

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

Not Restricted

S ECI 2023 04622

1559 HIGH STREET PTY LTD (ACN 620 354 234)	Plaintiff
v	
CAMILLO BUILDERS PTY LTD (ACN 618 874 776)	First Defendant
JOHN MCMULLAN	Second Defendant
THE COUNTY COURT OF VICTORIA	Third Defendant

JUDGE: Stynes J
WHERE HELD: Melbourne
DATE OF HEARING: 4 April, 20 May and 3 June 2024
DATE OF JUDGMENT: 9 May 2025
CASE MAY BE CITED AS: 1559 High Street Pty Ltd v Camillo Builders Pty Ltd & Ors
MEDIUM NEUTRAL CITATION: [2025] VSC 244

CONSTITUTIONAL LAW – Inconsistency of laws – Whether ss 10B, 23(1), 23(2), 23(2A), 28M, 28O, 28R(1)-(4), 28R(5)(a)(i) and/or 28R(5)(a)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) are inconsistent with ss 18, 232, 234, 236 and/or 237 of Australian Consumer Law as set out in Schedule 2 to the *Competition and Consumer Act 2020* (Cth) and invalid to that extent under s 109 of the *Commonwealth of Australia Constitution Act* – Where State legislation creates administrative process for adjudication of claims to progress payments under construction contracts – Finding there is no operational inconsistency between the State law and Commonwealth law – *Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25, applied – *Bitannia Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238, not followed – *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 337 ALR 452, distinguished.

JUDGMENT – Whether judgment obtained in the County Court of Victoria pursuant to s 28R(1)-(4) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) should be set aside on the basis that it is irregular and/or because a necessary fact to enliven the County Court’s jurisdiction did not exist – Where original adjudication determination was

corrected as a consequence of a slip or error pursuant to s 24 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether the “relevant date” to pay the adjudicated amount pursuant to s 28M of the *Building and Construction Industry Security of Payment Act 2002* (Vic) is calculated from the time of issue of the original adjudication determination or the corrected adjudication determination – Where no irregularity.

PROCEDURAL FAIRNESS – Whether ex parte judgment obtained in the County Court of Victoria pursuant to s 28R(1)-(4) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) was entered in circumstances which denied 1559 High Street Pty Ltd procedural fairness – Whether Camillo Builders Pty Ltd breached duty of candour when moving for judgment – Where no denial of procedural fairness or breach of candour.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	N D Hopkins KC with A G Rollnik	Arnold Bloch Leibler
For the First Defendant	M Robins KC with C Tran	KCL Law
For the Second Defendant	No appearance	No appearance
For the Third Defendant	No appearance	No appearance

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HER HONOUR:

A Introduction

- 1 The primary issue raised for consideration in this proceeding is whether various provisions of the *Building and Construction Industry Security of Payment Act* (Vic) (**‘SOP Act’**) governing the adjudication of disputes and the recovery of adjudicated amounts are inconsistent with sections 18, 232, 234, 236 or 237 of the Australian Consumer Law as set out in Schedule 2 to the *Competition and Consumer Act 2020* (Cth) (**‘ACL’**) and invalid to that extent under 109 of the *Commonwealth of Australia Constitution Act* (**‘Constitution’**).
- 2 This issue and others raised in this proceeding relate to a construction contract dated 29 June 2021 (**‘Construction Contract’**) between the plaintiff (**‘1559HS’**) as principal and the first defendant (**‘Camillo’**) as contractor for a project known as ‘Highpark Seasons’ at 1559 High Street, Glen Iris (**‘Project’**). The Project comprised 85 apartments and 9 terrace homes.
- 3 The initial contract sum was \$38,000,000. A number of provisional sum items were included in the Construction Contract, one of which was for the “façade system” in the amount of \$2,850,000 plus GST. Work on the façade system was performed by Camillo’s subcontractors, initially Colab Façade Pty Ltd.
- 4 On 13 June 2022, Colab Façade Pty Ltd entered into voluntary administration. Shortly thereafter, a related company, Colab Building Tech Pty Ltd (**‘Colab BT’**), was engaged as the new façade subcontractor.
- 5 By the end of June 2022, the amount allocated to the provisional sum item for the façade system had been increased to \$3,305,382.34 plus GST as a result of approved contract sum adjustments.
- 6 It is alleged by 1559HS that in around September 2022:
 - (a) Camillo made certain representations to 1559HS in respect of the progress of

the subcontractor's work on the façade system, the need to engage a new façade subcontractor and the cost to complete the outstanding works on the façade system. The alleged representations are described more fully below.

- (b) Those representations were misleading or deceptive in contravention of s 18 of the ACL and induced 1559HS to agree to the engagement of a new façade subcontractor – namely, Profix Aluminium Pty Ltd (**Profix**).

7 While Camillo disputes that it contravened s 18 of the ACL as alleged, it accepts for the purpose of this proceeding that 1559HS's claim under the ACL is 'non colourable' in the sense explained by the High Court in *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1 at [34]–[36] – namely, that it is genuinely in controversy and not incapable on its face of legal argument. It is not the function of this proceeding to determine whether or not Camillo did in fact contravene s 18.

8 Over the course of the Project, Camillo claimed \$7,408,520.34 for works relating to the façade system. 1559HS paid Camillo \$5,490,256.34 in response to those claims.

9 On 31 July 2023, Camillo served a payment claim for \$2,206,603.58 plus GST (**'Payment Claim'**). Among other things, the payment claim sought the unpaid balance of Camillo's claims for works relating to the façade system in the sum of \$1,918,264.01 plus GST.

10 On 11 August 2023, the superintendent issued a payment schedule indicating the amount 1559HS proposed to pay in the sum of \$171,384.48 including GST.

11 On 25 August 2023, Camillo made an adjudication application under the SOP Act.

12 In contesting Camillo's adjudication application, 1559HS sought to rely on the alleged misleading or deceptive conduct of Camillo, asserting that but for that conduct:

- (a) 1559HS would not have agreed to the engagement of the new façade contractor on the terms that it did; and
- (b) the amount claimed in the adjudication (or the bulk of it) would not have been

incurred.

- 13 The Adjudicator did not consider the merits of the alleged ACL claim in making his determination.
- 14 On 18 September 2023, the Adjudicator determined that \$1,709,710.30 including GST was payable by 1559HS to Camillo in respect of the Payment Claim (**'Original Determination'**).
- 15 On 26 September 2023, after being notified of an apparent typographical error in the Original Determination, the Adjudicator issued a corrected adjudication determination which increased the adjudicated amount to \$1,848,310.32 including GST (**'Corrected Determination'**).
- 16 On 27 September 2024, an adjudication certificate was issued by the Adjudicator pursuant to s 28Q of the SOP Act.
- 17 On 10 October 2023, in reliance on that certificate, judgment for \$1,877,174.07 was entered ex parte in favour of Camillo in the County Court of Victoria (**'Judgment'**).
- 18 1559HS seeks orders, amongst others, to the effect that the Corrected Determination and Judgment be quashed or set aside.
- 19 In short and amongst other things, 1559HS contends that:
 - (a) The SOP Act purports to prevent it (in the adjudication process, in the County Court and in this proceeding) from relying on its rights under the ACL in circumstances where it has a legitimate defence and/or cross-claim that would, if proved, substantially or completely extinguish the liability claimed.
 - (b) The practical effect of the relevant sections of the SOP Act is to alter, impair or detract from the operation of a law of the Commonwealth Parliament because, among other things, judgment has been entered against 1559HS and 1559HS now has to pay the adjudicated amount despite it having no opportunity to rely on its rights under the ACL.

B Issues that arise for determination

20 Having regard to the Further Amended Originating Motion ('FAOM'), the list of issues proposed by each party and the parties' oral and written submissions, I have identified the following issues for determination concerning the alleged inconsistency between the SOP Act and the ACL:

- (a) **Issue 1** - in relation to the provisions of the SOP Act **which govern the Adjudicator's determination** - Having regard to 1559HS's misleading or deceptive conduct claims under the ACL, are sections 10B, 23(1), 23(2), 23(2A) and/or 28M of the SOP Act inconsistent with sections 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?
- (b) **Issue 2** - in relation to the provisions of the SOP Act **which govern the County Court's entry of the Judgment** - Having regard to 1559HS's misleading or deceptive conduct claims under the ACL, are sections 28M, 28O and/or 28R(1)-(4) of the SOP Act inconsistent with sections 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?
- (c) **Issue 3** - in relation to the provisions of the SOP Act **which apply in this proceeding to set aside the Judgment:**
 - (i) Is 1559HS's claim under the ACL a defence arising "under the construction contract" for the purpose of s 28R(5)(a)(ii) of the SOP Act?
 - (ii) Having regard to 1559HS's misleading or deceptive conduct claims under the ACL, are sections 28R(5)(a)(i) and/or 28R(5)(a)(ii) of the SOP Act inconsistent with sections 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?

21 If the Corrected Determination is valid, the following additional issues arise for my determination in relation to the Judgment:

- (a) **Issue 4** - Should the Judgment be set aside on the basis that it is either irregular

and/or because a necessary fact to enliven the County Court's jurisdiction did not exist?

- (b) **Issue 5** – Was the Judgment made in circumstances where the County Court failed to accord 1559HS procedural fairness?

C Background

C.1 The alleged representations

22 It is unnecessary to descend into the detail of the conduct said to underpin 1559HS's claim under the ACL for the purpose of this proceeding. It is enough to provide the following high level summary of 1559HS's submissions in relation to that claim:

- (a) There were problems with the performance of the work in relation to the façade system including delays to completion.
- (b) On 2 September 2022, there was a meeting between the parties during which Camillo recommended to 1559HS and the superintendent that Colab BT be replaced by a new subcontractor, Profix, on a "do and charge" basis.
- (c) In making that recommendation and in correspondence that followed, Camillo represented to 1559HS and the superintendent that:
 - (i) if Camillo terminated the subcontract with Colab BT and engaged Profix, the total cost of completing the remaining façade works would be approximately \$500,000;
 - (ii) Profix could complete the remaining façade works by November 2022;
 - (iii) the estimated labour cost to complete the remaining façade works, if Profix was engaged on a "do and charge" basis, would be approximately \$252,000; and
 - (iv) most of the materials needed to complete the remaining façade works had already been ordered, paid for, fabricated and delivered to

Australia.

- (d) In reliance on those representations, the superintendent (on behalf of 1559HS) directed that Camillo terminate its subcontract with Colab BT and engage Profix on a “do and charge” basis to undertake the remaining façade works and 1559HS agreed to pay Camillo for that work on a day labour charge basis in respect of labour and for the net cost of materials.
- (e) However, after Profix was engaged, the cost to complete the remaining façade works increased well beyond \$500,000. Further, they were not completed by November 2022.
- (f) Instead:
 - (i) from October 2022 to July 2023, Camillo issued progress claims to 1559HS claiming a total of \$3,758,347.04 in respect of the remaining façade works; and
 - (ii) failed to achieve practical completion until 8 May 2023.
- (g) Had 1559HS known the true position it would not have instructed the superintendent to terminate Colab BT and Camillo would have then remained under an obligation under the Construction Contract to bring the works to practical completion, including completing the façade works, by the date for practical completion. In those circumstances Camillo’s entitlement to payment would have been limited to “the tender price approved by the Superintendent” subject to any variations. If Colab BT was late in completing the façade works, Camillo’s delay would have given rise to a claim by 1559HS for liquidated damages under the Construction Contract.

C.2 The Adjudicator’s Determination

- 23 The Adjudicator made his Original Determination on 18 September 2023, which he sent to 1559HS and Camillo by email on 19 September 2023.

- 24 On 26 September 2023, the Adjudicator issued the Corrected Determination.
- 25 In his Original Determination the Adjudicator identified 10 issues that arose on the submissions of the parties, including relevantly:

Issue 2: whether there is jurisdiction under the [SOP Act] where there is claimed defence based on Commonwealth legislation

- 26 He concluded, in relation to Issue 2 that he had jurisdiction under the SOP Act in respect of the adjudication application even though 1559HS made an arguable claim under the ACL. He did not consider the merits of that claim in making his determination.

C.3 Judgment entered in the County Court

- 27 On 28 September 2023, Camillo filed an originating motion in the County Court of Victoria seeking judgment, ex parte, under s 28R of the SOP Act and in reliance on the adjudication certificate that had been issued by the Adjudicator on 27 September 2024.

- 28 The application for judgment was supported by an affidavit of Christian Crema, a director of Camillo, in which it was relevantly deposed that:

- (a) as at 28 September 2023, 1559HS had not paid to Camillo the adjudicated sum (or any part thereof); and
- (b) 1559HS had not sought review of the adjudication certificate under the SOP Act.

- 29 On 10 October 2023, her Honour Judge Kirton of the County Court made orders on the papers entering judgment for Camillo against 1559HS in the sum certified in the adjudication certificate, plus further interest up to the date of the judgment, and costs fixed at \$2,000.

D Applicable legal principles - determining statutory inconsistency

- 30 The following principles are not in dispute.

31 Section 109 of the Constitution provides that:

When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

32 The starting point for the Court is to construe the relevant Commonwealth and State statutes having regard to their subject matter, scope and purpose in accordance with orthodox principles of statutory construction.¹

33 A relevant inconsistency will arise when a State law, if valid, would *alter, impair or detract* from the operation of a law of the Commonwealth.² This is known as ‘direct’ inconsistency, which is the form of inconsistency that 1559HS argues for.

34 The following principles apply when assessing whether there is direct inconsistency:

- (a) Any alteration, impairment or detraction must “be significant and non-trivial”, which is a question of fact and degree.³
- (b) It is necessary to consider the practical effect of both the State law and the Commonwealth law.⁴
- (c) Another way of characterising direct inconsistency is where the State law *takes away, varies or impairs the enjoyment of rights* created by the Commonwealth law.⁵

¹ *P v P* (1994) 181 CLR 583, 601 (Mason CJ, Deane, Toohey and Gaudron JJ).

² *Victoria v Commonwealth* (1937) 58 CLR 618, 630 per Dixon J; approved and confirmed as a relevant test to apply in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

³ *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 521 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), citing *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ). See also *Burns v Corbett* (2018) 265 CLR 304, 389 [190] (Gordon J).

⁴ *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at 399 [203] (Gummow J); *Bell Group NV (In Liq) v Western Australia* (2016) 260 CLR 500 at 521 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 (*‘Bitannia’*), [115] (Basten JA); *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016]) 337 ALR 452 (*‘Façade’*), 462 [41] (Warren CJ, Tate and McLeish JJA).

⁵ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 78 [32] (The Court). See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136 (where Dixon J said a law that would “*impair the enjoyment of*” a right created by Commonwealth legislation would be invalid); *Dao v Australian Postal Commission* (1987) 162

E Commonwealth Law – the ACL – its subject matter, scope and purpose

35 It is common ground that:

- (a) Section 18 of the ACL prohibits misleading or deceptive conduct.
- (b) Sections 232, 234, 236 and 237 are remedial provisions enlivened where there is a contravention of s 18.
- (c) The purpose of these provisions is to provide for the identification of a statutory norm of conduct and the curial enforcement of it in courts with the jurisdiction to do so.
- (d) The relevant rights created by the ACL include:
 - (i) a right to protection from loss, or prevention from suffering loss, as a result of a contravention of s 18; and
 - (ii) a right to relief under ss 232, 234 and 237 of the ACL in order to undo or prevent the effect of conduct falling within s 18.

F State Law – the SOP Act – its subject matter, scope and purpose

36 The main purpose of the SOP Act is to create a statutory entitlement to progress payments for those who carry out construction work.⁶

37 The means by which the SOP Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment.⁷

38 The means by which the SOP Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

- (a) The making of a payment claim (calculated in accordance with ss 10, 10A, 10B

CLR 317, 335 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ); *Western Australia v Ward* (2002) 213 CLR 1, 288 [667]-[668] (Callinan J).

⁶ SOP Act, ss 1, 3(1) and 9.

⁷ SOP Act, ss 3(2) and 9.

and 11) by the person claiming payment (a **claimant**).⁸

- (b) Service of the payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (a **respondent**).⁹
- (c) The provision of a payment schedule by the respondent.¹⁰
- (d) The referral of any disputed claim to an adjudicator for determination.¹¹
- (e) The adjudication of the dispute and the determination of the amount of the progress payment (if any) to be paid by the respondent to the claimant.¹²
- (f) The requirement that the respondent pay an adjudicated amount to the claimant.¹³
- (g) The recovery of the progress payment in the event of a failure to pay.¹⁴

39 Payments made under the SOP Act are interim. Pursuant to s 47(1), the procedure for the recovery of progress payments does not affect any right that a party to a construction contract:

- (a) may have under the construction contract; or
- (b) may have apart from the SOP Act in respect of anything done or omitted to be done under the construction contract.

40 In any proceeding before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the SOP Act, and may make appropriate orders for the restitution of any amount paid under the SOP Act on an interim basis.¹⁵

⁸ SOP Act, s 9(1).

⁹ SOP Act, s 14.

¹⁰ SOP Act, s 15.

¹¹ SOP Act, s 18.

¹² SOP Act, s 23.

¹³ SOP Act, s 28M.

¹⁴ SOP Act, ss 28O – 28R.

¹⁵ SOP Act, s 47.

41 In short and as found by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*:¹⁶

The statutory entitlement to a progress payment and the procedure for recovery of a progress payment are separate from, and in addition to, a contractor's entitlement under a construction contract to receive payment for completed work. The statutory entitlement is predicated upon the existence of a construction contract, but the entitlement and the means available for its enforcement stand apart from the parties' rights under that contract.

42 The SOP Act provides "a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract without undue formality or resort to the law."¹⁷

43 The principle behind the SOP Act is that the respondents to payment claims should 'pay now, argue later'. As observed by Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*:¹⁸

The [SOP Act] has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria ... Sub-contractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the [SOP Act].

44 By this proceeding, 1559HS challenges the validity of sections 10B, 23(1), 23(2), 23(2A), 28M, 28O and 28R of the SOP Act. It is convenient to address their scope and purpose here.

F.1 Section 10B – Excluded amounts

45 The amount of the progress payment recoverable under the SOP Act is to be calculated in accordance with, among others, s 10B of the SOP Act. Section 10B sets out classes of amounts, referred to as excluded amounts, that must not be taken into account in

¹⁶ (2018) 264 CLR 1, 16 [38] (Keifel CJ, Bell, Keane, Nettle and Gordon JJ).

¹⁷ *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, [45] (Basten JA)

¹⁸ (2009) 26 VR 112, 114 - 115 [2].

calculating the amount of a progress payment including, relevantly:

Excluded amounts

...

(2) The excluded amounts are –

...

- (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...

F.2 Section 23 – Adjudicator’s determination

46 An adjudicator is to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant.¹⁹

47 Sub-sections 23(2A) and (2B) of the SOP Act operate to invalidate an adjudication determination which takes into account an ‘excluded amount’. They relevantly provide:

Adjudicator's determination

...

(2A) In determining an adjudication application, the adjudicator must not take into account –

- (a) any part of the claimed amount that is an excluded amount; or
- (b) any other matter that is prohibited by this Act from being taken into account.

(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.

¹⁹ SOP Act, s 23(1).

F.3 Sections 28M, 28O and 28R - Payment and recovery of adjudicated amounts

- 48 Section 28M relevantly provides that if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant within a specified time.
- 49 If the respondent fails to do so then the SOP Act sets out a procedure for the recovery of the amount payable. The first steps are governed by s 28O and include the claimant requesting the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate.
- 50 If an adjudication certificate is provided to the claimant, s 28R provides for the recovery by the claimant of the unpaid portion of the amount payable.
- 51 Section 28R provides as follows:

Proceedings to recover amount payable under section 28M or 28N

- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
- (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court –
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
- (4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
- (5) If a person commences proceedings to have the judgment set

aside, that person –

- (a) subject to subsection (6), is not, in those proceedings, entitled –
 - (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge an adjudication determination or a review determination; and
 - (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
- (6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
- (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
- (8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

G Key Authorities

52 Three cases featured extensively in the parties' written and oral submissions in relation to each of the issues to be determined, namely:

- (a) *Bitannia Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 ('*Bitannia*'); and
- (b) *Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25 ('*Birdon*'); and
- (c) *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* (2016) 337 ALR 452 ('*Façade*').

G.1 Bitannia

- 53 Parkline Constructions Pty Ltd (**'Parkline'**) served a final payment claim on Bitannia Pty Ltd and Rossfield Nominees Pty Ltd (together **'Bitannia'**) under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**'NSW SOP Act'**). Under the NSW SOP Act (and similarly under the SOP Act) a person on whom a payment claim is served has 10 business days within which to provide a payment schedule or be liable for the amount claimed. If no payment schedule is provided and the amount claimed is not paid the claimant can commence proceedings to recover the unpaid amount as a debt in a court of competent jurisdiction. Bitannia did not respond with a payment schedule within the prescribed time. Proceedings were commenced in the District Court and judgment was obtained for the amount of the claim. Bitannia resisted payment of the claim in the District Court on a number of grounds including, relevantly, that Parkline had engaged in misleading or deceptive conduct in serving the payment claim which caused Bitannia not to prepare a payment schedule. Specifically, under the construction contract the progress payments were to be submitted to the architect. During the course of the works payment claims were directed to the architect as required. However, the impugned payment claim was directed to the general manager of a company which administered the contract. It indicated that it had been copied to the architect but it had not. Because it had not been copied to the architect, Bitannia did not provide a payment schedule within the period required.
- 54 Bitannia sought to rely on rights to relief said to arise under the *Trade Practices Act 1974* (Cth) (**'TPA'**).
- 55 Although the alleged misconduct might have been understood to be a basis of a *defence*, Bitannia accepted that, at least at trial, they were bound to bring their TPA claim by way of *cross-claim*, because of the judgment of *Bank of New Zealand v Spedley Securities Ltd (In liq)* (1992) 27 NSWLR 91 (**'Bank of New Zealand'**).²⁰ They further

²⁰ In that case, the Court of Appeal held that conduct proscribed by s 52 of the TPA cannot be relied upon as a defence in proceedings to establish a constructive trust.

accepted that if they were required to proceed by way of cross-claim, that was prohibited by s 15(4)(b)(i) of the NSW SOP Act.²¹

56 Section 15 of the NSW SOP Act (which is equivalent to s 16 of the SOP Act) relevantly provides that (**emphasis added**):

- (1) This section applies if the respondent:
 - (a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant:
 - (a) may:
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction,...
- ...
- (4) **If the claimant commences proceedings** under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
 - ...
 - (b) **the respondent is not, in those proceedings, entitled:**
 - (i) **to bring any cross-claim against the claimant, or**
 - (ii) **to raise any defence in relation to matters arising under the construction contract.**

57 Parkline did not dispute that Bitannia had an arguable case in respect of a claim that the Parkline's conduct was misleading or deceptive.²²

58 Bitannia argued that to the extent that reliance on such relief was precluded by the NSW SOP Act, the NSW SOP Act was inconsistent with the TPA and invalid to the

²¹ *Bitannia*, [76] (Basten JA).

²² *Bitannia*, [25] (Basten JA).

extent of that inconsistency pursuant to s 109 of the Constitution.²³

59 The primary judge awarded to Parkline the amount claimed in the payment claim, and relevantly held that:²⁴

- (a) s 15(4) of the NSW SOP Act prevented the bringing of a cross-claim; and
- (b) there was no inconsistency between s 15(4) of the NSW SOP Act and ss 52, 82, and 87 of the TPA.

60 The issues that arose for determination by the Court of Appeal included:²⁵

- (a) whether s 15(4)(b)(ii) of the NSW SOP Act precluded Bitannia raising, by way of defence, a contention that Bitannia's failure to provide a payment schedule had been caused by Parkline's misleading or deceptive conduct; and
- (b) whether, if that contention can only be raised by a cross-claim, s 15(4)(ii) is invalid to the extent that it prevents the taking of that course in reliance on a complaint of misleading and deceptive conduct in breach of s 52 of the TPA.

61 **Basten JA**, first considered whether Bitannia could rely on the alleged misleading and deceptive conduct as a defence. He noted that the prohibition on s 15(4) in relation to a cross-claim is, in terms, absolute, whereas the prohibition in relation to raising a defence is restricted to matters "arising under the construction contract".²⁶

62 He held that Bitannia's reliance on the respondent's conduct accompanying the service of the payment claim was not precluded by s 15(4)(b)(ii). He concluded that the defence raised:²⁷

...did not arise under the contract, nor was it in relation to a matter arising under the contract: rather it was in relation to misleading or deceptive conduct on the part of the respondent which could lead to injunctive relief under s 87 of the Trade Practices Act. While it is true that the phrase "in relation to" may identify any rational connection between the prohibited defence and a matter

²³ *Bitannia*, [24] (Basten JA).

²⁴ *Bitannia*, [55] (Basten JA).

²⁵ *Bitannia*, page 3.

²⁶ *Bitannia*, [78] (Basten JA).

²⁷ *Bitannia*, [96] (Basten JA).

arising under the construction contract, and while the entitlement to a progress payment depends in part upon the construction contract and conduct in execution thereof, this language would not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a statutory right.

63 He then considered whether the decision of *Bank of New Zealand* required that a claim of conduct in contravention of s 52 could be pleaded only by way of cross-claim rather than as a defence. He rejected that proposition.²⁸

64 He then observed that if his conclusion was wrong and there was no right to proceed by way of defence, that *Bitannia* could only succeed if it was entitled to raise the matters of misleading or deceptive conduct by way of a cross-claim.²⁹ As any form of cross-claim is precluded by s 15(4)(b)(i) he considered whether there was inconsistency between the Commonwealth and State Laws. He concluded that there was. In summary, he reasoned:³⁰

(a) In *Stock Motor Ploughs v Forsyth* (*'Forsyth'*),³¹ Dixon J stated at p 136:

...A provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right. In this Court an interpretation of s 109 of the Constitution has been adopted which invalidates a law of a state in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth.

(b) Although Dixon J was in dissent as to the outcome of that case, his statement of the underlying principle is well-accepted.

(c) That approach focuses on the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law.

(d) It may be necessary to look at the “practical effect” of the state law in relation to the Commonwealth right, so that it is not sufficient to look purely at the legal

²⁸ *Bitannia*, [97]–[104] (Basten JA).

²⁹ *Bitannia*, [105] (Basten JA).

³⁰ *Bitannia*, [112]–[115] (Basten JA).

³¹ (1932) 48 CLR 128.

operation of the Federal and State laws in question.

- (e) In the present case the impact of the State law on rights conferred under the TPA is direct and significant, in the sense explained by Dixon J in *Forsyth*.

65 Basten JA rejected the suggestion that the State law operates only as a procedural constraint in the sense that it does nothing to prevent rights being pursued in separate proceedings. He considered that the suggestion disregarded an important practical consequence of the State law. He stated at [118]:

...The loss which [Bitannia] seek to prevent is one which will occur, in a summary way, in the s 15 proceedings. The institution of separate proceedings will not avail them in that respect, unless they can obtain a stay of the s 15 proceedings to allow the separate Trade Practices Act proceedings to be completed...there must be real doubt as to whether a stay would be appropriate if its purpose were to allow the respondent to the proceedings to raise a matter (albeit elsewhere) which could not, on the present hypothesis, be raised directly in the s 15 proceedings by way of cross-claim or defence. The very purpose of that prohibition is to prevent a right to judgment on a payment claim being delayed by a cross claim.

66 He went on to observe that it is quite likely a court would refuse a discretionary stay in those circumstances, on the basis that Bitannia was in effect trying to achieve indirectly the very result which the Parliament had prohibited it from obtaining directly. He therefore concluded that if the complaint under the TPA could not be raised by way of defence, there was an inconsistency between the State law and the TPA.³²

67 **Hodgson JA** agreed with Basten JA that the appeal should be allowed.³³ He agreed that Bitannia's defence relying on the misleading conduct was not prohibited by s 15(4)(b)(ii) of the NSW SOP Act. He also agreed with Basten JA that to place significant procedural obstacles in the way of obtaining relief provided by the TPA would make s 15(4)(b) inconsistent with that Act. He observed that the TPA discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage, and it would not be in accordance with

³² *Bitannia*, [119] (Basten JA).

³³ *Bitannia*, [1]–[16] (Hodgson JA).

that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant. However, he stressed:³⁴

...that this is a case where the alleged misleading conduct was relevant to the claimant's entitlement to a judgment pursuant to s 15. In a case where the alleged misleading conduct is not relevant to that entitlement, but only to the final entitlement of the parties, s 15(4)(b) would not in my opinion place obstacles in the way of obtaining Trade Practices Act relief, and there would be no constitutional reason why it could not operate in accordance with its terms.

68 **Tobias JA** agreed with Basten and Hodgson JJA that Bitannia was not prevented from raising by way of defence the contention that its failure to provide a payment schedule was induced by Parkline's misleading or deceptive conduct in breach of s 52 of the TPA. In that circumstance he found it unnecessary to consider the inconsistency argument.³⁵

G.2 Birdon

69 The plaintiff and defendant were in dispute in relation to the plaintiff's liability to pay for the hire of a back hoe dredge vessel from the defendant. The defendant claimed that the contract for the hire of the dredge was a construction contract within the meaning of the NSW SOP Act and sought to invoke the NSW SOP Act procedure in relation to a payment claim made under that Act. The plaintiff challenged the defendant's attempt to invoke the NSW SOP Act and indicated that it did not propose to make payment of any part of the payment claim. The defendant then made an adjudication application with respect to its payment claim (the quantum of which was over \$2 million).

70 Before the relevant adjudication application was determined, the plaintiff commenced proceedings in the Federal Court under the *Admiralty Act 1988* (Cth) ('**Admiralty Act**') and the ACL, claiming that the dispute concerned a 'maritime claim' within the meaning of the Admiralty Act, and seeking an injunction restraining the defendant from pursuing the adjudication application under the NSW SOP Act.

³⁴ *Bitannia*, [14] (Hodgson JA).

³⁵ *Bitannia*, [17] – [20] (Tobias JA).

The plaintiff alleged the defendant had engaged in misleading or deceptive conduct relating to the hire of the dredge – specifically in relation to the length of the hire period under the contract.

71 The plaintiff argued that the provisions of the NSW SOP Act relating to the enforcement of the payment claim (ss 25 and 32) were inconsistent with the federal jurisdiction invoked under the Admiralty Act and the ACL, and were therefore invalid to the extent of the inconsistency.

72 Section 25 of the NSW SOP Act provides as follows (**emphasis added**):

25 Filing of adjudication certificate as judgment debt

(1) **An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.**

...

(4) **If the respondent commences proceedings to have the judgment set aside**, the respondent:

(a) **is not, in those proceedings, entitled:**

(i) **to bring any cross-claim** against the claimant, or

(ii) **to raise any defence in relation to matters arising under the construction contract**, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

73 Section 32 of the NSW SOP Act provides as follows:

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

74 By way of comparison, the Victorian equivalents to ss 25 and 32 of the NSW SOP Act are ss 28R and 47 respectively.

75 After interlocutory orders were made, a special case concerning questions raised by the plaintiff (the respondent to the payment claim) was reserved for consideration by the Full Court. Relevantly, the first question was:³⁶

Whether due to the plaintiff having invoked federal jurisdiction under s 4(3)(f) and 9 of the Admiralty Act and the Australian Consumer Law in proceedings in the Federal Court, the adjudication procedure under Pt 3 of the Security of Payment Act may not proceed?

76 It is apparent from paragraph [4] of the judgment and the reasons for decision given, this question raised squarely for consideration whether the provisions of the NSW SOP Act relating to the enforcement of a statutory claim for progress payments are inconsistent with the federal jurisdiction invoked by the plaintiff pursuant to the Admiralty Act and the ACL.

77 The majority (Keane CJ and Buchanan J, Rares J dissenting) held that there is no inconsistency between the State and the Commonwealth legislation.

78 In summary, **Keane CJ** reasoned:

- (a) There is no overlap between the regime established under the NSW SOP Act

³⁶ *Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25 ('*Birdon*'), 29 [5] (Keane CJ).

and the Admiralty Act. The NSW SOP Act creates and provides for the enforcement of a novel statutory right to provisional payment. The Admiralty Act provides for the quelling by the exercise of judicial power of a controversy as to the rights and obligations of the parties under the charter agreement and the ACL.³⁷

- (b) The provisions of the NSW SOP Act establish the content of a new statutory right created by that Act, including the quantification of the entitlement, the incidents of the right and the enforcement of the right. Critically, the existence and quantum of the new statutory right depends not on the true state of underlying facts as regulated by the charter agreement, but on the assessment of the adjudicator who is not required or authorised to make any findings about those facts.³⁸
- (c) There is not a single matter or controversy which encompasses both the maritime claim made by the plaintiff, and the claim for an adjudication of the quantum of provisional progress payments under the NSW SOP Act. Separate and distinct matters arise.³⁹
- (d) It may be accepted that all claims associated with the charter of the dredge, including the claim that the defendant has no entitlement at all to any payment, may be determined only by the exercise of the judicial power of the Commonwealth.⁴⁰
- (e) No federal law requires that there be no entitlement under State law for any party to see progress payments on a provisional basis in respect of any claim which might be brought in federal jurisdiction. Nor is it possible to identify a federal law which evinces an intention to enter upon, much less cover, the field occupied by the NSW SOP Act.⁴¹

³⁷ *Birdon*, 41 [63] (Keane CJ).

³⁸ *Birdon*, 41 [63] (Keane CJ).

³⁹ *Birdon*, 41 [64] (Keane CJ).

⁴⁰ *Birdon*, 42 [71] (Keane CJ).

⁴¹ *Birdon*, 42 [72] (Keane CJ).

79 Keane CJ concluded that nothing in the NSW SOP Act purports to prevent the Federal Court giving such judgment as reflects its determination of the respective entitlements of the parties, having regard to the substantive rights under the contract and the true operation of the ACL as found by the Federal Court.⁴²

80 However, he observed that it was possible to imagine a case in which a provisional payment made pursuant to a certificate under s 25 of the NSW SOP Act might not be recoverable from a builder if the builder has become insolvent between payment and a judgment in favour of the other party. He stated at [75]:

...To the extent that such a prospect threatens the efficacy of the final judgment of the Federal Court, then the court may meet that risk by granting an injunction to restrain the parties from asserting rights pursuant to the adjudication process. Thus in the present case, the plaintiff might obtain an interlocutory injunction to restrain the defendant from prosecuting an application for an adjudication under the [NSW SOP Act] if it were able to establish that it has a sufficiently strong case that the defendant is not entitled to rely upon that Act and that the balance of convenience favours that course.

81 **Buchanan J** agreed. Relevantly:

- (a) He observed it was common ground that the functions performed by the adjudicator do not involve the exercise of judicial power.⁴³
- (b) After considering the various provisions of the NSW SOP Act, he observed that s 25 confines the operation of an adjudication certificate as a judgment (when filed) to the unpaid portion of the adjudicated amount. Section 32(3) directs that in any (civil) proceedings in relation to any matter arising under a construction contract any amount paid must be allowed for and permits restitution of any such amount if appropriate. He then stated at [154]:

...In this way the statutory scheme seems to confine its intended operation to the establishment of an administrative procedure concentrated upon the timely recovery of claimed, upheld and unpaid “progress payments”, without any payment made in respect to a claim or an adjudication becoming legislatively fixed, unreviewable or irrecoverable in due course. The scheme bears all the hallmarks of an administrative arrangement for a speedy adjudication which will operate without prejudice to ultimate legal rights and to the extent

⁴² *Birdon*, 43 [74] (Keane CJ).

⁴³ *Birdon*, 59 [148] (Buchanan J).

necessary on an interim basis.

- (c) Informed by his understanding of the effect of the statutory scheme, Buchanan J saw no conflict or inconsistency between the provisions of the State Act, or their operation in the present case, and the provisions or operation of either the Admiralty Act or the ACL. He stated at [161]:

The State Act establishes an administrative procedure for claiming, determining and recovering progress payments. It does so, in my view, without disclosing any intention or having any operative effect, of intruding upon the exercise of the jurisdiction of this Court or the exercise of federal judicial power generally... The provisions of the *Admiralty Act* which are relied upon involve an express grant of jurisdiction with respect to identified classes of legal controversy. To the extent that vindication of a suggested legal right, or an attempt to enforce a suggested legal obligation, might involve the jurisdiction granted by the *Admiralty Act*, then a “federal matter” will have been identified. Similarly, proper invocation of rights given by the *Australian Consumer Law* will engage the exercise of federal judicial power. It may be accepted, having regard to the pleadings that so much has occurred in the present case. However, neither the effective exercise of that jurisdiction (in whatever court it might have been invoked) or the effective exercise of the authority of this Court is affected by the provisions or operation (to date or potentially) of the State Act. Nothing done, or to be done, in the adjudication procedure will alter, impair or detract from, or should be seen as reflecting a legislative attempt to alter, impair or detract from the exercise of the jurisdiction of this Court.

82 **Rares J** dissented. He concluded that ss 32(3) and 25 of the NSW SOP Act do alter, impair or detract from the operation of federal law by substantially, if not completely, proscribing the right of a person in the same proceedings to seek, or a court to set aside, a judgment under s 25 or to raise a cross-claim in the same proceedings by relying on rights under federal law.⁴⁴

83 He agreed with Basten JA in *Bitannia* that the prohibition on the claimant bringing a cross-claim in s 15(4)(b)(ii) created an operational inconsistency between the federal and State laws so that the State law would be inoperative to the extent of the inconsistency.⁴⁵

84 In relation to s 25(4), which he noted operates differently to s 15(4), he reasoned in

⁴⁴ *Birdon*, 56-57 [134] (Rares J).

⁴⁵ *Birdon*, 50 [109] (Rares J).

summary at [110]-[112]:

- (a) First, s 25(1) creates a court order that the debtor pay a sum.
- (b) Second, s 25(4) envisages the debtor commencing proceedings to have the judgment set aside.
- (c) Third, it is a condition of exercising any right to apply to the court to set that judgment aside that the debtor is to pay into court the unpaid sum due under the judgment as security.
- (d) There is no apparent discretion given to the court to relieve the debtor of that obligation. He observed that depending on the value of the payment claim the effect of that condition would be to create a potentially impossible financial barrier to the debtor commencing proceedings to set aside that judgment.
- (e) The Commonwealth legislation relied on in that case did not impose a mandatory precondition, of payment into court of the sum in dispute, on the right of a person to invoke the exercise of the federal jurisdiction they create.

85 He concluded that such an inflexible precondition imposed by State law is operationally inconsistent with the rights of all persons to apply to a court exercising the judicial power of the Commonwealth for relief under laws made by the Parliament.⁴⁶

G.3 Façade

86 Façade Treatment Engineering Pty Ltd (**'Façade'**) had agreed to design, supply and install façade works for Brookfield Multiplex Constructions Pty Ltd (**'Multiplex'**). Façade made payment claims under the SOP Act which were not paid in full. It was subsequently placed into liquidation. Façade, by the liquidator, then sought to enter judgment against Multiplex under the SOP Act to recover the outstanding amounts under the payment claims. The trial judge dismissed Façade's proceeding and Façade

⁴⁶ *Birdon*, 51 [112] (Rares J).

sought leave to appeal. Amongst the questions on appeal were:

- (a) Whether the SOP Act only applies to claimants that are a going concern. The Court held that s 9(1) of the SOP Act does not create an entitlement to progress payments for persons who are in liquidation and Part 3 of the SOP Act (which sets out the procedure for recovering payment claims) is not available to persons in liquidation.
- (b) Whether s 16(2)(a)(i) and 16(4)(b)(i) and (ii) of the SOP Act are constitutionally inconsistent with s 553C of the *Corporations Act 2001* (Cth) ('**Corporations Act**'). While it was unnecessary for the court to consider this issue, they concluded that a relevant inconsistency exists.

87 In relation to the issue of inconsistency the Court reasoned:

- (a) Section 553C of the Corporations Act provides for the set-off of mutual claims. It provides that, in the context of the winding up of an insolvent company, a party to whom the company owes a debt is entitled to set-off that debt against any sum it owes to the company.⁴⁷
- (b) The trial judge was satisfied that Multiplex had potential claims that it intended to advance and that the quantum of those claims, if proved, was likely to exceed the amounts sought by Façade under the SOP Act.⁴⁸
- (c) It follows from well-established authority and principle that because Façade is in liquidation, the claims Multiplex has with respect to the completion of the work and its liquidated damages claim will be set-off, pursuant to s 553C, against the sum in respect of which Façade sought to obtain a judgment debt.⁴⁹
- (d) Multiplex's opposing claims existed or were inchoate at the time of the commencement of the winding up and arose from mutual dealings between

⁴⁷ Façade, 462 [41] (Warren CJ, Tate and McLeish JJA).

⁴⁸ Façade, 463 [47] (Warren CJ, Tate and McLeish JJA).

⁴⁹ Façade, 486 [138] (Warren CJ, Tate and McLeish JJA).

- the parties, namely a prior dealing arising with respect to the subcontract.⁵⁰
- (e) The effect of liquidation upon a corporation is that s 553C of the Corporations Act is automatically attracted to any mutual dealings between the parties.⁵¹ The automatic set-off operates whether the party seeking to make a claim is the company in liquidation (as here) or the other party.⁵²
 - (f) Here, Façade was placed into liquidation on 6 February 2013. The proceeding for summary judgement was issued on 26 September 2014.⁵³
 - (g) The effect of s 553C is that as at 6 February 2013 any unpaid portion of the payment claims ceased to exist, as did the sum claimed by the counterclaim, and what replaced them was a single claim that represented the balance between them. The automatic effect of s 553C was anterior to the commencement of the proceedings before the judge.⁵⁴
 - (h) The practical effect of the summary judgment proceeding available under s 16(2) on the right to a set-off conferred by s 553C, is direct and significant in that it interferes with the rights made available under the Corporations Act.⁵⁵
 - (i) Set-off under s 553C affects substantive rights by enabling the creditor of a company in liquidation to use its indebtedness to that company as a form of security. Instead of having to prove with other creditors for the whole of its debt in the wind-up, it can set-off dollar for dollar what it owes the company in liquidation and prove for or pay only the balance. If Multiplex was not permitted to rely upon its counterclaim as a cross-claim or by way of a defence, it would be required to prove its claim in the liquidation and receive only a dividend pro rata to the amount of its claim despite having paid the full amount it owed. The circumstances would give rise to the very injustice which s 553C

⁵⁰ *Façade*, 486 [138] (Warren CJ, Tate and McLeish JJA).

⁵¹ *Façade*, 495 [164] (Warren CJ, Tate and McLeish JJA).

⁵² *Façade*, 496 [165] (Warren CJ, Tate and McLeish JJA).

⁵³ *Façade*, 500 [175] (Warren CJ, Tate and McLeish JJA).

⁵⁴ *Façade*, 500 [176] (Warren CJ, Tate and McLeish JJA).

⁵⁵ *Façade*, 500 [177] (Warren CJ, Tate and McLeish JJA).

was enacted to avoid. It would be deprived of the protection afforded by s 553C.⁵⁶

- (j) The inability to tell exactly what the eventual outcome of the issues in dispute between Façade and Multiplex will be does not preclude the operation of the s 553C, given that Façade is in liquidation and has been since 6 February 2012.⁵⁷

H Issue 1 – Whether sections 10B, 23(1), 23(2), 23(2A) and/or 28M of the SOP Act are inconsistent with sections 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?

H.1 How this issue arises

88 It is 1559HS's position that the SOP Act is inconsistent with the ACL because various provisions **governing the adjudication** alter, impair or detract from the operation of the ACL by their significant, practical curtailment or abrogation of 1559HS's rights under the ACL.

89 By its FAOM, 1559HS seeks, amongst other things, to have the Corrected Determination quashed. However, by its submissions, 1559HS acknowledged that the legal effect of the Corrected Determination may have been 'spent' by reason of the County Court Judgment, such that an order in the nature of certiorari cannot be made.⁵⁸ On that basis it seeks an order that Camillo be restrained by way of permanent injunction from taking any further steps to enforce the Corrected Determination.

90 1559HS also seeks to use the invalidity of the Corrected Determination for jurisdictional error as one basis for setting aside the Judgment. At first blush it seems that s 28R(5)(a)(iii) prohibits 1559HS from challenging the adjudication in these proceedings. However, in *Amaysa Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor*⁵⁹ (*'Amasya'*), Vickery J held that a determination can be

⁵⁶ *Façade*, 500-501 [178] (Warren CJ, Tate and McLeish JJA).

⁵⁷ *Façade*, 501 [181] (Warren CJ, Tate and McLeish JJA).

⁵⁸ Counsel for 1559HS referred to the explanation provided by the High Court in *Wingfoot Australia Partners Pty Ltd v Eyup Kocak* (2013) 252 CLR 480 at [24]-[25] (French CJ and Crennan, Bell, Gageler and Jeane JJ).

⁵⁹ [2015] VSC 233.

challenged for jurisdictional error in proceedings to have the judgment set aside and neither party took issue with 1559HS's entitlement to do so.

H.2 1559HS's submissions

91 1559HS submitted, in summary:

- (a) Sections 10B and 23(2A)-(2B) prevented 1559HS from raising (and prevented the Adjudicator from considering) an ACL claim as part of the adjudication process.
- (b) Section 28M then provides that if the adjudicator determines, necessarily without regard to the respondent's rights under Commonwealth legislation, that a respondent is required to pay an adjudicated amount, the respondent must pay that amount.
- (c) As a result of those sections of the SOP Act, 1559HS, was unable to rely on a complaint, founded in the ACL and based on misleading or deceptive conduct, which it would otherwise have been able to raise in defence of the adjudication application. This is a practical impairment of its rights under Commonwealth legislation.
- (d) Further, the SOP Act and the ACL have conflicting legislative purposes:
 - (i) the purpose of the ACL is to confer a right on parties to seek relief by way of, either individually or in combination, compensation, injunctions and other orders, to both undo and prevent the effect of conduct contravening the ACL.
 - (ii) the intention of the adjudication provisions in the *SOP Act* is to enable an adjudicator to determine a builder's right to a progress payment and then to ensure that progress payment is paid, with no or minimal opportunity by the respondent to avoid that payment by raising matters other than those identified in the narrow confines of the SOP Act, and

for the parties' substantive rights to be determined later in court proceedings.

- (e) The intention and purpose of the SOP Act cannot be achieved, in a case like this, without preventing a party from exercising its rights under the ACL.
- (f) Where such a conflict exists, s 109 of the Constitution requires that the will of the Commonwealth Parliament prevails.

H.3 Camillo's submissions

92 Camillo submitted, in summary:

- (a) The SOP Act establishes a statutory entitlement to progress payments that is separate from the entitlements of the parties under the Construction Contract or under any other law.
- (b) It is no purpose of the SOP Act to alter existing legal rights or entitlements on a final or substantive basis, all of which are preserved by s 47.
- (c) It is correct that the adjudicator could not consider 1559HS's claim under the ACL. That is because the possibility of curial orders under the ACL regime is not a matter which the Parliament has said the adjudicator should consider under ss 10, 10A, 10B and 23 of the SOP Act in determining the existence and extent of the new statutory entitlement to payment.
- (d) The adjudicator is exercising executive power, not judicial power.⁶⁰
- (e) The fact that the adjudicator is not exercising judicial power, and is not

⁶⁰ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189 (the Court). See also *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at [71]; *South Australia v Totani* (2010) 242 CLR 1 at [218]-[220]; See also *Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25 at [53], [57], [62]-[63] (Keane J), [93] (Rares J), [148] (Buchanan J); *Civil & Allied Technical Construction Pty Ltd v Resolution Institute* [2019] SASC 193 at [63] (Kourakis CJ); *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* (2022) 18 ACTLR 245 at [104] (Lee J; Elkaim J agreeing); *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56 at [5]-[7], [12] (Leeming JA; Mitchelmore JA agreeing); *Demex Pty Ltd v McNab Building Services Pty Ltd* [2023] NSWCA 261 at [24] (Kirk JA; Mitchelmore and Adamson JJA agreeing); *Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 at [30]-[35] (Philippides J); *ACN 060 559 971 Pty Ltd v O'Brien* [2008] 2 Qd R 396 at [16] (Mullins J); *In the matter of Ming Tian Real Property Pty Ltd* (2020) 145 ACSR 329 at [46] (Gleeson J).

purporting to determine existing rights and obligations, is significant. There is no intersection between what the adjudicator does and what a court may order under ss 18, 232, 234 and 237 of the ACL.

- (f) There is no inherent vice or inconsistency between the SOP Act and the ACL simply because the SOP Act provides for expeditious, summary and interim relief.
- (g) As there is no inconsistency between the SOP Act and the ACL, the Corrected Determination was not made in excess of jurisdiction. Accordingly, it should not be quashed.

H.4 Consideration

- 93 Having considered the subject matter, scope and purpose of the SOP Act and ACL, for the reasons that follow, I find that there is no operative overlap and therefore no inconsistency between ss 10B, 23(1), 23(2), 23(2A) and/or 28M of the SOP Act and ss 18, 232, 234, 236 and 237 of the ACL, in the sense that the State law does not alter, impair or detract from the operation of the ACL.
- 94 The provisions of the SOP Act establish a statutory entitlement to progress payments that is separate from and in addition to any other entitlement of the parties to the construction contract, including those that may arise under the ACL.
- 95 The purpose of an adjudication determination is to determine the right of a claimant to immediate payment of its progress claim.⁶¹ The SOP Act prevents adjudicators making that determination from considering arguable claims under the ACL because those claims are not relevant to the administrative tasks they undertake. As Keane CJ observed, and identified as critical to his reasoning in *Birdon*, the existence and quantum of the new statutory right depends not on the true state of underlying facts, but on the assessment of the adjudicator who is not required or authorised to make

⁶¹ *Grocon v Planit Cocciaardi* (2009) 26 VR 172, 202 [110] (Vickery J).

any findings about those facts.⁶²

96 The determination of a right to payment operates without prejudice to the ultimate legal rights of the parties to the contract. The SOP Act may operate to alter the distribution of financial risk between the parties ahead of the final determination of their rights under contract, common law or statute. However, that effect does not take away, vary or impair the rights that may otherwise arise under ss 18, 232, 234 and 237 of the ACL. Nor does it interfere at all with the separate exercise of judicial power provided for in the ACL. For example, the ACL includes an injunction power which may be invoked by an application in a proper case and where there is a proper basis to do so. Keane CJ imagined such a case in *Birdon* at paragraph [74]. 1559HS never sought to avail itself of that power. Rather it participated in the adjudication process under an objection to jurisdiction.

97 1559HS relies on *Bitannia* in support of its submissions, specifically the decision of Basten JA. That decision does not advance 1559HS's submissions on this issue because Basten JA did not address the issue of inconsistency between the ACL and the provisions of the SOP Act governing the task undertaken by the adjudicator.

98 1559HS also relied on the decision of the Court of Appeal in *Façade*. Again, that decision does not assist 1559HS. Critical to that decision is that s 553C of the Corporations Act is automatically attracted to any mutual dealings at the point of liquidation. The Court held that at that point, having regard to the sums claimed and counterclaimed, the unpaid portion of the payment claims under the SOP Act ceased to exist. Clearly the enforcement of a payment claim post liquidation, excluding consideration of the counterclaim, would defeat the purpose and object of s 553C of the Corporations Act. By comparison, in this case:

(g) Camillo is not in liquidation (and nor is there any allegation that it presents an insolvency risk); and

(h) any entitlement 1559HS may have arising under the ACL remains unaltered by

⁶² *Birdon*, 41 [63] (Keane CJ).

the making of the determination by the Adjudicator.

99 I find that:

- (a) there is no inconsistency between the provisions of the SOP Act governing the adjudication and the ACL; and
- (b) the Corrected Determination was not made in excess of jurisdiction and should not be quashed or set aside.

I Issue 2 – Whether sections 28M, 28O, and 28R(1)-(4) of the SOP Act are inconsistent with section 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?

I.1 How this issue arises

100 Section 28M of the SOP Act requires the respondent to an adjudication application to pay the adjudicated amount. If it fails to do so, a court of competent jurisdiction may enter judgment against the respondent on application by the claimant pursuant to ss 28R(1)-(4). In this case, the Judgment was entered against 1559HS in the County Court on 10 October 2023.

101 1559HS challenges the validity of the Judgment on the following bases:

- (a) The Judgment is void and unlawful as a consequence of the Corrected Determination being void and unlawful, having been made pursuant to provisions of the SOP Act that are inconsistent with the ACL. Having found that the Corrected Determination is not void and unlawful on such a basis, this part of 1559 HS's case must fail and will not be addressed further.
- (b) It was made pursuant to ss 28M and 28R(1)-(4) of the SOP Act, which sections are inconsistent with the ACL and inoperative to the extent of the inconsistency.

I.2 1559HS's submissions

102 1559HS submits, in summary:

- (a) Its obligation to make payment under s 28M arose in circumstances where 1559HS had no opportunity to raise the ACL defence. The effect of sections 28R(1)-(3) is that once an adjudication determination is made and an adjudication certificate issued the proceedings in the “court of competent jurisdiction” may be conducted ex parte – as it was in this case. As a consequence, 1559HS has had no opportunity to oppose judgment being entered for the adjudicated amount. This is a practical impairment of 1559HS’s rights under the ACL.
- (b) Had 1559HS been given notice of the proceeding for judgment, it could and would have raised its ACL defence in the County Court prior to judgment.
- (c) It was incumbent upon Camillo in making its ex parte application to communicate to the County Court that there was a live issue as to the validity of the legislation upon which ex parte judgment was sought and/or in the alternative that 1559HS may have an arguable defence that was not precluded by s 28R(5) of the SOP Act.
- (d) Another ‘practical impairment’ of 1559HS’s rights under the ACL is that it will suffer (and has suffered) loss in a summary way because judgment has been given, and it is obliged to pay that judgment and suffers the ignominy and (potential) adverse credit impacts of a judgment against it. It is no answer to such a contention to say that 1559HS’s rights are not altered or impaired because its final rights are preserved and it can bring court proceedings at a later time.
- (e) This ‘practical impairment’ corresponds to the impairment identified by Basten JA in the case of *Bitannia*. At [112] of that decision, his Honour found that s 15(4)(b) of the NSW SOP Act:

... prevents the respondent to a payment claim raising, by way of cross-claim, a complaint about the conduct of the claimant in serving the payment claim. The effect is to preclude the respondent from relying upon a complaint which might otherwise have been available in resistance to a claim, even though, if the claim were not payable, the

payment may be recoverable in separate proceedings. If that analysis of the effect of the [NSW SOP Act] is correct, one may ask, adopting the language from *Gould v Robson*, how can the respondent be said not to be injured, by this abridgment of its rights?

- (f) Even though 1559HS has now filed separate proceedings to prosecute its s 18 ACL claim, it is quite likely that those proceedings will not result in judgment for at least 12 months, meaning 1559HS is likely to be deprived of the use of \$1.8 million for over 12 months, even if it is successful in prosecuting its s 18 ACL claim.
- (g) The fact that an ex parte order can be set aside under court rules is beside the point. The practical impact is already manifest and judgment has been entered because the rights of 1559HS are impaired. Having the means to seek subsequently to ameliorate some of the damage done does not eschew inconsistency.
- (h) The County Court lacked the legal foundation to make the Judgment due to the invalidity of the relevant provisions of the SOP Act.
- (i) Therefore, the Judgment is tainted by jurisdictional error and amenable to an order in the nature of certiorari.

I.3 Camillo's submissions

103 Camillo submits, in summary:

- (a) It could not be said that the County Court made any jurisdictional error on the material before it because nothing before the County Court showed that 1559HS wished to pursue an ACL claim.
- (b) Subsections 28R(1)-(3) do not have the effect that 1559HS has no opportunity to oppose judgment. 1559HS's real submission is that it had no opportunity to oppose judgment because Camillo can and did move a court of competent jurisdiction for orders ex parte. But an order obtained ex parte can be set aside under the court rules or the exercise of inherent power and that is expressly

contemplated by s 28R(5).

- (c) There is no inconsistency and therefore the Judgment should not be quashed.

I.4 Consideration

- 104 Where an adjudication certificate has been provided to a person under s 28Q, that person may recover the unpaid portion of the amount payable under s 28M or s 28N as a debt due to that person in any court of competent jurisdiction: s 28R(1) of the SOP Act.
- 105 The adjudication determination itself is not enforced. It is the operation of sections 28M or 28N of the SOP Act which creates the obligation to pay and it is the debt created by the issue of the certificate under s 28Q that is to be enforced in a court of competent jurisdiction.⁶³
- 106 The entering of a judgment under the SOP Act involves the exercise of judicial power, not merely an administrative act.⁶⁴ The court must bring an independent mind to the application for a judgment debt.⁶⁵
- 107 Before entering judgment, pursuant to s 28R(2)-(4) of the SOP Act the court needs to be satisfied that:
- (a) an adjudication certificate and an affidavit complying with s 28R(2)(b) have been filed in the court; and
 - (b) the person liable to pay the amount payable under s 28M or 28N has failed to pay the whole of any part of that amount.
- 108 The court is not required to consider the substance of the adjudication determination itself nor the reasons for determination.⁶⁶

⁶³ *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor* [2015] VSC 233 ('*Amasya*'), [43] (Vickery J).

⁶⁴ Compare s 25(1) of the NSW SOP Act which provides that the adjudication certificate itself is filed as a judgment for a debt.

⁶⁵ *Amasya*, [45] (Vickery J).

⁶⁶ *Amasya*, [46] (Vickery J).

- 109 Obtaining judgment in a court of competent jurisdiction may be undertaken *ex parte*.⁶⁷
- 110 It is intended that there be a fast track procedure for the entry of judgment.⁶⁸ It is also intended that this scheme operate without prejudice to the legal rights of the parties to the construction contract and, to the extent necessary, on an interim basis.
- 111 The ACL creates rights to protection and relief (as identified in section E above). Those rights are expressly preserved by the SOP Act.
- 112 In my view, against this background, it is plain that the enforcement of the right of a claimant to payment of its progress claim under the SOP Act does not intersect with the operation of the ACL. The enforcement of an interim payment pursuant to the SOP Act ‘*pay now, argue later*’ regime, ahead of the determination of the rights and entitlements of the parties to the Construction Contract, does not alter, impair or detract from the enjoyment of those asserted rights.
- 113 The Court in *Birdon* considered whether the NSW equivalent provision was inconsistent with the Admiralty Act and the ACL. The reasons of the majority summarised above apply equally to this case and I adopt them. In adopting those reasons I am mindful that the procedure in NSW is similar but not identical to the procedure in Victoria. Most relevantly, s 25(1) of the NSW SOP Act provides that the adjudication certificate itself is filed as a judgment for a debt. Consequently the procedure in NSW to enter a judgment does not involve the exercise of judicial power.⁶⁹ However, that difference is not critical to the reasoning of the majority. What was critical was that the task being performed was the enforcement of a right to a progress payment – a new statutory right that does not depend on the true state of underlying facts but on the assessment of the adjudicator, a statutory right determined without prejudice to the parties’ ultimate legal rights.
- 114 1559HS relies on *Bitannia* in support of its submissions. However, I am not persuaded

⁶⁷ *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425, [37]–[38] (Vickery J).

⁶⁸ *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425, [37] (Vickery J).

⁶⁹ See for example *Birdon* 39 [53] (Keane CJ); *Amasya* [52] (Vickery J).

by it for reasons including that:

- (a) It is inconsistent with the ratio of *Birdon*. In my view, the reasoning in *Birdon* is correct.
- (b) The reasoning of Basten JA was obiter.
- (c) *Bitannia* is distinguishable on its facts. The conduct in *Bitannia* that was alleged to have been misleading or deceptive concerned the service of a payment claim. That is, it concerned the engagement of the process underpinning the statutory entitlement to payment. It was not conduct relevant to the final entitlement of the parties as in this case. This is an important distinction, and one acknowledged by Hodgson JA, who noted that the case before him was a case where the alleged misleading conduct was relevant to the claimant's entitlement to a judgment pursuant to s 15 and then stating at [14]:

In a case where the alleged misleading conduct is not relevant to that entitlement, but only to the final entitlement of the parties, s 15(4)(b) would not in my opinion place obstacles in the way of obtaining Trade Practices Act relief, and there would be no constitutional reason why it could not operate in accordance with its terms.

115 I find that there is no inconsistency between the provisions of the SOP Act governing the procedure to enforce a payment claim and the ACL. It follows that the Judgment should not be quashed or set aside on that ground.

J **Issue 3 – Whether sections 28R(5)(a)(i) and/or 28R(5)(a)(ii) of the SOP Act are inconsistent with sections 18, 232, 234, 236 and/or 237 of the ACL and, if so, invalid to the extent of the inconsistency?**

J.1 **How this issue arises**

116 By this proceeding 1559HS seeks to set aside the Judgment.

117 Section 28R(5) of the SOP Act provides that 1559HS is not in these proceedings entitled:

- (a) to bring any cross claim against Camillo; and/or

- (b) to raise any defence in relation to matters arising under the Construction Contract.

118 It is 1559HS's position that:

- (a) its defence does not arise under the Construction Contract; and
- (b) in any event, s 28R(5) is inconsistent with the ACL and invalid to that extent.

J.2 1559HS's submissions

119 1559HS asserts its defence arising under the ACL is not a defence in relation to matters arising under the Construction Contract. It submits that:

- (a) It was the misleading or deceptive conduct that caused 1559HS to engage Profix to complete the remaining façade works.
- (b) The central element of Camillo's claim under the SOP Act (a payment claim that was not paid) was created by misleading conduct. But for that conduct, the Payment Claim would not have existed.
- (c) The right 1559HS relies on in its proposed defence doesn't arise out of the Construction Contract. It arises out of the ACL. 1559HS does not call in aid any provision of that contract.
- (d) If s 28R(5)(a)(ii) applies and the ACL defence does not arise under the Construction Contract (i.e. if 1559HS can argue its ACL defence) then the Judgment should be stayed pending the hearing and determination of that ACL defence.

120 In relation to the issue of inconsistency 1559HS submits, in summary:

- (a) Sections 232, 234 and 237 of the ACL provide a right to injunctions, declarations, compensation and other relief. That is, these sections can prevent harm from arising out of misleading or deceptive conduct before that harm crystallises. The preventative relief provisions form a critical part of the

mechanism Parliament uses to secure conformity with the norm of conduct established by s 18.

- (b) Central to the determination of this issue is whether the SOP Act rights have a practical effect on or undermine the ACL regime.
- (c) The practical effect of section 28R(5) is that 1559HS cannot in this proceeding rely on its ACL claim by way of cross-claim and cannot raise any defence in relation to matters arising under the Construction Contract. In this case, it may be that the misleading conduct complained of by 1559HS was in relation to matters arising under the Construction Contract because that conduct resulted in 1559HS directing Camillo to terminate its subcontract with Colab BT and engage Profix on a “do and charge” basis to undertake the remaining façade works. That direction altered the parties’ rights under the Construction Contract.
- (d) The limitation on the court’s ability to grant preventative relief under the ACL significantly undermines the efficacy of the prohibition on misleading or deceptive conduct. The practical effect of sections 28R(5)(a)(i) and (ii) is direct and significant as it interferes with rights made available to under the ACL.

J.3 Camillo’s submissions

121 Camillo submits that it is not inconsistent with s 28R(5) of the SOP Act to prohibit a respondent from relying on its claims and defences under the ACL in seeking to have that judgment set aside. It says so for the following reasons:

- (a) The Full Court judgment of *Birdon* is authoritative and supports its position that there is no inconsistency between the relevant provisions of the ACL and the SOP Act in the manner alleged by 1559HS.
- (b) The decisions of *Bitannia* and *Façade*, relied upon by 1559HS, can be distinguished and are not authoritative in this proceeding.

J.4 Consideration

122 Section 28R(5) prevents 1559HS from raising “any defence in relation to matters arising under the construction contract”. I must first determine whether any defence based on the alleged misleading conduct was in relation to matters arising under the Construction Contract.

123 The words “in relation to” are wide words which signify the need for there to be some relationship or connection between the two subject matters.⁷⁰

124 In *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* (*‘Neumann’*),⁷¹ the Queensland Supreme Court of Appeal (Muir, Holmes and Chesterman JJA) considered (among other things) the scope of the words “in relation to” in the context of s 19(4) of the *Building and Construction Industry Payments Act 2004* (Qld) (**‘QLD SOP Act’**), which relevantly provides:

- (4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
 - (a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
 - (b) the respondent is not, in those proceedings, entitled –
 - (i) to bring any counterclaim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

125 Muir JA stated at [48] (with Holmes and Chesterman JJA agreeing):

...Had the provision intended to catch all defences having a connection with the construction contract, however remote, all words in s 19(4)(b)(ii) after “to raise any defence” would have been otiose: all payment claims are necessarily concerned with “matters arising under the construction contract”. The aim of the provision would appear to be to prevent respondents to claims relying on allegations that the moneys claimed are not owing for reasons referable to the terms of the construction contract and/or to the parties’ performance or failure

⁷⁰ *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472, 487-488 [68]-[69] (Hill J); *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119 (*‘Neumann’*), [46] (Muir JA with Holmes and Chesterman JJA agreeing).

⁷¹ *Neumann*.

to perform thereunder.

126 In this case, 1559HS was allegedly misled in around September 2022 during the currency of the works and about the timing and manner in which those works were to be performed.

127 According to the submissions of 1559HS, but for the misleading and deceptive conduct, Camillo would have remained under an obligation under the Construction Contract to bring the works to practical completion by the date for practical completion and, in those circumstances Camillo's entitlement to payment would have been limited to the tender price approved by the superintendent, subject to any variations. Further, if there was a delay in completion of the façade works, Camillo's delay would have given rise to a claim by 1559HS for liquidated damages under the Construction Contract.

128 It is apparent from these submissions that 1559HS's defence arising under the ACL is both referable to the terms of the Construction Contract and the parties' performance or failure to perform under it. As 1559HS observed in its own submissions about inconsistency, the alleged misconduct resulted in 1559HS directing Camillo to terminate its subcontract with Colab BT and engage Profix – a direction that operated to alter the parties' rights under the Construction Contract.

129 I therefore find that the defence does relate to matters arising under the Construction Contract and is caught by s28R(5)(a)(ii) of the SOP Act.

130 In relation to the issue of inconsistency, the SOP Act provides for a fast track procedure for the entry of judgment which may be undertaken ex parte. Very limited evidence is required. Only two specific documents are required to be filed, being:

- (a) the adjudication certificate; and
- (b) an affidavit complying with s 28R(2)(b).

131 The SOP Act then allows for the respondent to commence proceedings to have the judgment set aside, but on limited grounds. This approach is consistent with the

purpose of the SOP Act to create an expedited process for enforcing a statutory liability to pay an adjudicated amount on account, while preserving the parties' other rights.

132 Again, in my view and for the reasons I have already set out, the provisions of the SOP Act governing the procedure to enforce a payment claim (which include s 28R) do not alter, impair or detract from the operation of the ACL. It is not inconsistent with the rights under the ACL to allow for the enforcement of an interim payment under the SOP Act – ahead of the final determination of the rights of the parties to the Construction Contract.

133 As submitted by Camillo, the ACL creates a regime for the curial enforcement of rights. It does not undermine that scheme to allow a separate and new set of statutory rights to be created, and to leave it to a court to decide whether those rights can be enforced ahead of the ACL claim – especially when considered in the context of the 'full judicial armoury' (including case management, interlocutory injunctions, stays, freezing orders and remedial awards such as interest and restitution) – and nothing in the SOP Act carves out this Court's inherent power to grant an injunction or to order a stay in a proper case.

K **Issue 4 – Should the Judgment be set aside on the basis that it is either irregular and/or because a necessary fact to enliven the County Court's jurisdiction did not exist?**

K.1 How this issue arises

134 1559HS contend that County Court Judgment should be set aside because it was irregularly obtained. Specifically, when Camillo brought its ex parte application for judgment, 1559HS says there was no jurisdiction for the provision of an adjudication certificate as the time to pay had not elapsed under s 28M of the SOP Act.

135 This issue arises in the following circumstances:

- (a) On 21 September 2023, the solicitors for Camillo sent the Adjudicator a letter which stated that the Original Determination (made on 18 September 2024)

contained a mathematical error and requested the Adjudicator to make a corrected adjudication determination pursuant to the slip rule under s 24 of the SOP Act.

- (b) On 26 September 2024, the Adjudicator issued the Corrected Determination.
- (c) The correction and the reason for it may be summarised as follows:
 - (i) the parties had referred to a portion of the Payment Claim known as the ‘Early Completion Bonus’ as being either \$270,000 excluding GST (as contended by Camillo) or \$140,000 excluding GST (as contended by 1559HS);
 - (ii) at paragraph 254 of the Original Determination, the Adjudicator determined \$140,000 excluding GST was payable to Camillo in relation to the Early Completion Bonus;
 - (iii) for the purpose of the Original Determination, the Adjudicator prepared a table which he used to calculate his assessment of the adjudicated amount payable to Camillo;
 - (iv) in error, the Early Completion Bonus figure included in that table was recorded as \$14,000 excluding GST instead of \$140,000 excluding GST. It is not disputed that this was an error made by the Adjudicator;
 - (v) that error resulted in a calculated shortfall of the adjudicated amount by \$126,000 excluding GST (or \$138,600 including GST); and
 - (vi) by making the correction requested by Camillo, the adjudicated amount increased from \$1,709,710.30 including GST to \$1,848,310.32 including GST.

136 On 27 September 2023 an adjudication certificate was issued under s28Q of the SOP Act, certifying the corrected adjudicated amount.

K.2 Legislation – the SOP Act

137 It is convenient to set out here the additional provisions of the SOP Act which are relevant to the determination of this issue.

138 Section 23 describes the task to be undertaken by the Adjudicator and thereby defines “adjudicated amount”. Relevantly it reads:

Adjudicator’s determination

- (1) An adjudicator is to determine –
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
 - (b) the date on which that amount became or becomes payable; and
 - (c) the rate of interest payable on that amount in accordance with section 12(2).

...

139 Section 23A provides that the nominating authority must give a copy of that adjudication determination to the claimant and respondent.

140 Section 24 governs the correction of mistakes in determinations. Stated in full, it provides:

Correcting mistakes in determinations

- (1) An adjudicator may correct a determination made by him or her if the determination contains –
 - (a) a clerical mistake; or
 - (b) an error arising from an accidental slip or omission; or
 - (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination; or
 - (d) a defect of form.
- (2) The correction may be made –
 - (a) on the adjudicator's own initiative; or
 - (b) on the application of the claimant or the respondent.

- (3) If a correction is made to a determination under this section, the authorised nominating authority to whom the adjudication application was made must give a copy of the corrected determination to the claimant and the respondent and the Authority as soon as practicable after the correction is made.
- (4) An adjudicator cannot make a correction of a determination under this section if an application has been made under Division 2A for a review of the determination.

141 Division 2B of the SOP Act addresses the payment and recovery of adjudicated amounts. It contains ss 28M (which deals with a respondent's obligation to pay an adjudicated amount), 28O (which deals with the consequences of a respondent not paying an adjudicated amount), 28Q (which deals with adjudication certificates) and 28R (which has already been set out above). The relevant part of those provisions read:

28M Respondent required to pay adjudicated amount

- (1) Subject to sections 28B and 28N, if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date.
- (2) In this section *relevant date* means –
 - (a) the date that is 5 business days after the date on which a copy of the adjudication determination is given to the respondent under section 23A; or
 - (b) if the adjudicator determines a later date under section 23(1)(b), that later date.

...

28O Consequences of respondent not paying adjudicated amount

- (1) If the respondent fails to pay the whole or any part of an adjudicated amount in accordance with section 28M or 28N, the claimant may –
 - (a) request the authorised nominating authority to whom the adjudication application or the adjudication review application was made to provide an adjudication certificate under section 28Q; and

...

28Q Adjudication certificates

- (1) An adjudication certificate provided by an authorised nominating authority on a request under this Division must state that it is made under this Act and specify the following matters –
- (a) the name of the person requesting the certificate;
 - (b) the name of the person who is liable to pay the adjudicated amount;
 - (c) the amount payable under section 28M or 28N;
 - (d) the date on which payment of that amount was due to be paid to the person requesting the certificate.

...

142 The term ‘adjudication determination’, referred to in s 28M(2)(a), is defined in s 4 of the SOP Act to mean “a determination made by an adjudicator under section 23”.

K.3 1559HS’s submissions

143 1559HS submits that there are no degrees of irregularity in judgments. A judgment is either regular or irregular and where the responsibility for the irregularity lies at the feet of the plaintiff, the defendant “should be allowed to take advantage of the irregularity in [the] judgment and enter an appearance for the purpose of defending the action.”⁷²

144 1559HS contends in this proceeding the Judgment is irregular or void because it is based upon an irregular certificate. Specifically, when Camillo commenced its ex parte application in the County Court, there was no jurisdiction for the provision of an adjudication certificate under s 28O as time to pay had not elapsed under s 28M. That is, the Corrected Determination was issued on 26 September, only 1 day prior to the certificated being provided on 27 September 2023.

145 1559HS submits that:

- (a) Section 28M of the SOP Act provides that if an adjudicator determines that a

⁷² *Lam v Gulic* (1979) 25 ACTR 46 at p 48 (Blackburn CJ).

respondent is required to pay an adjudicated amount, then the respondent must pay the amount within 5 business days after the respondent is given a copy of the adjudication determination. Section 28M must also apply to *corrected adjudications*, as otherwise a respondent would be required to pay an incorrect amount.

- (b) Section 28O of the SOP Act provides that a claimant may request the nominating authority to provide an adjudication certificate if the respondent fails to make payment within 5 business days under s 28M.
- (c) Sections 28R(1)-(4) of the SOP Act provide that a proceeding seeking judgment cannot be brought, and judgment is not to be entered unless an adjudication certificate is filed in court supported by an affidavit stating that the whole or any part of the amount payable has not been paid under s 28M, **and** the respondent *is liable* to pay the unpaid amount at the time the proceeding is commenced.
- (d) In this case, on 27 September 2023, when the nominating authority provided the adjudication certificate upon which judgment was sought, 5 business days had not passed since the Corrected Determination was made.
- (e) Accordingly, there was no power under the SOP Act for the nominating authority to provide an adjudication certificate, and the adjudication certificate upon which judgment was sought and granted is void.

K.4 Camillo's submissions

146 Camillo submitted that the adjudication certificate is valid and 1559HS has misconstrued s 28M(2)(a). Specifically, it submitted that 1559HS's construction ignores the statutory reference in s 28M(2)(a) to s 23A of the SOP Act. Camillo says that reference is critical for the following reasons:

- (a) Where an adjudication determination is corrected under s 24 of the SOP Act, the corrected adjudication determination is not given to the parties pursuant to

s 23A, but pursuant to s 24(3). If s 28M had been intended to count time from the corrected adjudication determination, then it could have said so instead of just referring to s 23A.

- (b) What this means is that the “relevant date” did not start from the date the Corrected Determination was given under s 24(3) (on 26 September 2023) but from the date the Original Determination was given under s 23A (on 19 September 2023).⁷³
- (c) Starting the clock on the “relevant date” in s 28M without restarting it upon any correction serves the interests of prompt payment of the statutory entitlement to the claimant, which is consistent with the whole purpose of the SOP Act.

147 Further Camillo submitted that section 24 of the SOP Act is a ‘slip rule’ which should be given similar interpretation to court orders that are corrected under analogous provisions (whereby the order takes effect from the date it is made, rather than the date of correction).⁷⁴

148 Finally, Camillo submitted that:

- (a) At the time Camillo applied for the adjudication certificate, that part of the ‘adjudicated amount’ stated in the Original Determination provided to the parties on 19 September 2023 under s 23A had been unpaid and outstanding for six business days.
- (b) Even if the expression ‘adjudicated amount’ is to be construed as narrowly as 1559HS contends, Camillo was still entitled under s 28O to apply for an adjudicated certificate under s 28Q of the SOP Act on 27 September 2023. Accordingly the County Court had jurisdiction to at least make an order for the original adjudicated amount when Camilo applied.

⁷³ See *Steel Contracts Pty Ltd v Simons & Ors* [2014] ACTSC 146, [88] (Refshauge J).

⁷⁴ *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 133 ALR 206 (Black CJ, Lockhart and Lindgren JJ).

- (c) This Court could by declaration and/or injunction vary the County Court judgment by severing any premature judgment sum. Of course Camillo would then be free to apply to the County Court for the differential. This would invoke the consideration of futility and the Court's discretion to refuse judicial review relief or making supporting declarations here.⁷⁵

K.5 Consideration

- 149 It is common ground that the Corrected Determination was a consequence of an error made by the Adjudicator in the calculation of the adjudicated amount arising from an accidental slip.
- 150 Section 24 of the SOP Act empowers the Adjudicator to correct such an error. The Adjudicator's power to correct a determination under s 24 is, by its terms, discretionary. Injustice that may flow from the exercise of it would be an obvious matter to take into account. I note that both parties were on notice of the error and the request that it be corrected, before it was corrected. There is no suggestion that the exercise of the power was inappropriate.
- 151 Similarly, this Court has power to correct clerical mistakes or errors arising from an accidental slip as a part of its inherent jurisdiction and under r 36.07 of the *Supreme Court (General Civil Procedure) Rules 2015*.
- 152 When the court amends an order under a slip rule, the correction speaks from the date of the original order.⁷⁶ The essential purpose of the slip rule is to give effect to the intention which the court would have had, if it were not for the failure which lead to the accidental slip or omission. The legal operation of the later order is simply to correct a previous mistake.
- 153 Having regard to the text and purpose of the SOP Act, in my view, s 24 operates

⁷⁵ *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 41 [101] (Edelman J); 172 at [161]-[168] *Grocon v Planit Cocciardi* (2009) 26 VR 172, 215 - 216 [161]-[168] (Vickery J); See also *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [92] (Palmer J).

⁷⁶ *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 133 ALR 206, 211 (Lockhart J with whom Black CJ agreed).

similarly to the slip rule applied to court orders, such that in this case the Corrected Determination speaks from the date of the Original Determination. My reasons for this conclusion are as follows:

- (a) Section 28M sets the time by which the respondent must pay the adjudicated amount by express reference to the determination given under s 23A. Had parliament intended the clock to restart with any correction, a reference to a corrected determination delivered under s 24(3) could have been included in s 28M but it was not.
- (b) Such a construction is consistent not only with the text but also the purpose of the SOP Act to give effect to the determination the Adjudicator would have made, if it were not for the failure which lead to the accidental slip or omission, and to provide for the speedy enforcement of it.

154 As the Corrected Determination operates from the date of the Original Determination, there was nothing irregular about the certificate relied upon to underpin Camillo's ex parte application and no basis to set aside the Judgment delivered pursuant to it.

L Issue 5 – Was the Judgment made in circumstances where the County Court failed to accord 1559HS procedural fairness?

L.1 1559HS's submissions

155 1559HS claims the Judgment is void and unlawful because it was not accorded procedural fairness as the Judgment was entered:

- (a) In circumstances where the adjudication certificate was irregular for the reasons described in section K above. As I have determined that the Adjudication Certificate was not irregular, I reject this submission and will not address it further.
- (b) Pursuant to an ex parte application and therefore it had no opportunity to raise its defence based on its arguable claim under the ACL or jurisdictional challenges it has raised in this proceeding.

- (c) Pursuant to an ex parte application in which Camillo breached its duty of candour when it failed to disclose this argument and the statutory inconsistency argument to the County Court.

L.2 Camillo's submissions

156 Camillo submits, in summary, that there was no denial of procedural fairness because:

- (a) It was and is always open to 1559HS to seek to set aside the ex parte Judgment.
- (b) If 1559HS were right, every ex parte judgment would be invalid on the basis of a denial of procedural fairness, which is plainly wrong.

L.3 Consideration

157 Procedural fairness may be denied to a party where a court makes a decision on grounds that were not pleaded or argued and without giving the party adversely affected a reasonable opportunity to give evidence and make submission on those grounds.⁷⁷

158 I reject the claim that 1559HS was denied procedural fairness by the County Court.

159 First, the process for enforcing the determination is set out in s 28R. The SOP Act is concerned with the enforcement of the statutory entitlement to a progress payment, not the determination of the broader rights of the parties to the construction contract. The court need only be satisfied of the matters set out in s 28R(2) to (4) (see paragraph [107] above). It is intended to be a fast track procedure for the entry of judgment that may proceed ex parte. In those circumstances, there is no denial of procedural fairness by the County Court proceeding as provided for in the SOP Act.

160 Second, I am not satisfied that there has been any breach of candour by Camillo in relation to the ex parte application for judgment. The obligation on Camillo invoking the s 28R procedure is to file the certificate and an affidavit. It did so. Noting, again, that the SOP Act is not concerned with the determination of the broader rights of the

⁷⁷ *Kuek v Wade* [2017] VSCA 329, [63] (Tate and Kyrou JJA).

parties to the construction contract, it was not necessary for Camillo to raise for the Court's attention 1559HS's claim under the ACL unless for example, it was a claim arising from conduct undertaken in service of a payment claim for the purpose of creating the statutory right.⁷⁸

161 Third, even if there had been a breach of the duty of candour, that is not a breach that strikes at the jurisdiction of the County Court. Rather, it is a matter for the Court to attend to in the exercise of its jurisdiction.

M Camillo's reliance on s 138B of the Competition and Consumer Act

M.1 How this issue arises

162 Just prior to lunch on the third and last day of hearing, Camillo raised a new and alternative argument for the first time, without prior notice to the Court or the plaintiff and without explanation for the delay in raising it.

M.2 Camillo's submissions

163 Camillo submits in summary:

- (a) Section 77(iii) of the Constitution permits the Commonwealth Parliament to invest federal jurisdiction in State Courts and it did so in respect of ACL claims through s 138B of the *Competition and Consumer Act 2010* (Cth).
- (b) Section 138B is subject to an express restriction in sub-section 138B(3) which provides that the jurisdiction conferred on the several courts of the States is conferred within the limits of their several jurisdictions, whether those limits are as to locality, subject matter or otherwise.
- (c) This restriction is self-imposed in the sense that the Commonwealth Parliament could have required State courts to be invested with unfettered jurisdiction to determine ACL claims, despite whatever the Victorian Parliament wanted, but

⁷⁸ *Khouzame v All Seasons Air Pty Ltd* (2015) 229 FCR 279, 285-286 [27]-[28] (Robertson, Wigney and Gleeson JJ).

that is not what was done.

- (d) By the interim SOP Act statutory scheme the Victorian parliament has established a statutory cause of action and conferred jurisdiction in respect of that cause of action in s 28R. In any proceeding to set aside the judgment entered under s 28R, that proceeding is limited by the Victorian Parliament to exclude defences or cross claims within s 28R. Section 138B(3) respects that legislative choice, where, as here, there is a subject matter exclusion.
- (e) What s 138B does is invest jurisdiction in the County Court and Supreme Court to determine ACL claims in proceedings separate from the proceeding in which it is sought to set aside the judgment entered. Such separate proceedings are not proceedings to have the judgment set aside and are thus not excluded by s 28R(5).
- (f) In short, there is no inconsistency between the ACL and s 28R(5) at any level, in circumstances where the Commonwealth Parliament did not purport to override any limits which the Victorian Parliament chose to place on causes of action heard by State courts in particular proceedings.

M.3 1559HS's submissions

164 1559HS objected to the new argument being raised and heard.

165 Under cover of that objection it provided short written submissions following the hearing as follows:

- (a) This Court has the power to determine Commonwealth matters by reason of s 39(2) of the *Judiciary Act 1903* (Cth) and s 138B(1) of the *Competition and Consumer Act 2010* (Cth).
- (b) This matter is a single justiciable controversy in federal jurisdiction.⁷⁹ There are not two matters, one here in this Court, and another matter to be agitated in

⁷⁹ *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226, [47]-[48], [57] – [58] McLeigh, Niall and Walker JJA); *Façade*, 474 [92] (Warren CJ, Tate and McLeish JJA).

separate proceedings. If Camillo is correct, then the entire matter would fall outside the Supreme Court's jurisdiction the moment 1559HS's non-colourable ACL claim is raised.

- (c) In *D & H Investments Pty Ltd & Anor v Wagner*,⁸⁰ White J stated at [114]:

It is not within the legislative competence of a State Parliament to preclude one of its courts, whilst it continues in existence, from exercising a federal jurisdiction which has been conferred upon it.

- (d) Section 28R(5) does not restrict the Court's jurisdiction. What it does is impose what are akin to procedural rules on counterclaims and defences that can be brought in proceedings to set aside a judgment. Those rules (like time limits and rules of court) validly restrict the exercise of common law rights. However, to the extent they purport to alter, impair or detract from the operation of a Commonwealth law, they are invalid.
- (e) The Court's jurisdiction to determine the matter is different to the powers it may use in exercising its jurisdiction.⁸¹

M.4 Consideration

166 It is neither necessary nor appropriate for me to determine this issue in the following circumstances:

- (a) It is an argument relied on by Camillo in the event it was otherwise unsuccessful. I have found in favour of Camillo in relation to each of the other issues in dispute.
- (b) The objective of the Commercial Court is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute. Steps were taken in this matter to identify real issues in dispute by the conferral and agreement of a list of issues in advance of trial. This issue about s 138B was not identified.

⁸⁰ [2005] SASC 51.

⁸¹ *Minister for Immigration v B* (2004) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J); *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J).

Instead it was first raised in the middle of the third and last day of hearing. No good reason was given by Camillo why this issue was raised late and without notice.

- (c) The prejudice experienced by 1559HS is evident and it sensibly takes objection to this new argument being entertained at all.
- (d) While the issue raised for determination is a legal question it has been posed with little assistance to the Court. Camillo did file very short written submissions in support of its argument following the hearing but without any supporting authority.

N Conclusion

167 Subject to hearing from the parties as to their form of order, I propose to make orders to the effect that the FAOM of 1559HS be dismissed.

CERTIFICATE

I certify that this and the 56 preceding pages are a true copy of the reasons for judgment of Justice Stynes of the Supreme Court of Victoria delivered on 9 May 2025.

DATED this ninth day of May 2025.



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Associate