

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

Not Restricted

S ECI 2018 1284

SHAPE AUSTRALIA PTY LTD (ACN 003 861 765)

Plaintiff

v

THE NUANCE GROUP (AUSTRALIA) PTY LTD (ACN 068 215 341) & ORS Defendants

JUDGE: Digby J  
WHERE HELD: Melbourne  
DATE OF HEARING: 11 October 2018  
DATE OF JUDGMENT: 21 December 2018  
CASE MAY BE CITED AS: Shape Australia v The Nuance Group  
MEDIUM NEUTRAL CITATION: [2018] VSC 808

ADMINISTRATIVE LAW – Relief in the nature of certiorari – Whether decision can be quashed for jurisdictional error – *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*, r 56.

BUILDING CONTRACTS – Adjudication Determinations – Where applicant seeks to recover amounts subject of valid determination – Where Adjudicator makes ‘findings’ – Whether valid Adjudication Determination creates issue estoppel.

BUILDING CONTRACTS – Judicial review of Adjudication Determination – Whether payment claim lacks reference date – Whether Adjudicator incorrectly determined jurisdiction – Whether adjudicated amount includes excluded amount – Whether Adjudication Determination is affected by jurisdictional error – *Building and Construction Industry Security of Payment Act 2002 (Vic)*, ss 9, 10B.

BUILDING CONTRACTS – Payment claims – Where respondent claims liquidated damages – Whether liquidated damages are excluded amount – Whether payment claim is for recoupment of liquidated damages.

APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For Shape	Mr I G Roberts SC	Turtons
For Nuance	Mr M G Roberts QC with Ms C L Symons	Piper Alderman

For the second, third, fourth and fifth defendants No appearances<sup>1</sup>

HIS HONOUR:

**Second application for judicial review**

- 1 On 29 June 2018, I delivered judgment in *The Nuance Group (Australia) Pty Limited v Shape Australia Pty Limited*<sup>2</sup> (the first proceeding) in relation to the Nuance Group application dated 19 March 2018 for relief in the nature of certiorari quashing an Adjudication Determination made under the *Building and Construction Industry Security of Payment Act 2002* (the SOP Act). The Adjudication Determination dated 2 March 2018 (the First Adjudication Determination) was with respect to payment claim 13 (PC-13) made under the parties' construction contract (the Contract).
- 2 In the first proceeding, I decided to quash the First Adjudication Determination because the Adjudicator failed to perform his basic and essential function as required under the SOP Act.<sup>3</sup>
- 3 On 27 July 2018, Shape made an adjudication application dated 27 July 2018 in respect of payment claim 14 (PC-14) served on Nuance. PC-14 included the uncontested individual line items claimed in PC-13. On 23 August 2018, the Adjudicator determined that he did not have jurisdiction to hear this application and in any event, determined that a nil amount was payable by Nuance to Shape (the Second Adjudication Determination).
- 4 In the current proceeding, the plaintiff (Shape) now seeks the following relief against the first defendant (Nuance) and the relevant Adjudicators:<sup>4</sup>
  - (a) An order remitting the Adjudication Application dated 27 July 2018 to the Third Defendant to be determined according to law.
  - (b) Further, or alternatively, an order remitting the Adjudication Application dated 19 March 2018 to the Fifth Defendant to be

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<sup>1</sup> By notices to the Court the second, third, fourth and fifth defendants advised they do not intend to take any active role in the proceedings and will abide the decision of the Court, save as to costs.

<sup>2</sup> [2018] VSC 362.

<sup>3</sup> Ibid [76], [77].

<sup>4</sup> Amended Originating Motion dated 25 September 2018.

determined according to law.

- (c) A declaration that to the extent that the claims made by Shape included in each of the Adjudication Applications dated 19 March 2018 and 27 July 2018 may be characterised as a claim for reimbursement of liquidated damages, that claim is not an excluded amount by virtue of s.10(3) of the *Building and Construction Industry Security of Payment Act 2002* (Vic).
- (d) An order quashing the Adjudication Determination of the Third Defendant made on 27 July 2018 under the *Building and Construction Industry Security of Payment Act 2002* (Vic).

5 For the reasons below, the Second Adjudication Determination is not affected by jurisdictional error and is not liable to be quashed. Further, as a consequence, the First Adjudication Determination cannot be remitted back to an Adjudicator. Further, in the circumstances the Court's discretion should not be exercised to remit the First Adjudication Determination. Shape's Amended Originating Motion should be dismissed.

### **Background**

6 The background facts are set out in the judgment of 29 June 2018 given in the first proceeding. For present purposes I recall, in summary, the following:

- (a) The parties contracted on or around 8 July 2018. In short, Nuance contracted with Shape to have Shape demolish, refurbish and fit out an existing retail duty-free space located at Melbourne International Airport, Terminal 2, on the Departures Level.
- (b) The initial contract price for the relevant scope of works under Contract was \$13.8 million (excluding GST). The work involved included demolition, metal-works, partitions and doors, ceilings, floor tiling, structural steel, electrical works, mechanical works, fire services and audio visual works.
- (c) On 2 March 2018, Shape issued PC-13 for the amount of \$3,533,233.84 which included a mixture of claims, including claims that had been certified and paid, claims for dispute variations which were not certified for payment and not paid, and claims for liquidated damages that had been certified and

deducted.

- (d) On 2 March 2018, Nuance responded to the payment claim with a payment schedule in which it identified \$nil as being payable.
- (e) On 19 March 2018, Shape made an adjudication application for a reduced amount of \$2,243,105.55 which was referred to an Adjudicator.
- (f) On 27 March 2018, Nuance submitted its adjudication response.
- (g) On 6 April 2018, Shape made its further submissions in response to the Adjudicator's notice dated 5 April 2018. On 11 April 2018, Nuance made further submissions upon invitation of the Adjudicator.
- (h) On 13 April 2018, the Adjudicator issued the First Adjudication Determination for this proceeding, in the amount of \$1,400,007.12.
- (i) On 24 April 2018, Nuance made an application for review of the First Adjudication Determination on the basis that the adjudicated amount included an excluded amount. That application was referred to a review Adjudicator.
- (j) On or about 30 April 2018, Shape submitted its response to the review application. On 15 May 2018, the review Adjudicator issued an adjudication review for an amount in the sum of \$1,216,715.72. The Adjudicator found, amongst other things, that while the adjudication amount included excluded amounts, those excluded amounts were not in the nature of liquidated damages. The Adjudicator also found that nine items of work, in the nature of contested variations, constituted excluded amounts which had been included in the adjudicated amount.

7 In the judgment disposing of the first proceeding, I quashed the First Adjudication Determination and the associated Review Adjudication. The relevant paragraphs of the judgment state:

[76] ...I find that the Adjudicator has, in this case, failed to compliantly undertake the Adjudication Determination in accordance with the SOP Act, and in particular s 23 of that Act. I also find for the above reasons that the Adjudication Determination did not satisfy the requirement that it include reasons for the determination and the basis on which the amount had been decided as required by s 23(3)(a) and (b) of the SOP Act. Accordingly, the subject Adjudication Determination is void and should be quashed.<sup>5</sup>

[77] Because a Review Adjudication can only be validly undertaken in relation to a preceding valid Adjudication Determination under the SOP Act, the subject Review Adjudication is, as a result of the findings in the last preceding paragraph, void and of no effect.<sup>6</sup>

8 The following events then took place after judgment was handed down in the first proceeding:

(a) On 10 July 2018, Shape issued PC-14 for the amount of \$1,285,579.62.<sup>7</sup> PC-14 included claims for items of construction work that were claimed in PC-13 which were the subject of the First Adjudication Determination.<sup>8</sup>

(b) On 23 July 2018, Nuance issued a payment schedule in respect of PC-14 in which it identified a nil amount as being payable.<sup>9</sup>

(c) On 27 July 2018, Shape made an adjudication application to the third defendant in respect of PC-14.<sup>10</sup>

(d) On 23 August 2018, the third defendant issued the Second Adjudication Determination in respect of PC-14 in which he found that:

(i) the absence of a reference date made PC-14 invalid;<sup>11</sup>

(ii) the invalidity of PC-14 deprived him of jurisdiction to determine the

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<sup>5</sup> *The Nuance Group (Australia) Pty Limited v Shape Australia Pty Limited* [2018] VSC 362 [76].

<sup>6</sup> *Ibid* [77].

<sup>7</sup> CB414.

<sup>8</sup> Defendant's Submissions, [14].

<sup>9</sup> CB433.

<sup>10</sup> CB449.

<sup>11</sup> CB447-48.

adjudication application;<sup>12</sup>

- (iii) in any event, the amount payable was nil, because the entirety of the purported claim was for an excluded amount, being an attempt to recoup the first defendant's asserted entitlement to liquidated damages.<sup>13</sup>

### **Present judgment in the second proceeding**

9 Shape now applies for orders remitting the First Adjudication Determination or the Second Adjudication Determination to the respective Adjudicators, or other appropriate persons, for re-determination according to law.

10 In my view the key and dispositive issues in the current trial are:

- (a) Is there an *issue estoppel* which arises in respect of the claims determined in the presently-valid Second Adjudication Determination;
- (b) If no issue estoppel arises, should the Court grant relief in the nature of certiorari to quash the Second Adjudication Determination;
- (c) Should there be a remittal of the plaintiff's Adjudication Application in relation to PC-13 to the First Adjudicator, or some other Adjudicator.

### **Issue estoppel**

11 A final decision given by a competent tribunal creates an issue estoppel binding the parties and those claiming through them. The issue estoppel extends to any issue of fact or law that was the legal foundation or justification for the decision.<sup>14</sup>

12 In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (Chase)*,<sup>15</sup> McDougall J explained that the decisions of Adjudicators under the NSW SOP Act create issue estoppels

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> *Blair v Curran* (1939) 62 CLR 464, 531-32 (Dixon J).

<sup>15</sup> (2010) 78 NSWLR 393.

within their field of operation:

In short, the *Security of Payment Act* gives to an Adjudicator legal authority to make a binding determination as to an entitlement to a progress payment. The limited finality of that decision, considered in conjunction with the issue estoppels that it creates, has a real and present effect on the legal rights of the claimant and the respondent. The claimant is not entitled to more than the adjudicated amount, and may be estopped from asserting any different entitlement, in respect of the same payment claim, in a subsequent payment claim. The respondent is bound to pay the adjudicated amount, and is estopped from denying liability for it in respect of any subsequent payment claim. All of those consequences follow from, and only from, the *Security of Payment Act*.<sup>16</sup>

13 Macfarlan JA reached a similar conclusion in *Dualcorp v Remo Constructions Pty Ltd (Dualcorp)*:<sup>17</sup>

These various provisions in my view indicate a legislative intent to render Adjudication Determinations relevantly conclusive. Such determinations do not conclude contractual rights... The Act however creates special statutory rights to progress payments. When a claim is made, a dispute arises and an Adjudication Determination resolves that dispute. I consider that determination to be final and binding between the parties as to the issues determined, except to the extent that the Act allows the determination to be revisited.<sup>18</sup>

14 The same principles are applicable in relation to the SOP Act in this jurisdiction. Notwithstanding that the regime is 'interim' within the parties' broader contractual or commercial relationship, as highlighted above by Macfarlan JA in *Dualcorp*, an adjudication is a *final* determination of the parties' relevant entitlements under the SOP Act. The decision is 'final' in the sense that the discrete cause of action to recover, or to resist, payment of a particular progress payment under the SOP Act has been determined and extinguished.<sup>19</sup> As Macfarlan JA pointed out in *Dualcorp*, it would be 'contrary to the scheme of the Act to permit claimants simply to resubmit the already adjudicated claims if they were dissatisfied with the adjudication'.<sup>20</sup> The same in my view applies to an attempt to remit claims which have been the subject of an unsuccessfully impugned Adjudication Determination.

<sup>16</sup> Ibid 445 [259].

<sup>17</sup> (2009) 74 NSWLR 190.

<sup>18</sup> Ibid 203.

<sup>19</sup> See *Kuligowski v Metrobus* (2004) 220 CLR 363, 375 [25].

<sup>20</sup> *Dualcorp v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190, 203.

15 The parties agree that items claimed in PC-14 were also claimed in PC-13.<sup>21</sup> Subject to the outcome in this proceeding, the Second Adjudication Determination is presently a 'valid' final decision on PC-14. Accordingly, Nuance submitted that an issue estoppel prevented the remittal and re-determination of PC-13 unless or until PC-14 had been quashed and even then only if in the Court's discretion remitter was appropriate.<sup>22</sup>

16 In response, Shape referred to the following statements from Fraser J in *Spankie v James Trowse Constructions Pty Ltd*:<sup>23</sup>

[25] ...The decision in *Dualcorp* is therefore readily distinguishable from this case, in which there was no valid Adjudication Determination of payment claim 14.<sup>24</sup>

...

[27] The appellant is not a party in *Dualcorp*'s position because payment claim 14 was not the subject of a valid Adjudication Determination. The appellant simply adopted a legitimate response to the failure of the adjudication process. For that reason, and for the other reasons I have given, I do not regard the decision in *Dualcorp* as justifying the conclusion that the respondent's payment claim 16 was not authorised by the relevant provisions of BCIPA.<sup>25</sup>

17 Shape's central submission is that an issue estoppel does not arise here because the First Adjudication Determination has been quashed.<sup>26</sup> I accept that submission in respect of the First Adjudication Determination. However, as I understand Nuance's submission, issue estoppel is said to arise in respect of the presently valid *Second Adjudication Determination*.<sup>27</sup> In my view neither PC-14, nor PC-13, can be remitted for re-determination unless and until the Second Adjudication Determination which has determined the claimant's entitlement to payment on PC-14 (which re-presented the same claims as PC-13) has been quashed.

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21 Nuance's Submissions, 4 October 2018, [27]; Shape's Submissions, 25 September 2018, [9].

22 Nuance's Submissions, 4 October 2018, [24].

23 [2010] QCA 355;T65.21-66.24.

24 Ibid [25].

25 Ibid [27].

26 Shape's Reply Submissions, 9 October 2018, [8]; T65.31-66.7.

27 T69.26-70.5.

18 I consider that Nuance's submission as to the existence and effect of an issue estoppel created by the Second Adjudication Determination should be accepted. In this particular case the Second Adjudication Determination must be quashed before the First Adjudication Determination or the Second Adjudication Determination could be remitted.

19 For the reasons which are addressed below in relation to the Second Adjudication Determination, that Adjudication Determination should stand.

20 Therefore, the final and binding adjudication determination of the Adjudicator in the Second Adjudication<sup>28</sup> as to the plaintiff's entitlement in relation to payment on its PC-14 claim gives rise to an issue estoppel in relation to that claim, on whatever basis it is rejected by the Adjudicator, providing that rejection is not successfully reviewed.<sup>29</sup>

21 In my view in respect of a payment claim which is determined under the SOP Act this is the case, including where the Adjudicator's Determination rejects such claim on the primary ground that it has no reference date foundation under the SOP Act, and, as here, where the Adjudicator, as an alternative or secondary finding, which is non-dispositive, concludes that the relevant claim was in any event in the nature of an excluded amount which was not claimable under the Act.

### **Should the Second Adjudication Determination be quashed**

22 In substance, Shape advances two grounds for quashing the Second Adjudication Determination:

- (a) That the Adjudicator mischaracterised his jurisdiction in failing to identify a valid reference date; and
- (b) That the Adjudicator misapplied the decision in *Seabay Properties Pty Ltd v*

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<sup>28</sup> Save as to the extent the SOP Act allows the determination to be revisited; *Dualcorp*.

<sup>29</sup> Reasons for Judgment, [14]

*Galvin Construction Pty Ltd (Seabay)*,<sup>30</sup> by finding Shape's claim for an unpaid contract amount was an excluded amount because the basis on which Nuance did not pay this amount was in respect of a right to liquidated damages.

### Ground 1 - Reference date and jurisdiction

23 One of the essential components to a valid payment claim is the occurrence and available foundation of a valid 'reference date'. Section 9(1) of the SOP Act provides:

#### 9 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person –
- (a) who has undertaken to carry out construction work under the contract; or
  - (b) who has undertaken to supply related goods and services under the contract –
- is entitled to a progress payment under this Act, calculated by reference to that date.

24 In turn, a valid payment claim, sustained by a valid reference date, is a precondition to the Adjudicator exercising powers under the SOP Act. The High Court of Australia (the High Court) observed in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*,<sup>31</sup> in respect of the New South Wales equivalent to the SOP Act:

Section 8(1) [**Victorian s 9(1)**] makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1) [**Victorian s 14(1)**].<sup>32</sup>

25 Broadly, the first ground for quashing the Second Adjudication Determination alleges that the Adjudicator erred in finding that there was no available reference date and as a result, erred in finding that he lacked jurisdiction. On Shape's submission this mischaracterisation of jurisdiction was a 'jurisdictional error'.

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<sup>30</sup> [2011] VSC 183.

<sup>31</sup> (2016) 260 CLR 340.

<sup>32</sup> Ibid 360–61 (highlighted words in brackets added).

## Shape's submissions on reference date

26 Shape's submission on this aspect is developed as follows:

(a) First, that the Adjudicator was incorrect to find that no new work had been carried out after 2 February 2018.

Shape submits this finding (i) ignores a statutory declaration that work had been carried out after 2 February 2018, and (ii) is inconsistent with the Adjudicator's finding elsewhere that work may have been carried out up to 2 March 2018.<sup>33</sup>

(b) Second, Shape submits that the Adjudicator's resultant findings are also erroneous. These include that (i) 28 February 2018 was the appropriate reference date, (ii) PC-14 contravened the prohibition against multiple payment claims in respect of the same reference date and (iii) PC-14 was served out of time.<sup>34</sup> Specifically, Shape nominated 28 June 2018 as the reference date for PC-14; Shape asserts PC-14 was served within three months as required under the SOP Act.<sup>35</sup>

(c) Third, that the Adjudicator incorrectly assumed that he must identify the 'first available' reference date after the work was performed.<sup>36</sup> Shape submits that reference dates continued to accrue pursuant to the parties' construction contract on the twenty-eighth day of each month, including after practical completion.<sup>37</sup>

27 Shape referred to the following observation of Riordan J in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd (Ian Street Developer)*:<sup>38</sup>

In my opinion, there is no basis for limiting the entitlement to work performed after the prior reference date. I do not consider there is any basis upon which s 9(1) could be interpreted as if it contained additional words of

<sup>33</sup> Shape's Submissions, 25 September 2018, [17].

<sup>34</sup> Shape's Submissions, 25 September 2018, [18].

<sup>35</sup> T67.20-30.

<sup>36</sup> Shape's Submissions, 25 September 2018, [19]; T27.14-28.

<sup>37</sup> Shape's Submissions, 25 September 2018, [20].

<sup>38</sup> [2018] VSC 14; T27.29-28.10.

limitation. Neither do I consider the object of the Act would be advanced by the construction proposed by Ian Street. If such a construction were adopted:

- (a) a claimant would lose its rights under the Act if, in any period, it chose not to make a claim because, for example, a limited amount of work had been completed during the period; and
- (b) there could be substantial disputes about the precise value of uncompleted works at the time of a prior reference date for the purpose of calculating what work was performed in the period prior to the relevant reference date.<sup>39</sup>

28 This decision was upheld on appeal although the Victorian Court of Appeal did not specifically address Riordan J's above observations concerning s 9(1) of the SOP Act.<sup>40</sup>

29 In light of the above passage, Shape submitted work that is the subject of the claim may be performed *up to* the reference date and that there is no additional requirement for the work to have been performed *immediately prior* to the reference dates.<sup>41</sup> Put simply, other reference dates can occur between completion of the work and service of the payment claim.

30 In summary, Shape submits the Adjudicator's mischaracterisation of the reference date resulted in him finding that he did not have jurisdiction and that erroneous finding of 'no jurisdiction' constitutes a jurisdictional error requiring that the Second Adjudication Determination be quashed.

#### **Nuance's submissions on reference date**

31 Nuance submits that the Adjudicator's factual findings should not be challenged on an application for judicial review.<sup>42</sup>

32 In the alternative, Nuance submits that the Adjudicator's findings are ultimately unimpeachable.

33 Nuance's submission is, in summary, as follows. That:

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<sup>39</sup> Ibid [111].

<sup>40</sup> *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294.

<sup>41</sup> T67.4-26.

<sup>42</sup> Nuance's Submissions, 4 October 2018, [30], [31].

- (a) the Adjudicator *did* take into account the statutory declaration that work had been completed after 2 February 2018, in his determination that the reference date could not have arisen after 28 February 2018.<sup>43</sup>
- (b) it was open to the Adjudicator to reject the statutory declaration.<sup>44</sup>
- (c) there is no evidence the Adjudicator made an inconsistent finding that work ‘may’ have been carried out after 2 March 2018.<sup>45</sup> Specifically, the paragraph from the Second Adjudication Determination to which Nuance referred states:

164. I have determined that:

- ...
- b. the claimant did not claim for any new works that had been carried out or were to be carried out since the date of practical completion on 2 February 2018 or after the previous payment claim 14 served on 2 March 2018...<sup>46</sup>

Nuance submits that this paragraph ‘does not support [Shape’s] assertion and it is unclear on what basis this assertion is made’.<sup>47</sup>

34 Nuance also referred to the following passage from the decision of Vickery J in *Commercial & Industrial Construction Group v King Construction Group (King Construction)*:<sup>48</sup>

The text “calculated by reference to [the relevant reference date]” in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.<sup>49</sup>

As long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act. The statutory scheme for the making of valid payment claims provides for no other requirement in relation to the time when the work the subject of the payment claim was performed, or when the materials were

<sup>43</sup> Nuance’s Submissions, 4 October 2018, [28].

<sup>44</sup> T533.16–25.

<sup>45</sup> Nuance’s Submissions, 4 October 2018, [28.2].

<sup>46</sup> CB545.

<sup>47</sup> Nuance’s Submissions, 4 October 2018, [28.2].

<sup>48</sup> [2015] VSC 426; T48.4–8.

<sup>49</sup> *Ibid* [101].

supplied.<sup>50</sup>

35 In light of this passage, Counsel for Nuance submitted that ‘the claim itself determines what the relevant reference date is’.<sup>51</sup> The Adjudicator’s task with respect to a reference date is to (i) identify the work covered in the payment claim, (ii) identify the *latest date* relating to that work and (iii) identify the reference date that next follows that date.<sup>52</sup>

36 It was found by the Second Adjudicator (and is now accepted by the plaintiff and the first defendant) that PC-14 claimed for the same work as PC-13.<sup>53</sup> Nuance submitted that was significant for two reasons:

(a) The SOP Act precludes a claimant from making more than one claim under the same reference date SOP Act s 14(8);<sup>54</sup> and

(b) The SOP Act precludes making a claim more than three months after the last item of work was completed.<sup>55</sup>

37 The Adjudicator thus rejected PC-14 for want of a reference date.<sup>56</sup> Nuance submits those findings were correct and should be maintained.

### **Considerations in relation to the *reference date* challenge**

#### ***The Court can review jurisdictional facts***

38 In many situations an Adjudicator may make factual findings that are not amendable to judicial review. That reflects an important distinction between ‘merits’ and ‘legalities’ in relation to the scope of an Australian Court’s function in respect of judicial review. As Brennan J has observed, ‘the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the

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50 Ibid [102].

51 T48.19–20.

52 T48.21–29.

53 T48.5–11; Defendant’s Submissions [14]; CB241–42.

54 T49.12–20.

55 T49.16–20.

56 CB545.

relevant power and, subject to political control, for the repository alone'.<sup>57</sup>

39 'Jurisdictional facts' are a well-established exception to the above rule.<sup>58</sup> This is because the existence (or non-existence) of a jurisdictional fact may determine the legality of the exercise of the power in question. The point was explained by Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission (City of Enfield)*:<sup>59</sup>

Where the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility.<sup>60</sup>

40 Under the SOP Act, there must be a *valid payment claim* for the Adjudicator to make a determination. An indispensable prerequisite of a valid payment claim is an available *reference date* to found the payment claim. In this way Parliament has prescribed the existence of this particular factual situation as a condition precedent to the Adjudicator exercising his or her power to make a determination under the SOP Act.<sup>61</sup> On an application for judicial review, where relevantly in issue, the Court must determine for itself whether the reference date exists.

41 In submitting that the Court is precluded from reviewing jurisdictional facts, Nuance refers to the following statement of Vickery J in *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No. 2) (Grocon)*:<sup>62</sup>

... in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an Adjudicator the capacity to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on Adjudicators jurisdiction to make an incorrect decision in relation

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57 Ibid 35–6.

58 See, eg, *Cabal v Attorney-General* (2001) 113 FCR 154, 166–67 (Weinberg J); See Louis L. Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

59 (2000) 199 CLR 135.

60 Ibid 158–59.

61 *Building and Construction Industry Security of Payment Act 2002* (Vic.) s 9(1), s 14(1).

62 (2009) 26 VR 172; T54.1–8.

to such jurisdictional facts which will not be overturned by certiorari.<sup>63</sup>

42 However, after *Kirk*, in *Sugar Australia v Southern Ocean Pty Ltd*,<sup>64</sup> Vickery J concluded:

To the extent that anything inconsistent with this conclusion appears in paras [115]–[116] of *Grocon*, in the light of the later reasoning of the High Court in *Kirk* and of the New South Wales Court of Appeal which followed it in *Chase Oyster Bar*, I do not follow my earlier ruling.<sup>65</sup>

43 This statement requires reconsideration in light of the High Court’s pronouncements, including in *Kirk v Industrial Court (NSW) (Kirk)*.<sup>66</sup> In *Kirk*, which was handed down just five months after *Grocon*, the High Court found that the Supreme Courts in each state have an immutable supervisory function, preserved by Chapter III of the Australian Constitution, to enforce the limits of state executive and judicial power.<sup>67</sup> State legislation purporting to oust the Supreme Courts’ jurisdiction to grant relief for ‘jurisdictional error’ is in this respect beyond power.<sup>68</sup>

44 In summary, *Kirk* explained in relation to the issue referred to above that:

- (a) one of the defining features of a State Supreme Court, inherited from the King/Queen’s Bench, is the power to grant certiorari for jurisdictional error, namely to supervise and enforce limitations on the use of public power within the states;
- (b) Chapter III of the Australian Constitution contemplates (and requires) the existence of State Supreme Courts which that will perform this function;
- (c) parliaments have no power to curtail or remove this power reposed in State Supreme Courts under the Constitution. Legislation purporting to have this effect, of removing the power of State Supreme Courts to grant certiorari for

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63 Ibid 203 [116].

64 [2013] VSC 535.

65 Ibid [115].

66 (2010) 239 CLR 531.

67 Ibid 581.

68 Ibid 584.

jurisdictional error, is unconstitutional.

45 Furthermore, as a matter of statutory construction, the Court presumes that Parliament did not intend to pass unconstitutional legislation.

46 Accordingly, if an Adjudicator purports to exercise power under the SOP Act despite the non-existence of a jurisdictional fact, whether the non-existence of that part of the Adjudicator's jurisdictional base is ignored or wrongly determined by the Adjudicator, the Adjudicator will have committed a jurisdictional error.<sup>69</sup>

47 *Kirk* has held that State Supreme Courts *must* have the power to review jurisdictional errors which are alleged to have occurred. If the SOP Act has the privative effect suggested in *Grocon*, namely that the Supreme Court is precluded from relieving a certain species of jurisdictional error, the SOP Act would, in that respect, be rendered unconstitutional.

48 Save for Nuance's reference to *Grocon* at [30] of its written submissions, the parties to this proceeding did not actively press a construction of the SOP Act which excludes the power of this Court to grant certiorari in respect of an Adjudicator's erroneous determination of a jurisdictional fact. In any event, such a construction should be rejected. There is no express provision in the SOP Act purporting to make such an exclusion.

49 For these reasons, Nuance's apparent passing submission that the Court cannot review the Adjudicator's finding as to certain jurisdictional facts should be rejected. To the extent that *Grocon* is inconsistent with *Kirk* and *City of Enfield*, I am ultimately bound by the decisions of the High Court.<sup>70</sup>

### *The Adjudicator's Determination*

50 Section 9(2)(a) of the SOP Act provides as the first alternative that a reference date is to be determined in accordance with the terms of the parties' construction contract.

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<sup>69</sup> See *Craig v South Australia* (1995) 184 CLR 163, 177.

<sup>70</sup> Reasons for Judgment, [39], [43] and [44].

51 Annexure 1 to the parties' Contract provides that payment claims should be made on the twenty-eighth calendar day of each month.<sup>71</sup> This relates to the substantive provision for reference dates found in the following paragraph in cl 42.1:

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.<sup>72</sup>

52 The wording of cl 42.1 gives rise to a threshold requirement that 'work [is] carried out by the Contractor in the performance of the Contract to that time'.<sup>73</sup> Accordingly, a question of fact arises, namely, whether the claimant carried out work under the Contract so as to engage this reference date.

53 The Adjudicator found:

46. Payment claim 14 was in the same format as payment claim 13 with only three columns. The amount for 'difference' for all line items throughout the claim was \$0.

47. I infer that no new claimable works had been carried out since the previous payment claim.<sup>74</sup>

...

89. The payment claim did not include any amount for new works carried out in the period preceding the payment claim.

90. Claims for variations and interest until practical completion had been agreed, certified and paid by the respondent.<sup>75</sup>

....

145. In its further submissions, the claimant asserted that new work had been done and included a statutory declaration to that effect at TAB 11

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71 CB80.

72 CB70.

73 Ibid.

74 CB531.

75 CB536.

in the claimant's supporting documents.<sup>76</sup>

146. The statutory declaration stated that four items of work had been completed since 2 February 2018 and that the payment claim included allowances for the works as described.

147. Details of times or costs for these additional items were not provided in the payment claim, and as the payment claim did not identify or particularise the new works or their costs, they cannot be considered in this determination.

...

149. I am satisfied that there was no new specific item of construction work carried out or to be carried out under s 9(2)(a) of the Act and that the relevant reference date for payment claim 14 was no later than 28 February 2018.

...

154. As there were no new works claimed in payment claim 14, the relevant reference date under section 9(2) of payment claim 14 was 28 February 2018, the reference date of the previous payment claim 13.<sup>77</sup>

155. As the reference date adopted for payment claim 14, 28 June 2018, was more than 3 months after 28 February 2018, I am satisfied that payment claim 14 was not served within the period of 3 months after the relevant reference date to comply with s 14(4)(b) of the Act.<sup>78</sup>

...

163. I am satisfied that payment claim 14 was a second payment claim in respect of a reference date under the construction contract.<sup>79</sup>

...

165. I am satisfied that payment claim 14 was not made in accordance with the Act and that I do not have jurisdiction to make a determination.<sup>80</sup>

54 In summary the Adjudicator:

(a) found that no claimable works had been carried out since the previous payment claim;

(b) rejected Shape's assertion and purported evidence to the contrary (the

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<sup>76</sup> CB543.  
<sup>77</sup> CB544.  
<sup>78</sup> CB544-5.  
<sup>79</sup> CB545.  
<sup>80</sup> CB546.

abovementioned statutory declaration);

(c) found the last available reference date was 28 February 2018;

(d) found that the reference date of 28 June 2018 adopted for PC-14 was a reference date outside the 3 month time limit provided for by s 14(4)(b) of the Act; and

(e) found that PC-14 is a second payment claim sought to be made in respect of the same reference date, in breach of s 14(8) of the Act.

55 The Adjudicator concluded that, in the circumstances, there was no valid payment claim because PC-14 was:

(a) served more than three months after 28 February 2018; and

(b) a second payment claim in respect of the same reference date under the construction contract.

56 Having found that there was no reference date and no valid payment claim, the Adjudicator determined that he did not have jurisdiction under the SOP Act to make an Adjudication Determination under the Act.

*The Adjudicator's findings are correct*

57 The Adjudicator's factual and resultant legal conclusions as to his want of jurisdiction were primarily founded on the factual finding that *no new work had been performed after February 2018*. In assessing the correctness of this factual finding, the Court may consider the evidence<sup>81</sup> before the subject decision maker and the admission and treatment of that evidence, and may, as well as considering what was before the original decision maker, consider other materials adduced by the parties to the immediate proceeding.<sup>82</sup>

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<sup>81</sup> *Federated Engine-Drivers and Firemen's Association of Austrasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 415-16 (Griffith CJ); 444 (O'Connor J); 454-55 (Isaacs J).

<sup>82</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 (Gleeson

58 In this case Shape's submissions seeking a different finding to the Adjudicator should be rejected for the following reasons:

- (a) To find that there was an available reference date of 28 June 2018, would require the factual conclusion that claimable work had been performed within the relevant timeframe. This requirement arises from cl 42.1 of the relevant Contract; ('work [is] carried out by the Contractor in the performance of the Contract to that time').<sup>83</sup>
- (b) Vickery J observed in *King Construction Group*, that ('[a]s long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act').<sup>84</sup>
- (c) Shape, it appears, did not redress the evidentiary deficiencies in its case before the Adjudicator. Shape asserted that the Adjudicator 'ignored the statutory declaration'.<sup>85</sup> However, paragraphs [145]-[147], in particular of the Second Adjudication Determination demonstrates the Adjudicator *did* take the statutory declaration into account, before rejecting this evidence. The Adjudicator was, as he was entitled to be, not satisfied as to the plaintiff's assertion that items of work had been carried out since 2 February 2018. Further, the declaration in issue was not adduced as evidence in this proceeding. There is, therefore, no conflicting evidence at this trial, and correspondingly no evidence that Shape had undertaken work after 2 February 2018 that would engage a reference date under the Contract. Finally, on this aspect the Adjudicator did not make any finding that work was done up to early March 2018.

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CJ, Gummow, Kirby and Hayne JJ); 155 (Gaudron J); *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 724 (Spigelman CJ).

<sup>83</sup> CB070.

<sup>84</sup> *Commercial & Industrial Construction Group v King Construction Group* [2015] VSC 426 [102].

<sup>85</sup> Shape's Submissions, 25 September 2018, [18].

- (d) Shape's submissions in relation to *Ian Street Developer* and the need for an Adjudicator to avoid confining himself or herself to the 'first available reference date' are beside the point in my view. Although, this legal proposition may be correct, it is clear that what led to the Adjudicator's conclusion that there was no reference date for PC-14 was the underlying factual finding, based on the evidence adduced at the adjudication, that work had not been performed after 2 February 2018. I consider for the reasons I have outlined that this finding is unassailable.
- (e) The Court undertaking a review of the present nature may give weight to the original findings. That is not an approach analogous to 'deference', but rather, reflects the reality that often there will be no cause for giving 'different weight... to the evidence from that given by the primary decision maker'.<sup>86</sup> The circumstances attending the Court's discretion to give weight to the original finding include, as Gummow J has observed consideration of 'the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning'.<sup>87</sup> To guide this enquiry, Mortimer J adopted a three-limbed analytical framework focusing on the 'justification, transparency and intelligibility' of the purported the exercise of the power under review.<sup>88</sup>
- (f) Here, I consider the Adjudicator's finding that no new work had been performed after February 2018 is justified, transparent and intelligible. The finding is transparent given the reasons provided for the Second Adjudication Determination span twenty-two pages and are compliant with s 23A(3) of the SOP Act. Further, the Adjudicator provided a transparent and intelligible justification for his finding as outlined above. He first set out the contractual

<sup>86</sup> *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158–59 (citations omitted).

<sup>87</sup> *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 655 (Gummow J).

<sup>88</sup> *Kaur v Minister for Immigration and Border Protection* (2014) 236 FCR 393, 424 [117] (Mortimer J).

requirement that work was performed to engage the reference date. He then considered the evidence adduced by Shape that it performed this work (referring to the abovementioned statutory declaration) and he ultimately rejected that assertion by the plaintiff and the purported evidence was unpersuasive and was not probative, including because the statutory declaration insufficiently particularised the work sought in the payment claim. That was the only evidence adduced to support the assertion that work had been performed after 2 February 2018 and it was open to the Adjudicator to treat that evidence as inadequate or unpersuasive. On the rejection of that evidence, it followed that there was no new reference date for PC-14.

59 For the above reasons, PC-14 was not a valid payment claim for want of a reference date. The Adjudicator's finding that there was no new work performed after February 2018, and his conclusion that there was no reference date available to Shape, were, in my view, correct.

60 Further, for the reasons I have separately summarised I consider that the Second Adjudicator was also correct in his conclusions, including as summarised at [70(a)] and [80] below, and in concluding that PC-14 claimed an excluded amount under s 10B of the SOP Act.

### ***Conclusion on Ground 1***

61 In summary:

- (a) this Court has the power to review jurisdictional facts under the SOP Act, and the statement in *Grocon*, to the extent that it conflicts with the law as now explained including in *Kirk* and *Enfield*, clearly should not be followed;
- (b) the Adjudicator was correct in finding that there was no reference date available for PC-14 and that PC-14 was therefore an invalid payment claim.

62 Accordingly, the findings of the Adjudicator in relation to PC-14 were correct and

should be maintained. Ground 1 fails.

### **Ground 2 - Excluded amounts**

63 By Ground 2 Shape challenges the Adjudicator's finding that PC-14 was to 'recoup' liquidated damages and the Adjudicator's resultant conclusion that the amount was excluded under s 10B(2) of the SOP Act.

64 I highlight however that because the Adjudicator found that PC-14 was unsupported by a reference date, the Adjudicator's finding in relation to Ground 2 was ultimately not a necessary or dispositive finding.

65 Similarly, although not determinative, given my conclusions as to PC-14 being unsupported by a reference date, I have addressed Ground 2 below principally because of its potential relevance to the plaintiff's claims for remitter, and the exercise of my discretion on those applications.

### **Shape's submissions on ground 2**

66 Shape submits that its contractual claim for monies owed under the agreement is not excluded from PC-14 merely because Nuance asserted that 'liquidated damages are payable'.<sup>89</sup> Critically, Shape says there is no nexus between Nuance's claim to liquidated damages and Shape's claims in PC-14.<sup>90</sup> Further Shape submits, in any event, that Nuance *believed* it was entitled to liquidated damages does not alter the legal character of the amount sought in PC-14.<sup>91</sup>

67 On Shape's submission, the Adjudicator has extended the principle in *Seabay* in determining that the legal character of amounts sought by the claimant could be altered by the unilateral assertions of the respondent<sup>92</sup> or by the time at which a claim or a set-off is first agitated.<sup>93</sup> Shape submits that this is a misapplication of the

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<sup>89</sup> T26.20-30.

<sup>90</sup> Shape's Submissions, 25 September 2018, [32].

<sup>91</sup> T26.20-23.

<sup>92</sup> T26.24-30.

<sup>93</sup> T68.29-69.11.

*Seabay* decision. In this situation Shape submits it would be appropriate to remit the Second Adjudication Determination to the Adjudicator and to 'to provide some guidance... concerning the correct application of *Seabay*'.<sup>94</sup>

68 As outlined below, Nuance challenges the correctness of treating liquidated damages as time-related damages pursuant to *Seabay*. In reply, Shape maintains that this aspect to the decision in *Seabay* was correct. Shape submitted that a claim for liquidated damages 'ordinarily will result in a delay dispute' because the response will involve an extension of the date for practical completion.<sup>95</sup>

### **Nuance's submissions on ground 2**

69 Nuance submits that any purported error of law by the Adjudicator in his application of *Seabay* is 'non-jurisdictional' and is not a basis for judicial review.<sup>96</sup> Nuance submits that this follows the High Court's decisions holding that the New South Wales and South Australian equivalents to the SOP Act have privative effect excluding relief in the nature of certiorari for non-jurisdictional errors of law.<sup>97</sup>

70 In any event, Nuance rejects that the Adjudicator's application of *Seabay* and the characterisation of the claimed amounts. Nuance summarises the reasoning of the Adjudicator as follows:

- (a) Firstly, the Adjudicator found that PC-14 was 'a claim for the reconciliation of the contract, not a claim for works carried out'.<sup>98</sup>
- (b) Secondly, when the individual items of work were adjusted and reconciled, the claim was 'for an amount equal to liquidated damages'.<sup>99</sup>
- (c) Thirdly, *Seabay* excluded liquidated damages under s 10B(2) of the SOP Act.

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<sup>94</sup> Shape's Submissions, 25 September 2018, [34].

<sup>95</sup> T68.2-11.

<sup>96</sup> Nuance's Submissions, 4 October 2018, [33]-[35]; T54.15-20.

<sup>97</sup> *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5.

<sup>98</sup> CB531.

<sup>99</sup> Nuance's Submissions, 4 October 2018, [36], [37].

Thus, the Adjudicator determined that 'payment claim 14 included an excluded amount that cannot be taken into account in determining the adjudication application under s 23(2A) of the Act'.<sup>100</sup>

(d) Fourthly, the Adjudicator also found that each claimed item of work which was not an 'excluded amount' had been paid in full.

71 Accordingly, the Second Adjudicator concluded that there were no items for which Shape was entitled to receive a progress payment under the SOP Act and the adjudicated amount should be nil.<sup>101</sup>

72 Nuance also points out that any suggestion the Adjudicator failed to consider the statutory declaration in relation to timing of work performed is 'plainly wrong'.<sup>102</sup> The Second Adjudicator's consideration of this evidence is shown in paragraphs [145]-[147] and in particular [146] of the Second Adjudication Determination which are extracted herein.

73 Nuance maintains the Adjudicator's treatment of PC-14 was sound in principle, including because challenges to the withholding of liquidated damages should be made from the outset and as the subject of formal civil proceeding. Nuance submits that it is inappropriate to surreptitiously recoup an alleged liability for liquidated damages which have been contractually adjusted against the Contract Sum from time to time during the course of the Contract by the Superintendent, through SOP Act progress payment procedures.<sup>103</sup>

74 Alternatively, Nuance submits that the Court should find that the treatment of liquidated damages in *Seabay* was incorrect.<sup>104</sup> While accepting that the excluded amounts as defined and provided for in the SOP Act should apply to both claimants

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<sup>100</sup> CB541.

<sup>101</sup> Nuance's Submissions, 4 October 2018, [38].

<sup>102</sup> T53.16-25.

<sup>103</sup> T56.22-28.

<sup>104</sup> T56.29-57.5.

and respondents,<sup>105</sup> Nuance points out that the argument in *Seabay* proceeded upon the assumption that liquidated damages were an excluded amount as time-related damages.<sup>106</sup> Nuance submits this position should be reconsidered. On Nuance's submission, liquidated damages are actually 'an agreed contractual adjustment', functioning like any other form of agreed contractual variation,<sup>107</sup> thus lacking the essential nature of time-related damages.<sup>108</sup>

75 If successful, the last submission would allow Nuance to assert its right to liquidated damages as a 'set-off' in the event PC-14 were remitted.

### **Considerations on excluded amounts**

#### *There was a claim to recoup liquidated damages*

76 The payment schedule shows that Nuance asserted an entitlement to \$1,207,500 in liquidated damages. Shape continues to deny its liability for these damages in the underlying contractual dispute between the parties. For present purposes, the salient question is whether Shape sought to pre-emptively 'recoup' Nuance's asserted and earlier adjusted entitlement to liquidated damages through PC-14 and whether in the particular circumstances of this matter the Second Adjudicator was justified in concluding that the PC-14 claim by Shape fell within the terms of s 10B of the SOP Act.

77 In light of the payment schedule, in its submissions to the Adjudicator, Shape stated:

...SHAPE claims the full value of the construction work it has undertaken. Particulars of that work are set out, in detail, on pages 2 to 8 of the payment claim. Those pages do not contain any reference to a reimbursement for liquidated damages, because SHAPE is not making such a claim. SHAPE submits that Dufry has mischaracterised the nature of SHAPE's claim in an effort to invite the Adjudicator to take into account an excluded amount (liquidated damages).<sup>109</sup>

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105 T58.20-29.

106 T57.30-58.4.

107 T58.11-14.

108 T58.11-29.

109 CB471.

78 In its responsive submissions to the Adjudicator, Nuance stated:

The reality of the situation is that all of the claims that are the subject of Payment Claim 14 have been assessed and paid for as part of payment claims no. 1-13, SHAPE is instead seeking the recovery of liquidated damages that have been levied over time and deduced from sums otherwise due. Until Payment Claim 14, SHAPE did not have any adjudication process seek to challenge the deduction of Liquidated damages [sic]. That is when deductions of liquidated damages were made by the Superintendent in previous progress certificates, those deductions went unchallenged [sic]. It is now impermissible to seek to recoup those deductions.<sup>110</sup>

79 In its further submissions to the Adjudicator, Shape stated:

...the contract the subject of the Adjudicator is for a lump sum. SHAPE is seeking a progress payment calculated in accordance with the contract. The only way to work out what should be paid is by having regard to the total value of the works undertaken (including adjustments), and then subtract what has been paid previously. It is not correct to say that SHAPE has been previously paid for particular items. Rather, SHAPE has merely been paid a lump sum on account of the final balance.<sup>111</sup>

80 The Adjudicator inferred that the underlying nature of PC-14 made by Shape was to recoup the liquidated damages claim that had been asserted by Nuance. The Second Adjudication Determination states :

116. The payment claim did not expressly state that its purpose was to recoup liquidated damages and the payment schedule did not state that there was a set off the amount of liquidated damages.<sup>112</sup>

117. The claimant stated that the payment claim was a lump sum claim based on an adjusted contract sum, excluding deductions for liquidated damages, and, in its payment claim, did not accept the deduction for liquidated damages in the adjust contract sum for its payment claim and for the adjudication.<sup>113</sup>

118. The superintendent had issued contract variations to deduct the liquidated damages from the adjusted contract sum prior to payment claim 14. The payment schedule did not seek to set off the amount in response to a payment claim but relied on the adjusted contract sum to withhold payment to the claimant.<sup>114</sup>

...

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110 CB494.

111 CB503.

112 CB540.

113 CB540.

114 CB540.

123. In seeking to recoup the liquidated damages that had been deducted from the adjusted contract sum prior to the issue of Payment Claim 14, part of the claimed amount was an excluded amount.<sup>115</sup>
124. I am satisfied that payment claim 14 included an excluded amount that cannot be taken into account in determining the adjudication application under s 23(2A) of the Act.<sup>116</sup>

81 Even so, for the reasons below, the Adjudicator's finding and characterisation of PC-14 as an attempt to recoup liquidated damages was, placing to one side for present purposes his primary finding in relation to the lack of a reference date in relation to PC-14, a determination within his jurisdiction and one he was empowered to make on the merits albeit secondary and arguably not dispositive given his decision that PC-14 was invalid because it had no reference date.<sup>117</sup>

82 In its submissions to the Adjudicator, Nuance pointed out that liquidated damages have been periodically levied over the course of the construction project<sup>118</sup> and the other claims comprising the adjusted contract sum in PC-14 have been determined or paid through earlier payment claims.<sup>119</sup> There is no dispute between the parties in this proceeding in relation to this last observation. Indeed, Shape initially characterised PC-14 as a lump sum claim for the reconciliation of the Contract.<sup>120</sup> The Adjudicator accepted that submission.<sup>121</sup>

83 As recognised by the Second Adjudicator, when the individual items of work in PC-14 are adjusted and reconciled, PC-14 equates to the amount of Nuance's asserted entitlement to liquidated damages.<sup>122</sup> I note in this regard that Shape obliquely submitted simply that PC-14 does not contain an express reference to liquidated

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<sup>115</sup> CB541.

<sup>116</sup> CB541.

<sup>117</sup> In addition, I leave for another day the question of whether the High Court's decisions in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, and *Maxcon Constructions Pty Ltd v Vadasz*, have ousted this Court's jurisdiction to grant certiorari for non-jurisdictional error of law on the face of the record. I note that the effect of those decisions in Victoria will likely require consideration in light of s 85 of the *Constitution Act 1975* (Vic.).

<sup>118</sup> CB494.

<sup>119</sup> CB494.

<sup>120</sup> CB503.

<sup>121</sup> CB531, [51], [52].

<sup>122</sup> CB536.

damages.<sup>123</sup> However, the Second Adjudicator appreciated that the amount of PC-14 can be explained on no other basis, given no new work had been performed and the other claims in PC-14 have been satisfied. Accordingly, the PC-14 claims, in all probability, are in substance in the nature of a claim to recoup Nuance's asserted entitlement to liquidated damages which had been earlier deducted from the Contract Sum by Superintendent effected adjustments from time to time.

*The claim to recoup liquidated damages is excluded under s 10B(2)*

84 Adjudicators must not take into account 'any part of the claimed amount that is an excluded amount'.<sup>124</sup> In *Seabay Vickery J* decided:

...a proper construction of s 10B of the Act renders the defined excluded amounts applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent.<sup>125</sup>

85 The decision in *Seabay* is relevant in two ways to the present case. The *Seabay* decision, in part, was to the effect that:

(a) Firstly, the exclusion of certain amounts from payment claims under the SOP Act applies to both claimants and respondents.<sup>126</sup> For example, a respondent cannot 'set-off' its liabilities under a payment claim by asserting a right to an excluded amount.

(b) Secondly, liquidated damages are an excluded amount. This is because (i) liquidated damages are compensatory<sup>127</sup> and (ii) the SOP Act excludes, amongst other things, 'any amount... claimed under the construction contract for compensation due to the happening of an event'.<sup>128</sup>

86 After a lengthy recitation of *Seabay* in the Second Adjudication Determination, the Adjudicator applied the decision as follows:

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123 CB471.

124 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23(2A)(a).

125 *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 [124].

126 *Ibid* [124].

127 *Ibid* [88].

128 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 10B(2)(b).

119. The decision in *Seabay v Galvin* affirmed the position that liquidated damages are an excluded amount under s 10B(2)(b)(ii) and s 10B(2)(c) of the Act and a deduction for liquidated damages by the respondent as a set off in a payment schedule in response to a payment claim is not permitted.<sup>129</sup>

120. Similarly, in my opinion, a payment claim to recoup the liquidated damages that had been deducted under the terms of the contract (although disputed by the claimant) may also be considered to be a claim for an excluded amount.<sup>130</sup>

87 The Adjudicator has reasoned that an amount to 'recoup' liquidated damages is to be excluded for analogous reasons to those Vickery J referred to in relation to liquidated damages per se in *Seabay*.

88 There remains the question argued in this proceeding as to whether the above application of the decision in *Seabay* accords with the proper meaning of s 10B(2) of the SOP Act. In construing s 10B to answer this question, the Court should prefer a construction of that provision that promotes the purpose or object of the Act.<sup>131</sup>

89 Section 10B(2) of the SOP Act provides:

**10B Excluded amounts**

- (2) The excluded amounts are—
- (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
  - (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—
    - (i) latent conditions; and
    - (ii) time-related costs; and
    - (iii) changes in regulatory requirements;
  - (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;
  - (d) any amount in relation to a claim arising at law other than under the construction contract;
  - (e) any amount of a class prescribed by the regulations as an excluded amount.

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<sup>129</sup> CB540.

<sup>130</sup> CB540.

<sup>131</sup> *Interpretation of Legislation Act 1984* (Vic.) s 35(1).

90 In *Seabay*, Vickery J made the following further observations in relation to the rationale for the 'excluded amounts' provisions of the SOP Act:

- (a) the 'excluded amounts' are in construction disputes 'often attended with considerable complexity and speedy resolution can be an elusive goal';<sup>132</sup>
- (b) the Act is not designed to accommodate such claims given the timeframes imposed for adjudications,<sup>133</sup> and that these amounts are more suitably determined under the general law, either in Court or via arbitral proceedings, such that the 'pay now argue later' policy of the SOP Act can be given full effect;<sup>134</sup> and
- (c) a respondent's ability to raise contentious matters in a proceeding to recover progress payments could deprive a claimant of the cash flow that the SOP Act is designed to protect.<sup>135</sup>

91 In many cases, determining the application of liquidated damages will require a detailed forensic examination of the construction work and its progress. Such an exercise is unsuited to, and undesirable, as part of the fast-tracked proceeding to recover an interim progress payment. The SOP Act promotes the swift determination of progress payment entitlements, with minimal factual and legal complexity, to ensure a cash flow is maintained through the relevant network of contractors.<sup>136</sup> Parliament contemplated that imperfect SOP awards would be adjusted in subsequent civil proceedings between the parties.<sup>137</sup>

92 Furthermore, amounts levied or claimed as liquidated damages are ordinarily juxtaposed to the entitlement asserted by the Contractor in relation to events causing compensable delay and time related costs. That is, the compensation claimed to be

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<sup>132</sup> *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 [120].

<sup>133</sup> *Ibid* [123].

<sup>134</sup> *Ibid* [121].

<sup>135</sup> *Ibid* [122].

<sup>136</sup> *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, 121.

<sup>137</sup> *Building and Construction Industry Security of Payment Act 2002* (Vic) s 47.

due to the proprietor under the construction contract as compensation for events giving rise to time-related costs under the construction contract represents the other side of the same contractual coin.

93 If claims for contractor's delay related costs per se are excluded under s 10B(2) of the Act, there may be a disconformity and potentially an irrational and unfair outcome in relation to time-related costs for events of delay and the application of compensation by way of liquidated damage in respect of the effect of the same events, if claims for compensation by way of liquidated damages were not also excluded. As explained, both claims of the types referred to are often interdependent. To allow recoupment of liquidated damages for events of delay, including liquidated amounts related to time related costs but disallow countervailing claims for compensation for events for which the contractor may claim time related costs may very commonly cause prejudice.<sup>138</sup>

94 However the key issue is whether the language of s 10B(1) and (2) of the SOP Act is broad enough to support the Second Adjudicator's conclusions on this aspect.

95 Section 10B(1) of the SOP Act provides in effect that all excluded amounts are to be ignored in relation to calculating the amount of progress payment to which a person is entitled under the construction Contract. The statutory reference therein to the concept of undertaking the calculation of a progress payment entitlement is in my view very broad and sufficiently broad to take into account the application of any excluded amount which is relevant including by way of set off or allowance in respect of a progress payment.

96 I consider that s 10B(2) of the SOP Act extends to cover claims for compensation due to the happening of an event and extends further to include any amount relating to a claim for time related costs. A claim for compensation for an event including an event giving rise to an asserted entitlement to time related costs in the nature of

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<sup>138</sup> *Roseville Bridge Marina Pty Ltd v Bellinghaum Marine Australia Pty Ltd* [2009] NSWSC 320 [43].

liquidated damages triggers the operation of that section.

97 For the above reasons, the Adjudicator was, in my view, correct to consider that the *Seabay* decision supported his findings and was correct to exclude the entirety of PC-14 as an amount calculated to recover earlier Superintendent effected adjustments to the Contract Sum on the basis of Shape's liability to pay or allow liquidated damages.

98 I again point out that this aspect of the secondary basis for the Second Adjudicator's Determinations has been addressed, notwithstanding that this aspect concerning s 10B of the SOP Act is not in my view dispositive in relation to either the Second Adjudicator's Determination or this decision, because I consider that this conclusion by the Second Adjudicator is a matter relevant to the exercise of my discretion in relation to the plaintiff's application to remit the PC-13 adjudication application to the First Adjudicator alternatively some other Adjudicator.

99 In the circumstances, including those referred to in the last preceding paragraph, and because Nuance has succeeded on this aspect, it is unnecessary to address Nuance's alternative submission that Vickery J's treatment of liquidated damages in *Seabay* was 'plainly wrong'.

***Conclusion on Ground 2***

100 Accordingly:

- (a) PC-14 in substance claimed an amount to recoup earlier Superintendent effected adjustments to the Contract Sum on account of liquidated damages; and
- (b) That amount is excluded under s 10B(2) of the SOP Act.

101 The findings of the Adjudicator were correct and should be maintained. Ground 2, although not dispositive, also fails.

**No remittal**

102 Because the items the subject of the First Adjudication Determination are the same as those the subject of the Second Adjudication Determination, and the Second Adjudication Determination remains valid and effectual, Shape's application for remittal must be rejected. There is, for this reason, nothing to remit.

103 Further, in my view, as a result of the application of issue estoppel addressed above, re-agitation by the plaintiff of the PC-13 claims, which are the subject of a valid determination in relation to PC-14, is precluded.

104 In light of this conclusion it is not necessary, nor in my view appropriate, to determine the question argued in the parties' submissions in relation to the availability of remittal in respect of Adjudication Determinations under the SOP Act,<sup>139</sup> and nothing herein should be taken as conveying any view as to the Court's power to order that remedy and process under the SOP Act.

105 However, on the assumption for present purposes that a power to remit does exist in respect of the SOP Act adjudication determinations, I consider that in this particular matter the discretionary considerations that would attend the Court's exercise of such a power would in any event dissuade me from doing so in this case. That is because:

- (a) Here some six months have elapsed between 19 March 2018, the date of the plaintiffs' Adjudication Application in relation to PC-13, (the payment claim now sought to be remitted), and the application dated 12 September 2018 herein for remission which will necessarily, given the provisions of ss 14, 15, 18, 21 and 23 of the SOP Act circumscribing the matters which may be presented to and addressed by the Adjudicator, result in any Adjudication

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<sup>139</sup> *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [No 2]* [2010] VSC 255; *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243; *SSC Plenty Road Pty Lt v Construction Engineering (Aust) No 2 Pty Ltd* [2015] VSC 680; *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No.2)* [2016] NSWSC 1229 at [60]-[81]; *Duro Felguera Australia Pty Ltd v Samsung C&T Corporation* [2018] WASCA 28; McDougall J also referred to the decision of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770.

Determination produced on the remitter being uninformed as to the relevant works, their value, matters relating to progress and potentially material conduct of the parties to the Construction Contract. Put another way, such matters concerning the relevant project, may occur between the time of the original Application for Adjudication or original Adjudication Determination and the time of a Court's decision which may remit to the original or a new Adjudication, resulting in such occurrences probably not being able to be taken into account by the Adjudicator to whom the matter may be remitted, potentially also giving rise to a payment determination which is out of context with the then current state of progress claims and payments and which is at odds with and yet may materially affect intervening progress payment claims and entitlements and possible intervening progress claim adjudications. Further, even more time would elapse in this case before an Adjudicator provided an adjudication determination on such a remitter.

- (b) The remission sought by the plaintiff of PC-13 for adjudication by the original Adjudicator is for the whole of PC-13 to be remitted. Remission is not sought of only a discrete part or parts of that claim for reconsideration or clarification. Here, in substance, the remission sought is to effect a full re-adjudication of the Builder's PC-13 claim which was submitted for work carried out in early 2018. To accede to such a process would in my view, in this instance, contradict the intent and purpose of the SOP Act which is intended to bring about an expeditious interim determination of progress payment claims. To permit such a remitter would be at odds with the strict timing requirements of the SOP Act including those provided by ss 14, 15, 18 and 21 of the SOP Act. These provisions of the Act, amongst others, fix times within which the parties are required to address payment claim disputes under the SOP Act.
- (c) The parties' inability to comply with the timing requirements of the SOP Act in relation to the prosecution and response in respect of the remitted

Adjudication and the resultant effect on the process of re-adjudication being undertaken expeditiously will be contradictory to the purpose and intent of the Act to enable contemporary interim<sup>140</sup> including in relation to the time limits set by s 24(4) of the SOP Act. The remitted adjudication, if permitted, would not be addressed or decided relatively contemporaneously with the performance of the work the subject of the progress claim or the relevant contractual administration of the building project, including the financial administration thereof.

(d) By reason of the matters addressed above in relation to Ground 2 remitters in relation to the claims in PC-13 and PC-14 appear to be of little or no utility because those congruous claims are of no merit because they are likely to be excluded under the SOP Act.

(e) At all events there should be no remitter in relation to the Second Adjudication Determination because for the reasons referred to above that determination should stand and there should be no remitter in relation to the First Adjudication Application, including for the reasons outlined at [17], [18], [20] and [21] above in relation to the issue estoppel arising as a result of the Second Adjudication Determination.

106 I add that I am not persuaded as to the first defendant's arguments that a remitter should not be ordered because it will give rise to a want of procedural fairness,<sup>141</sup> or the first defendant's argument that such a remittal may give rise to apprehended bias,<sup>142</sup> or that the original Adjudicator is *functus officio*.<sup>143</sup>

107 I see no convincing basis for the first two contentions by the first defendant and I consider the third contention to be unarguable if a power to remit existed, and

<sup>140</sup> *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd & Ors* (2016) 260 CLR 340, [14].

<sup>141</sup> First Defendant's Submissions, 4 October 2018, [55]-[60].

<sup>142</sup> *Ibid* [40]-[44].

<sup>143</sup> *Ibid* [45]-[48].

irrelevant if such a power did not exist.

**Decision**

108 For the above reasons there should be no order remitting the First Determination to the original adjudicator, nor should the Second Determination be quashed or remitted to Mr Rozenbes.

**Orders**

109 The plaintiff's Amended Originating Motion will be dismissed.

110 I will await the parties' proposed final form of orders, including as to costs.

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