addition, a tracking summary and tracking reference number (60448357119099) in relation to the relevant item of Express Post;
- (c) the Express Post envelope, referred to in paragraph (b) above being tracked and delivered to Suite 5, 13-25 Church Street, Hawthorn 3122, in the State of Victoria (the address) on Monday 8 July 2019;¹⁷ and
- (d) highlights the plaintiff's stated position that it is not able to locate the Australia Post envelope in which the said Notice of Acceptance was sent to the plaintiff.¹⁸

¹⁷ Third El-Hajj Affidavit, [8] and Exhibit 'WEH-2'.

¹⁸ Third El-Hajj Affidavit, [10].

Relevant provisions of the SoP Act

34 The relevant sections of the SoP Act provide:

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).

21. Adjudication responses

- (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within –
 - (a) 5 business days after receiving a copy of the application; or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application –
whichever time expires later.

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.

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.
- ...
- (2B) An adjudicator's determination is void-
- (a) to the extent that it has been made in contravention of subsection (2);
 - (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

50. Service of notices

- (1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person –
 - (a) by delivering it to the person personally; or
 - (b) by lodging it during normal office hours at the person's ordinary place of business; or
 - (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
 - (d) in such manner as may be prescribed for the purposes of this section; or
 - (e) in any other manner specified in the relevant construction contract.
- (2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected –
 - (a) in the case of posting – 2 business days after the day on which the notice or document was posted;
 - (b) in the case of a facsimile – at the time the facsimile is received.
- (3) If a facsimile is received after 4.00pm on any day, it must be taken to have been received on the next business day.

Relevant subcontract provisions

35 Clause 38 the subcontract provides:

Notices

- 38.1 A notice required or permitted to be given by one party to another under this Subcontract must be in writing, addressed to the other party and:
 - 38.1.1 delivered to that party's address;
 - 38.1.2 sent by registered mail to that party's address; or (iii) transmitted by facsimile to that party's address.
- 38.2 A notice given to a party in accordance with clause 38.1 is treated as having been given and received:
 - 38.2.1 if delivered to a party's address, on the day of delivery if

- delivered before 4:00pm on a Business Day and otherwise on the next Business Day;
- 38.2.2 if sent by registered mail, 2 Business Days after the date of posting; and
- 38.2.3 if transmitted by facsimile to a party's address and a correct and complete transmission report is received before 4:00pm, on the day of transmission if a Business Day, otherwise on the next Business Day.

36 Further, in 'Schedule A' Item 3, the subcontract also provides as follows:¹⁹

3	CONTRACTOR	
	Name	Rise Constructions Pty Ltd
	ABN/ACN	ABN: 49 610 135 709
	Address	Suite 5, 13-25 Church St, Hawthorn, VIC, 3122

Adjudication Determination

37 The relevant paragraphs of the Adjudication Determination also provide:

Purported adjudication response

- 76 On Monday 15 July 2019, after completing the above parts of this determination, I received advice from Adjudicate Today that the Respondent had submitted an adjudication response on Friday 12 July 2019.
- 77 I had previously been advised by Adjudicate Today that the Application was served on the Respondent on 4 July 2019, and my acceptance was served by Express Post on Monday 8 July 2019. By my calculations, the timeframe for the Respondent to submit an adjudication response had expired on Wednesday 11 July 2018 (stet). Hence my decision to proceed with the determination after that time.
- 78 I reviewed this purported adjudication response to the extent necessary to establish if there had been an error in the timeframes for service. According to paragraph 10 of its written submission, the Respondent asserted that it received my acceptance by post on 10 July 2019.
- 79 I explained the situation to Adjudicate Today and asked for confirmation of service. Adjudicate Today confirmed that service of my acceptance was affected on 8 July 2018 (stet):

¹⁹ CB152.



80

I therefore do not accept that the Respondent has submitted an adjudication response within the timeframe provided by the Act, and I have no power to grant an extension. Section 22(3) of the Act provides that I must not consider this submission in determining this adjudication.

Plaintiff's submissions

- 38 The plaintiff observes that in reaching his decision, the Adjudicator concluded that the plaintiff's Adjudication Response²⁰ was out of time and could not be considered when evaluating the payment claim.²¹ The plaintiff submitted that its Adjudication Response was served within time and that the Adjudicator's failure to have regard to that response amounted to the plaintiff being deprived of natural justice.²²
- 39 The plaintiff notes that s 21(1) of the SoP Act provides that a respondent is to provide its Adjudication Response within five business days after receiving a copy of the Adjudication Application or two business days after receiving the Adjudicator's Notice of Acceptance of the adjudication application, whichever times expires later.

²⁰ Plaintiff's Submission, 8 November 2019, (Plaintiff Submission) [3]; see also CB218-232.

²¹ CB25-26, [76]-[80].

²² Plaintiff Submission, [3].

- 40 The plaintiff submitted that the date five business days after it received a copy of the Adjudication Application expired on 11 July 2019 in accordance with s 21(1) of the SoP Act.²³
- 41 The plaintiff noted that the Adjudicator determined that the Notice of Acceptance was served on the plaintiff on 8 July 2019. The plaintiff submitted that the Notice of Acceptance was in fact received on 10 July 2019 giving the plaintiff, pursuant to s 21(1) of the SoP Act, until 12 July 2019 to provide its Application Response. The plaintiff's Adjudication Response was in fact provided to the Adjudicator on 12 July 2019.²⁴
- 42 The plaintiff submitted that Suite 5, 13-25 Church Street, Hawthorn was neither its registered nor business office address.²⁵ The plaintiff further submitted the relevant building at that address contains a number of suites with 15 letterboxes located at the front,²⁶ and the plaintiff only occupying one suite.²⁷
- 43 The plaintiff submitted that from 5 July 2019, following advice from KCL Law, Mr Lin checked the plaintiff's letterbox at the address at least once a day, for the purpose of receiving any items from the Adjudicator and instructed Ms Chai, to do the same.²⁸
- 44 The plaintiff contended that Ms Chai checked the letterbox at the address on at least two occasions each workday and continued to do so.²⁹ The plaintiff asserts that on 10 July 2019, Ms Chai retrieved the Notice of Acceptance from the letterbox at the address.³⁰
- 45 The plaintiff noted that the Adjudicator relied on an Australia Post delivery receipt

²³ Ibid [6].

²⁴ CB25-26, [76]-[77].

²⁵ Plaintiff Submission, [8(b)]; see also CB451.

²⁶ Ibid [8(c)]; see also CB453.

²⁷ Ibid [8(c)]; see also CB454.

²⁸ Ibid [8(d)]; see also CB453.

²⁹ Ibid [9(c)]; see also CB503.

³⁰ Ibid [9(d)]; see also CB503.

which indicated a tracked parcel delivery time of 1:55pm on Monday 8 July 2019³¹ and the plaintiff further submitted that no admissible evidence has been adduced as to the accuracy of this record and/or the actual contents contained in the said parcel. The plaintiff contended that the delivery receipt fails to account for the very real possibility that, regardless of whether the parcel contained the Notice of Acceptance, the Notice of Acceptance was deposited into a letterbox of another occupant at 13-25 Church Street, Hawthorn who later deposited it into the correct box.³²

46 If the evidence of Ms Chai and Mr Lin is accepted, the plaintiff contends the only conclusion available on the evidence is that the Notice of Acceptance was not placed in the plaintiff's letterbox at the address until 10 July 2019.³³

47 The plaintiff submitted that the address was not the plaintiff's ordinary place of business and that there are no other means of service prescribed in the *Building and Construction Industry Security of Payment Regulations 2013*. The plaintiff also submitted that this eliminates s 50(1)(a)-(d) of the SoP Act as a possible means of service. Similarly, the plaintiff submitted that the timing provisions in s 50(2)(a) of the SoP Act do not apply in this instance because those provisions are only enlivened in relation to service on a person's ordinary place of business, which did not occur.³⁴

48 The plaintiff further submitted that the Notice of Acceptance was not sent by Registered Mail (nor by facsimile). It was sent by Express Post. Accordingly, the plaintiff submits cl 38.1 of the subcontract does not apply and none of the alternatives for effecting service under s 50(1) of the SoP Act were engaged and therefore s 50 of the SoP Act has no work to do.³⁵

49 Moreover, the plaintiff submitted that if it is wrong about whether s 50 of the SoP Act applies, it contends that (as with s 160(1) of the *Evidence Act 2008*) s 50 of the SoP

31 CB26.

32 Plaintiff Submission, [10].

33 Ibid [11].

34 Ibid [16].

35 Ibid [18].

Act creates nothing more than a rebuttable presumption which will yield to evidence of the date of actual receipt of a document in issue.³⁶

50 The plaintiff submitted that the service provisions under s 50 of the SoP Act are facultative and not mandatory.³⁷ Notwithstanding this submission, the plaintiff contends that it is necessary to ask whether the mailing of the Notice of Acceptance to the subcontract address was, of itself, good and effective service.³⁸

51 The plaintiff submitted that s 20(1) of the SoP Act provides that an Adjudicator accepts an Adjudication Application by causing a Notice of Acceptance to be 'served' on the claimant and the respondent. The plaintiff highlights that there is a difference in terminology when compared with s 21(1)(b) of the SoP Act which provides that time only begins to run upon the respondent 'receiving' the Adjudicator's Notice of Acceptance.³⁹

52 The plaintiff contended that the SoP Act is consistent in its use of specific verbs in relation to the various steps that are to take place under the SoP Act, for example:

- (a) a payment claim is to be 'served' (ss 3(3)(a), 14(1), 14(4)-(8), 15(4)(a) and 17(1)(a) of the SoP Act);
- (b) a payment schedule is to be 'provided' (ss 3(3)(b), 15(1), 15(4)(b), 16(1)(a), 17(1)(b), 18(1)(a) and(b), 18(2)(b) and 21(2A) of the SoP Act);
- (c) a claimant is to 'apply', or 'make application', for adjudication (ss 16(2)(a)(ii), 18(1), 18(2), 18(3)(c)-(e) and 18(7) of the SoP Act);
- (d) an adjudication response is to be 'lodged' (ss 21(1), 21(2A), 22(1) and 22(3) of the SoP Act, save that s 21(3) of the SoP Act requires the respondent to 'serve'

³⁶ Ibid [19].

³⁷ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors* [2010] VSC 199, [162].

³⁸ Plaintiff Submission, [20].

³⁹ Ibid [21].

any such response on the claimant).⁴⁰

53 The plaintiff submitted that the use of the word 'receiving' in s 21(1)(b) of the SoP Act must be taken to refer to the date of receipt, rather than actual or deemed service.⁴¹

54 This issue, the plaintiff submitted, was considered by the Supreme Court of Queensland in *CMF Projects Pty Ltd v Masic Pty Ltd & Ors*,⁴² (*CMF Projects*) in respect of the comparable provisions of the Queensland legislation. As here, the Adjudicator accepted the date the notice of appointment was deposited into the respondent's post office box as good service despite the respondent's evidence that the notice was not, in fact, 'received' until 5 days later. Daubney J held:

Notwithstanding the observations by the adjudicator at paragraph 20.3.1 of his reasons, there is a distinction in BCIPA between the notions of 'service' and 'receipt' of documents. The word 'receive' in the *Building Construction Industry Security of Payment Act 1999* (NSW) has been considered on numerous occasions, particularly in the context of s 17(3)(c) of that Act, which is the equivalent of s 21(3)(c) of BCIPA. That subsection relevantly provides that an adjudication application must be made 'within 10 business days after the claimant receives the payment schedule'. It seems now to be clear enough on the authorities that the word 'receive' connotes that, whilst the document in question need not come to the attention of a particular person within the relevant office, it nevertheless does actually need to have arrived at, and thereby been received', at the recipient's registered office, or place of business, and be there during normal office hours.⁴³

55 The plaintiff contended that its Adjudication Response was served within the two business days provided for by s 21(1)(b) of the SoP Act. They were therefore 'duly made' within the meaning of s 23(2) of the SoP Act and the Adjudicator was bound to consider them. The plaintiff further contended that the use of the word 'must' indicates that the requirements of s 23(2) of the SoP Act are mandatory.

⁴⁰ Ibid [22].

⁴¹ Ibid [23].

⁴² [2014] QSC 209.

⁴³ Ibid [25]; The plaintiff also refers to the meaning of 'receipt' in *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317, [93]-[122]; *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259, [63] and *Firedam Civil Engineering v KJP Construction* [2007] NSWSC 1162, [64]-[65], cited in *CMF Projects Pty Ltd v Masic Pty Ltd & Ors*.

56 The plaintiff submitted that this is reinforced by s 23(2B) of the SoP Act which provides that:

- (2B) An adjudicator's determination is void –
(a) to the extent that it has been made in contravention of subsection (2) ...⁴⁴

57 Finally, the plaintiff contended that the Adjudicator expressly refused to have regard to the Adjudication Response. Accordingly, the Adjudication Determination was void for jurisdictional error by operation of ss 23(2) and (2B) of the SoP Act, or for want of procedural fairness, or liable to be quashed for error of law on the face of the record.

First defendant's submissions

58 The first defendant submitted in essence that the Adjudicator's findings and conclusions at [76]-[80] of his Adjudication Determination justified the Adjudicator's determinations that:

- (a) the Notice of Acceptance was served on and thereby received by the plaintiff on 8 July 2019;
- (b) the plaintiff was, in the circumstances, required to lodge its Adjudication Response with the Adjudicator within two business days after receiving the Adjudicator's Notice of Acceptance of the application, namely on or before 10 July 2019;
- (c) because the plaintiff did not lodge its Adjudication Response on or before 11 July 2019 the Adjudicator was correct in refusing to take the plaintiff's Adjudication Response into account; and
- (d) the Adjudicator had in his possession, by the date of the Adjudication Determination on 6 August 2019, materials sufficient for the Adjudicator to decide as summarised in (a) above, and as a result, reject the plaintiff's

⁴⁴ Plaintiff Submission, [29].

contention about the time of receipt of the Notice of Acceptance and as a result to rely on s 22(3) of the SoP Act to refuse to consider the plaintiff's Adjudication Response.

Considerations

59 In this matter, on the bases of its Motion, the plaintiff must demonstrate jurisdictional error on the part of the Adjudicator, an error of law on the face of the record or want of natural justice, in order to obtain relief of the type sought by the plaintiff, principally that the subject Adjudication Determination purportedly made under the SoP Act should be quashed.

60 It is necessary to be cautious in this area not to trespass beyond the confines of legitimate review. Judicial review is not an appellate procedure enabling either a general review of the decision in question or the substitution of the decision of the reviewing court on the basis that it thinks that the decision it has come to is correct and should be substituted. Furthermore, caution is also required in judicial review under the SoP Act to ensure that impermissible arguments as to there being no evidence before the Adjudicator to support the Adjudicator's findings do not amount in reality to an attempted appeal on the merits.

61 Here it is argued by the plaintiff that the Adjudicator fell into error in relation to his Determination that the plaintiff was served with, and thereby received, the subject s 20(1) SoP Act Notice of Acceptance on 8 July 2019 and consequentially the plaintiff also argues that the Adjudicator erroneously decided that the time within which the plaintiff was required to lodge its Adjudication Response expired on 11 July 2019.

The Security of Payment Act

62 The SoP Act requires the Adjudicator, upon acceptance of an Adjudication Application, to cause a notice of acceptance to be served on the claimant and the respondent, as provided by s 20(1) of the SoP Act.

63 The SoP Act, and in particular s 21(1)(b), provides for the time within which the

respondent may lodge with the Adjudicator its 'adjudication response', relevantly in this matter at any time within 2 business days after receiving notice of an adjudicator's acceptance. Under the regime established by the SoP Act, time is of the essence; mandatory language is used to fix deadlines for procedural steps and the default position is that the Adjudicator has only 10 business days after his or her acceptance of the adjudication application in which to make the required Adjudication Determination.

64 Section 50 of the SoP Act authorises the giving or service of any document required by the SoP Act to be effected as follows:

- (a) delivered to the relevant person personally; or
- (b) lodged during normal office hours at the persons ordinary place of business;
or
- (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
- (d) in any other manner specified in the relevant construction contract;
- (e) if the giving of or service of a notice or document is by post to the person's ordinary place of business, that service is taken to have been effected two business days after the document was posted.

65 The provisions of s 50 of the SoP Act are not exhaustive in relation to the service, or provision of a notice or document, required to be communicated or provided under the SoP Act.

66 Section 22(1) of the SoP Act prohibits an Adjudicator from determining an adjudication application until after the end of the period within which the respondent may lodge an Adjudication Response.

67 To fail to abide by the prohibition in s 22(1) of the SoP Act and to proceed to determine an Adjudication Application before the expiration of the time within

which the respondent may lodge an Adjudication Response renders the Adjudication Determination vulnerable to being impugned on the bases that the Adjudicator failed to comply with the mandatory requirement referred to in s 22(1) of the SoP Act, and in circumstances where the respondent desired, or may have desired, to lodge an Adjudication Response within the time provided for it to do so under the SoP Act, may expose the Adjudication Determination to being liable to be quashed because it was made in contravention of s 23(2)(d) of the SoP Act, thus attracting the operation of s 23(2B) of the SoP Act and arguably also because the Adjudication Determination was made in breach of the requirements of natural justice to which the respondent was entitled.

68 Here the Adjudicator, seized of the initiating Adjudication Application, determined that application, and in so doing relied upon s 22(3) of the SoP Act in deciding not to consider the plaintiff's Adjudication Response because the Adjudicator decided on the material of which he was apprised, that the Adjudicator's Notice of Acceptance of the Adjudication Application was served on, and thereby received by, the plaintiff on 8 July 2019.

69 I consider, for the reasons which follow, that the Adjudicator's Determination outlined in the last preceding paragraph, was in essence a finding of fact on an ancillary component of the merits of the parties' positions in the Adjudication and did not constitute a finding or decision as to a jurisdictional fact.

Material before the Adjudicator

70 Whether the Adjudicator has fallen into jurisdictional error calls into question the Adjudicator's finding and decision as to the date of service of, and receipt by, the plaintiff of the Adjudicator's Notice of Acceptance of the Adjudication Application.

71 Whether the plaintiff was served with and thereby received the Adjudicator's Notice of Acceptance on 8 July 2019 is, I consider, a determination of fact made by the Adjudicator as an ancillary component of the merits in this Adjudication.

72 This ancillary component of the Adjudicator's Determination is not in the nature of a decision as to a foundation of the Adjudicator's jurisdiction because the question of the timely service and thereby receipt of the Adjudicator's acceptance of the Adjudication Application, is a factual matter to be decided by the Adjudicator acting within jurisdiction and power under the SoP Act, in particular s 23 of that Act and pursuant to his appointment, and acceptance of that appointment, to the Adjudication.

Factual determinations as to matters in dispute not reviewable

73 Accordingly, the determination by the Adjudicator of the question of whether there has been timely service of his acceptance to appointment as Adjudicator is a question the Adjudicator is empowered to make on the merits, including where relevant the Adjudicator's application of the requirements of the SoP Act and interpretation of the relevant subcontract and finding on the facts which bear on these issues.

74 It follows that the Adjudicator's decision that in this matter the plaintiff was served with and received notice of the Adjudicator's acceptance on 8 July 2019 is not amenable to judicial review.⁴⁵

75 Neither, am I satisfied that the plaintiff has established any error of law on the face of the Adjudication Determination or vitiating want of natural justice. As to these aspects, whether or not the Adjudicator relevantly erred in the findings and decisions criticised by the plaintiff, is to be evaluated taking into account the materials before the Adjudicator at the time of his Adjudication Determination.⁴⁶

76 Here the material before the Adjudicator, at the time of the Adjudication Determination, provided a sufficient basis for the Adjudicator to be satisfied that the plaintiff had been served with and thereby received the Notice of Acceptance dated

⁴⁵ *Parisiennne Basket Shoes Pty Ltd v Whyte* 59 CLR 369 at 390-391.

⁴⁶ No request for further submissions (SoP Act, s 22(5)) or application or request to provide further submissions or evidence as to service or receipt under s 20(1) or s 22(1) of the SoP Act was made by either the plaintiff or the first defendant.

5 July 2019 on 8 July 2019, and furthermore to be satisfied as further outlined below that the service requirements of s 50(1)(c) of the SoP Act were also made out.

77 Relevantly the Adjudicator, in the proper exercise of his jurisdiction in this case, considered the parties' competing positions in relation to when the plaintiff was served with and received the Adjudicator's Notice of Acceptance.⁴⁷ The Adjudicator found that the plaintiff was, in accordance with s 20(1) and (2) of the SoP Act, served with that Notice dated 5 July 2019 on 8 July 2019 and also found that in the result, pursuant to s 21(1)(b) of the SoP Act, the plaintiff received the Adjudicator's Notice of Acceptance on 8 July 2019. These were, in my view in this matter, finding of fact.

78 The material before the Adjudicator and relied upon in the Adjudication Determination at [76]-[80] was, in my view, sufficient to establish, and for the Adjudicator to find, that the Express Post envelope enclosing the Adjudicator's Notice of Acceptance was sent at 4:12pm on Friday 5 July 2019 to the plaintiff's contract stipulated address at Suite 5, 13-25 Church Street, Hawthorn, Vic, 3122.⁴⁸

79 Further, the Australia Post tracking record of the Express Post envelope referred to and relied upon by the Adjudicator at [79] of his Adjudication Determination is also sufficient to establish, and for the Adjudicator to find, that service at the contract stipulated address was effected at 1:55pm on Monday 8 July 2019,⁴⁹ being one business day (and three calendar days) after the Adjudicator's Notice of Acceptance was posted by means of Express Post to the plaintiff.

80 I am not persuaded in relation to the above findings that the Adjudicator has acted beyond his jurisdiction, or perpetrated any error on the face of the record or acted otherwise in a way which renders his Adjudication Determination liable to be quashed or set aside.

81 This is because here the Adjudicator found and decided the date of service and

⁴⁷ CB222, [10]; CB26, [78], [80].

⁴⁸ CB205; CB152, 'Schedule A' Item 3; CB859-863; see also T27.30-31. T28.1-5.

⁴⁹ Third El-Hajj Affidavit, Exhibit 'WEH-2'.

receipt, pursuant to ss 20(1) and 21(1)(b) of the SoP Act respectively, as he was entitled to do, and also found that the respondent to the adjudication had failed to lodge its Adjudication Response within the two business days allowed by the SoP Act after the respondent was served with and thereby received the Adjudicator's Notice of Acceptance of the Adjudication Application.

82 These abovementioned factual findings preferred the material before the Adjudicator, in particular the Australia Post Express tracking records and the address set out on the Notice of Acceptance dated 5 July 2019, to the plaintiff's assertion of receipt of the Notice of Acceptance on 10 July 2019.⁵⁰

83 The Adjudicator did not have before him the plaintiff's post Adjudication Determination evidence summarised above which also asserted receipt on 10 July 2019. The Adjudicator however, did resolve and decide the issue of service and receipt of the Notice of Acceptance as an ancillary issue of fact on the materials presented to him, as in my view he was entitled to do.

84 I reject the plaintiff's argument that its evidence directed to refuting actual receipt of the Notice of Acceptance in issue on 8 July 2019, impugned the Adjudicator's findings as to service and receipt of the Notice of Acceptance. This plaintiff evidence was not before the Adjudicator, and in any event as explained above, the Adjudicator is not amenable to judicial review in relation to his factual findings on such an issue, nor in my view does the Adjudicator's Determination on these matters disclose an error of law on the face of his Determination.

85 I also reject the plaintiff's submission that it is assisted by s 160 of the *Evidence Act 2008* (Vic) or the decision of Daubney J in *CMF Projects*.⁵¹ In relation to both the operation of that section and Daubney J's observations in relation to s 21(3)(c) of the *Building and Construction Industry Payments Act 2004* (Qld), the Adjudicator's findings in this case as to the date of service and thereby receipt displace the

⁵⁰ CB26, [78].

⁵¹ [2014] QSC 209.

presumption in s 160 and also decide the actual date of arrival and thereby receipt, as similarly answered by his Honour in *CMF Projects*.

86 In my view, the Adjudicator in this instance was apprised of sufficient material upon which to properly conclude that the plaintiff had received the Adjudicator's Notice of Acceptance of the Adjudication Application on 8 July 2019. That material and the Adjudicator's bases of satisfaction as to service and thereby receipt to the Notice of Acceptance by the respondent on 8 July 2019, are summarised at paragraphs [76]-[80] of the Adjudication Determination.

Plaintiff's ordinary place of business and agreed address of service of notices and documents

87 In my view the Adjudicator also had a basis on the material before him to find that service of the Adjudicator's Notice of Acceptance was effected on the plaintiff at its ordinary place of business at Suite 5, 13-25 Church Street, Hawthorn, Vic, 3122 and that the said Notice of Acceptance was served in a way which not only satisfied s 20(1) and (2) of the SoP Act by means of Australia Post Express Post delivery but also as statutorily provided for by s 50(1)(c) of the SoP Act.

88 Section 50(2) of the SoP Act provides for the statutory establishment of the giving or service of notices and documents, including the Adjudicator's Notice of Acceptance. Section 50(2) of the SoP Act provides that such service is for the purposes of the SoP Act effective two business days after the day on which that Notice of Acceptance was posted. Accordingly, these provisions of the SoP Act and the facts earlier referred to, as found by the Adjudicator, also established service of the Adjudicator's Notice of Acceptance on the respondent in the adjudication on 8 July 2019.

89 Further, as I have earlier also referred to, even absent the deeming effect of s 50 of the SoP Act for the purpose of service, the second defendant as found by the Adjudicator, served the Notice of Acceptance on the plaintiff by the means of simple Express Post and thereby satisfied service under s 20(1) of the SoP Act and provided a basis for the Adjudicator to find receipt by the plaintiff on 8 July 2019 of the Notice

of Acceptance, which in turn triggered the timing requirements of s 21(1)(b) of the SoP Act for the plaintiff's Adjudication Response.⁵²

90 Further, I do not accept the plaintiff's argument that the Express Post communications sent to the plaintiff by the third defendant containing the Adjudicator's Notice of Acceptance was not posted to the plaintiff's ordinary place of business and therefore such service falls outside the language of s 50 of the SoP Act.

91 The construction subcontract between the plaintiff and the first defendant formally recorded the plaintiff's address at 'Schedule A', Item 3⁵³ of that subcontract. The plaintiff's address was thereby formally defined and agreed to between the parties as 'Suite 5, 13-25 Church Street, Hawthorn, VIC, 3122'. The subcontract, read as a whole, including Schedule 'A', Item 3 and [38] also reflects the parties' clear intention that the address referred to in Schedule 'A' is that party's address for written notices, documents and other written communications.

92 The Notice of Acceptance was addressed accordingly.⁵⁴

93 In my view, the parties' formal agreed specification of the plaintiff's address reflects their agreement in the subcontract as to each parties' address and the ordinary place of business of each party.⁵⁵

94 Further, the plaintiff has not established, nor indeed sought to establish, that it notified any change to its formal agreed address in the subcontract at any time prior to the Adjudication Determination.

95 There was no doubt that the plaintiff's address, Suite 5, 13-25 Church Street Hawthorn Vic 3122, was the address at which in fact the Adjudicator's Notice of

52 Third El-Hajj Affidavit, Exhibit 'WEH-2'.

53 CB152.

54 CB205.

55 Third El-Hajj Affidavit, which was not before the Adjudicator, at [9] states, 'Suite 5, 13-25 Church Street, Hawthorn VIC 3122 is where David Lin and Paul De Saram each have an office where they conduct their business from'.

Acceptance was received by the plaintiff (on the plaintiff's assertion on 12 July 2019) and this was the address which was said to be constantly monitored by the plaintiff for incoming communications from the Adjudicator, including to do with the SoP Act processes.⁵⁶

96 Accordingly, I consider that the Adjudicator was entitled to find that the Australia Post express tracking information which noted the third defendant's Notice of Acceptance had been delivered to the plaintiff on 8 July 2019, was a delivery to the plaintiff's subcontract nominated address and ordinary place of business at Suite 5, 13-25 Church Street, Hawthorn, Vic 3122.

97 Furthermore, the factual conclusions by the Adjudicator referred to above are, in the circumstances earlier referred to in these reasons, clearly rational, intelligible and manifestly reasonable.

98 Here there is, as I have indicated, a sufficient evidentiary basis to support these conclusions and findings by the Adjudicator and to support in particular the merit based factual finding which the Adjudicator made in relation to service and receipt by the plaintiff of the Notice of Acceptance in issue, on 8 July 2019. There conclusions and findings were made by the Adjudicator acting within jurisdiction and for that reason cannot be legitimately impugned by way of judicial review in the context of the SoP Act. Further, for the above outlined reasons no error of law apparent on the face of the Adjudication Determination.

Conclusions

99 I consider that the Adjudicator's decision that the plaintiff was on 8 July 2019 served with and received the relevant Adjudicator's Notice of Acceptance of the Adjudication Application was a decision which the Adjudicator made within jurisdiction and power and was at all events a decision based on sufficient materials before the Adjudicator. The Adjudicator was justified on evidentiary, logical and

⁵⁶ Supplementary Affidavit of Yi (David) Lin, 12 November 2019, [11(b)]; and CB503 [9]-[10], [12]-[13].

reasonable bases to so conclude and find.

100 Having found, as the Adjudicator did on the evidence and the merits in the adjudication, that the plaintiff was served with and received the Adjudicator's Notice of Acceptance on 8 July 2019, the Adjudicator was entitled to, and in my view was right to find that pursuant to s 21(1) of the SoP Act the plaintiff's time within which to lodge any Adjudication Response with the Adjudicator expired on 11 July 2019 and that the Adjudicator was thereafter unconstrained in proceeding to determine the Adjudication Application by reason of s 22(1) of the SoP Act, or otherwise. However pursuant to s 22(3) of the SoP Act, the Adjudicator was also prohibited from considering the plaintiff's out of time Adjudication Response.

101 Accordingly, the effect of the application of s 22(3) of the SoP Act, in my view, completely relegates the plaintiff's contention that the Adjudicator deprived the plaintiff of natural justice by not considering the plaintiff's out of time Adjudication Response.

102 For the above reasons I am not persuaded that any of the plaintiff's grounds of review in this matter should succeed, and I shall dismiss the Originating Motion for Judicial Review and the associated Summons.

Orders

103 Accordingly I shall order that:

1. The plaintiff's Originating Motion and Summons both dated 13 August 2019 are dismissed.
2. By 4.00pm on 18 December 2019, the sum of \$66,950 which is held in the trust account of the plaintiff's solicitor be paid to the first defendant.
3. The plaintiff pay the first defendant interest, to be agreed or determined, on the judgment sum from 6 August 2019 to 17 December 2019.
4. Paragraph [3] of the Orders made 22 August 2019 is revoked.

104 I shall await the parties proposed final orders, including as to costs.