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

Not Restricted

S ECI 2021 04907

ARGYLE BUILDING SERVICES PTY LTD
(ACN 151 322 520) — Plaintiff

v

DALANEX PTY LTD trading as RK BASEMENT & STRUCTURE SOLUTIONS
(ABN 98 372 123 062) — First Defendant

JOHN McMULLAN — Second Defendant

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	14 April 2022; further written submissions 19 April 2022 and 3 May 2022
DATE OF JUDGMENT:	10 August 2022
CASE MAY BE CITED AS:	*Argyle Building Services Pty Ltd v Dalanex Pty Ltd (No 2)*
MEDIUM NEUTRAL CITATION:	[2022] VSC 452

ADMINISTRATIVE LAW – Building and construction – Judicial review – Adjudication under Part 3 Division 2 of the *Building Industry Security of Payment Act 2002* (Vic) – Application for *certiorari* and declarations – Whether subcontract specified reference date – Inconsistency between contractual provisions – Reference date unable to be determined by reference to contract – Adjudicator correctly applied s 9(2)(b) of Act – Purported unilateral withdrawal of payment claim – Second payment claim purportedly served in respect of single payment claim a nullity – No jurisdictional error established – Notice issued pursuant to s 21(2B) – Whether submissions to adjudicator 'duly made' – Whether adjudication determination contravened s 23(2B) – Contravention of s 23(2B) not proved – *Building Industry Security of Payment Act 2002* (Vic) ss 9(2), 15(2)-(3), 19, 21(2B), 22(5), 23(2), 23(2A), 23(2B) – *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd* [2018] VSCA 289, *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VCC 1261, *Fitzgerald v Masters* (1956) 95 CLR 420, *Valeo Construction Pty Ltd v Pentas Property Investments Pty Ltd* [2018] VSC 243,

Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) 74 NSWLR 190, *Trustees of the Roman Catholic Church for the Diocese of Lismore v TF Woollam and Son Pty Ltd* [2012] NSWSC 1559, *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 referred to – *Citi-Con (Vic) Pty Ltd v Punton's Shoes Pty Ltd* [2020] VCC 804, *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd* [2009] NSWCA 157, *John Holland Pty Ltd v Roads and Traffic Authority of NSW* [2007] NSWCA 19, *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Craig QC with Mr A Blunt	Thomson Geer
For the Defendants	Mr M Robins QC with Mr D Dudderidge	Ward & Co

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HIS HONOUR:

Introduction and Overview

1 The plaintiff, Argyle Building Services Pty Ltd ('Argyle'), is the head contractor on a building project located at 68-74 Chapman Street, North Melbourne. The first defendant, Dalanex Pty Ltd, trading as RK Basement and Structure Solutions ('RK'), is a subcontractor to Argyle on the project.

2 In this proceeding Argyle applies for an order that the adjudication determination of the second defendant, John McMullan, dated 9 November 2021 ('Adjudication Determination') in favour of RK in the sum of $431,266.80, made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('SOP Act'), be quashed.[1] Alternatively, Argyle seeks a declaration that the Adjudication Determination is void.

3 The grounds relied upon by Argyle in its amended originating motion dated 23 February 2022 are as follows:

> 1. Mr McMullan committed a jurisdictional error, by determining that the 12 July 2021 payment claim, being the payment claim relevant to the Adjudication Determination, was made on and from a 'reference date' for the purposes of section 9(1) of the SOP Act, in circumstances where RK had served multiple payment claims on and from the reference date …
>
> 2. The Adjudication Determination is void by reason of section 23(2B)(b) of the SOP Act because Mr McMullan took into account RK's further submissions dated 28 October 2021 and its supporting further documentation, in circumstances where those submissions and that further documentation had not been duly made for the purposes of section 23(2)(c) of the SOP Act …[2]

4 The relief sought by Argyle is opposed by RK. Mr McMullan played no active role in the proceeding.

5 In support of their respective positions, Argyle and RK relied on written submissions filed both before and after the hearing:

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1 In these reasons, unless stated otherwise, all amounts are expressed as inclusive of GST.

2 Plaintiff, Amended Originating Motion dated 23 February 2022, [1]-[2].

(a) Argyle's submissions are dated 11 March 2022, 28 March 2022 and 19 April 2022; and

(b) RK's submissions are dated 11 March 2022, 25 March 2022 and 3 May 2022.

6 Three issues fell for determination in the proceeding.

(a) The first: whether Mr McMullan committed a jurisdictional error by determining that 12 July 2021 was a 'reference date' under the subcontract because s 9(2)(b) of the SOP Act, rather than s 9(2)(a) of the Act, was the subsection required to be applied ('Ground 1(a)').

(b) The second, related to the first: whether RK served multiple progress payment claims in respect of the same 'reference date' under the subcontract ('Ground 1(b)'). The relevant claims were submitted:

(i) on 21 June 2021, in the amount of $379,723.15 ('Claim 8'), later purportedly unilaterally withdrawn by RK and replaced by a claim made on 2 July 2021 ('Claim 8.1'); and

(ii) on 12 July 2021, in the amount of $465,586.68 ('Claim 9').

(c) The third: whether the Adjudication Determination is void by reason of s 23(2B)(b) of the SOP Act because Mr McMullan took into account RK's further submissions dated 28 October 2021 which had not been 'duly made' for the purposes of s 23(2)(c) of the SOP Act ('Ground 2').

7 For the reasons that follow, I have determined those issues as follows:

(a) There was no jurisdictional error as alleged in Ground 1(a). Mr McMullan was correct to find that s 9(2)(b) of the SOP Act applied to determine the 'reference date' under the subcontract. As found by Mr McMullan, 12 July 2021 was the 'reference date' under the subcontract.

(b) Having regard to the finding concerning Ground 1(a), the issue raised by

Ground 1(b) does not arise on the facts. Claim 9, made on 12 July 2021, was a claim for work performed in the month of July. Claim 8 was originally made on 21 June 2021. It was a claim for work performed for the month of June. The original Claim 8 was unilaterally withdrawn by RK and replaced by Claim 8.1 on 2 July 2021. The Act does not contemplate the unilateral withdrawal and resubmission of a payment claim. Claim 8.1, when purportedly re-submitted on 2 July 2021, was a nullity. Claim 8 remained the only payment claim submitted for the month of June. Claim 9 was a payment claim for the month of July. This was not a case of the service of multiple payment claims on and from the same reference date. Ground 1(b) fails.

(c) Ground 2 also fails. Ground 2 depended upon a finding that the s 21(2B) notice issued by Mr McMullan on 26 October 2021 (the '21(2B) Notice') was a notice issued in contravention of s 21(2B) of the SOP Act. Argyle submitted that because the 28 October 2021 submissions by RK were made in response to that notice, the submissions were not 'duly made' as required by s 23(2)(c). Ground 2 fails because the 21(2B) Notice was not issued in contravention of s 21(2B). It is a matter for the adjudicator to determine whether submissions were 'duly made'. If that is not correct and the issue is one for the Court to determine, in my opinion the 28 October 2021 submissions were 'duly made' in response to the 21(2B) Notice. Even if the notice did not comply with s 21(2B) (a proposition I reject) Mr McMullan had the power to request written submissions pursuant to s 22(5) of the SOP Act. Even if he purported to act under a head of power that was not available to him, the decision to invite submissions was a valid decision. Further, s 23(2B) imposes an obligation upon the moving party to show the extent to which the adjudication determination is void. Argyle failed to discharge that onus. In circumstances where Argyle sought and was given an opportunity to make submissions in response to the 28 October 2021 submissions, and where it made such submissions and provided additional materials in support, there was no denial of procedural fairness. For those reasons, the relief sought must be

refused.

The Legislation

8 A large number of the provisions of the SOP Act are relevant to the grounds upon which Argyle relies. Although reference is made later in these reasons to specific provisions, it is convenient to reproduce all of the relevant provisions:

> **1. Purpose**
>
> The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.
>
> …
>
> **3. Object of Act**
>
> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
>
> (3) The means by which this 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 by the person claiming payment; and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable; and
>
> (c) the referral of any disputed claim to an adjudicator for determination; and
>
> (d) the payment of the amount of the progress payment determined by the adjudicator; and
>
> (e) the recovery of the progress payment in the event of a failure to pay.
>
> (4) It is intended that this Act does not limit—
>
> (a) any other entitlement that a claimant may have under a construction contract; or
>
> (b) any other remedy that a claimant may have for recovering that other entitlement.

…

9. Rights to progress payments

(1) On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

(2) In this section, "reference date", in relation to a construction contract, means—

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d),[3] if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract; or

…

14. Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

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3 Those provisions are not relevant on the facts of this case, which does not concern either a single one-off payment or a final payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

Note Section 10(3) provides that a progress payment must not include an excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served

under this Act in respect of a construction contract if —

(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and

(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

…

15. Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule —

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

(d) must be in the relevant prescribed form (if any); and (e) must contain the prescribed information (if any).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If —

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not provide a payment schedule to the claimant —

(i) within the time required by the relevant construction contract; or

(ii) within 10 business days after the payment claim is served; whichever time expires earlier —

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

…

18. Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an adjudication application) if—

(a) the respondent provides a payment schedule under Division 1 but—

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

(3) An adjudication application—

(a) must be in writing; and

(b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and

(c) in the case of an application under subsection (1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule; and

(d) in the case of an application under subsection (1)(a)(ii), must be made within 10 business days after the due date for payment; and

(e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and

(f) must identify the payment claim and the payment schedule (if any) to which it relates; and

(g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and

(h) may contain any submissions relevant to the application that the claimant chooses to include.

(4) If the construction contract to which the payment claim relates lists 3 or more authorised nominating authorities, the application must be made to one of those authorities chosen by the claimant.

(5) A copy of the adjudication application must be served on the respondent.

* * * * *

(7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator as soon as practicable.

(8) An adjudicator to whom an application is referred under subsection (7) must be a person who is eligible to be an adjudicator as referred to in section 19.

…

21. Adjudication responses

(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within—

(a) 5 business days after receiving a copy of the application; or

(b) 2 business days after receiving notice of an adjudicator's acceptance of the application—

whichever time expires later.

(2) The adjudication response—

(a) must be in writing; and

(b) must identify the adjudication application to which it relates; and

(c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and

(ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and

(d) may contain any submissions relevant to the response that the respondent chooses to include.

(2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

(2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant—

(a) setting out those reasons; and

(b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

(3) A copy of the adjudication response must be served on the claimant.

(4) In this section "relevant principal" in relation to the respondent, means any person with whom the respondent has entered into a contract (that is not a construction contract exempted from this Act under section 7(2)(b) or 7(2)(ba)) for the provision by the respondent of construction work or goods and services if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the first-mentioned person engaged the respondent to carry out or supply.

22. Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

(2) An adjudicator must serve a written notice—

(a) on any relevant principal and any other person who is included in the adjudication response under section 21(2)(c); and

(b) on any other person who the adjudicator reasonably believes, on the basis of any submission received from the claimant or the respondent, is a person who has a financial or contractual interest in the matters that are the subject of the adjudication application.

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

(a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance

with section 20(2); or

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

(4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

(5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator —

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and

(b) may set deadlines for further submissions and comments by the parties; and

(c) may call a conference of the parties; and

(d) may carry out an inspection of any matter to which the claim relates.

(5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

(6) The adjudicator's power to determine an application is not affected by the failure of either or both of the parties to make a submission or comment within the time or to comply with the adjudicator's call for a conference of the parties.

23. 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).

Note The adjudicated amount may be added to under section 45(8).

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only —

(a) the provisions of this Act and any regulations made under this Act;

(b) subject to this Act, the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(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.

(3) The adjudicator's determination must be in writing and must include—

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided.

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract—

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

…

28. Claimant may make new application if previous application refused

or not determined

(1) This section applies if—

(a) a claimant fails to receive an adjudicator's notice of acceptance of an adjudication application within 4 business days after the application is made; or

(b) an adjudicator who accepts an adjudication application fails to determine the application within the time allowed by section 22(4).

(2) In either of those circumstances, the claimant—

(a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) may make a new adjudication application under section 18.

(3) Despite sections 18(3)(c), 18(3)(d) and 18(3)(e), a new adjudication application may be made at any time within 5 business days after the claimant becomes entitled to withdraw the previous adjudication application under subsection (2).

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

9 There are some definitional and other features of and related to the SOP Act that should be noted, particularly in relation to Ground 1(a). They concern the qualifications held by adjudicators and the process and criteria for their appointment.

10 An 'adjudicator' is defined in s 4 of the SOP Act to mean the person appointed in accordance with the Act to determine the application.

11 Section 19(1)(b) of the SOP Act provides that the qualifications, expertise and experience of a natural person in order for that person to be eligible to be an adjudicator under the Act may be prescribed. No criteria have been prescribed.

12 Section 42(1) of the SOP Act provides that the Victorian Building Authority (the 'VBA') may authorise persons to nominate adjudicators for the purposes of the Act. Section 41(2) provides that before giving an authorisation, the VBA must have regard to any guidelines issued by the Minister and published in the Government Gazette as provided for in s 44 of the SOP Act. Section 44(2)(c) of the SOP Act

provides that the guidelines may provide for the qualifications and experience that are relevant to the carrying out of an authorised nominating authority as adjudicators. Ministerial Guidelines pursuant to s 44 of the SOP Act have been gazetted.[4]

13 Nothing in the SOP Act or those guidelines refers to or imposes an obligation upon authorised nominating authorities to appoint persons as adjudicators who are legally qualified.

The Subcontract

14 The subcontract between Argyle and RK is dated 14 December 2020. It is for the carrying out of concreting and basement works on the project for the sum of $2.1 million.

15 Before Mr McMullan, there was a dispute between the parties as to the relevant documents which comprise the subcontract. Argyle identified the following documents which it submitted relevantly comprise the subcontract:

(a) a formal instrument of agreement dated 14 December 2020 ('FIA');

(b) an amended standard form of subcontract conditions AS 4901-1998 ('GCs'); and

(c) a scope of works ('Scope of Works').

16 Before Mr McMullan, RK submitted that the contractual documents did not include the GCs.[5] However, opposition to the proposition that the subcontract includes the GCs was not maintained by RK in the proceeding.[6]

17 The relevant subcontract documents include three separate provisions which concern the making of progress claims/payment claims. Contractual provisions concerning the making of payment claims are relevant to determining the 'reference

4 Victoria, *Victoria Government Gazette,* No 69, 30 March 2007.
5 Court Book ('CB'), 813.
6 See, for example, RK's submissions dated 11 March 2022, [14].

date' pursuant to s 9(2) of the SOP Act.

18 Part A of Annexure A to the FIA states, against the heading 'Time for payment claims (Clause 37.1)':

> Claims submitted *by the 20th day* of the month with payment no later than 30 days after the end of the month in which the claim is made.[7]

19 Item 18 in Annexure B to the FIA deletes clause 37.2 of the GCs, replacing that clause with the following:

> The Subcontractor is required to submit claims *no later than the 21st* of each month with a full break up of items of work and percentage (%) complete for each item of work. Claims received after this date will be included in the claim for the following month…[8]

20 Item 4.4 of the Scope of Works states:

> Progress claims to be submitted *on the 20th day* of each month for works up to the 25th day of the month claimed…[9]

21 No provision of the subcontract documents provides a hierarchy to be applied in the case of inconsistency or conflict in subcontract documents. There is, similarly, no clause contained in the subcontract documents that determines how any inconsistency between contractual terms is to be resolved. The closest to a clause addressing inconsistencies or conflicts is Item 4 of Annexure B of the FIA, which replaces clause 8.1 of the GCs:

> **Clause 8.1 is deleted and replaced by:**
>
> The Contract supersedes all previous offers and negotiations.
>
> The several documents or evidence, which constitute the Contract, shall be taken as mutually explanatory and anything contained in one but not in another, shall be equally binding as if contained in all.
>
> If either party discovers any ambiguity or discrepancy or inconsistency in any document prepared for the purpose of performing the Works, that party shall notify the Main Contractor's Representative in writing of the ambiguity, discrepancy or inconsistency. The Main Contractor's Representative shall direct the Subcontractor as to the interpretation to be followed by the

7 CB, 108 (emphasis added).
8 CB, 115 (emphasis added).
9 CB, 123 (emphasis added).

> Subcontractor in carrying out those parts of the Works to which the ambiguity, discrepancy or inconsistency relates. Any such ambiguity, discrepancy or inconsistency shall be at the Subcontractor's risk and any direction given under this clause shall not entitle the Subcontractor to any compensation, whether by way of an addition to the Subcontract Sum or otherwise, or extension to the Date for Substantial completion.[10]

22 It is common ground that RK did not seek clarification from Argyle of the date by or on which payment/progress claims must be submitted, as might perhaps have been sought pursuant to clause 8.1 (as deleted and restated by Item 4 of Annexure B). I say 'perhaps' because the ability of a party to successfully invoke replacement clause 8.1 depends upon the ambiguity or inconsistency in clauses 37.1 and 37.2 (as amended by item 18 of FIA) of the GCs and clause 4.4 of the Scope of Works being properly categorised as an 'ambiguity or discrepancy or inconsistency in any document prepared for the purpose of performing the works'. As no party sought to rely on clause 8.1, it is unnecessary to resolve the question of its application in this case.

23 The lack of reliance on clause 8.1 notwithstanding, the substituted clause 8.1 still has work to do when the Court is called upon to construe ambiguous or inconsistent documents. That is because the clause provides, in part:

> the several documents … which constitute the Contract shall be taken as mutually explanatory and anything contained in one but not in another shall be equally binding as if contained in all.[11]

The Payment Claims and the Adjudication Determination Process

24 On 9 November 2021 Mr McMullan made the Adjudication Determination, determining Claim 9 in favour of RK in the sum of $431,266.80. The various progress payment claims, submissions, applications and responses which culminated in the Adjudication Determination are quite complex.

Progress Payment Claims

25 On 21 June 2021, RK issued Claim 8 in the sum of $379,723.15. In the email which attached the claim, Grant Harris, the Financial Controller of RK, described the claim

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10 CB, 111.

11 Ibid.

as the 'June Progress Claim'. On 2 July 2021, Argyle provided its payment schedule in response. It rejected the claim in full. The payment schedule referred to there being no itemised claim breakdown.[12] In response to the payment schedule, on 2 July 2021, in an email from Mr Harris, RK informed Argyle as follows:

> We take on board the comments made by Argyle within the payment schedule dated 2 July 2022.
>
> Accordingly, we formally withdraw claim 8.
>
> We will shortly issue a new claim 8 addressing the comments raised by Argyle in the payment schedule responding to the now withdrawn claim 8.[13]

26 On 2 July 2021, RK issued Claim 8.1. The replacement claim also sought payment of $379,723.15.[14]

27 On 12 July 2021, RK issued Claim 9 in the amount of $465,586.68. The claim comprised $258,985.03 outstanding under Claim 8, together with fresh claims totalling $85,734.48.[15]

28 On 9 September 2021, Argyle provided its payment schedule in response to Claim 9.[16] The schedule lists the 'Claim Period' for the claim as June 2021.[17] The 'Scheduled Amount' in the schedule is $355,159.65 – that is, Argyle asserted that it was owed $355,159.65 by Argyle. Under the heading 'Reason for Nonpayment of Claim', Argyle stated:

> Under the **BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002 (Vic) – SECT 14(8)** *"A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract."*
>
> Claim 8 was submitted by RK for the June period on 21st of June 2021.

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12 CB, 249.
13 CB, 244.
14 CB, 355.
15 CB, 252.
16 In the Adjudication Determination, Mr McMullan noted that no payment schedule was provided in response to Claim 9; the payment schedule provided by Argyle in response to Claim 9 was provided on 9 September 2021, past the deadline for payment required by s 15(4)(b) of the SOP Act. However, it appears that no party took that point in the adjudication: CB, 2253.
17 RK submitted that the claim period was incorrectly stated in the payment schedule and should have instead referred to July 2021: Transcript of Proceedings, *Argyle Building Services Pty Ltd v Dalanex Pty Ltd trading as RK Basement & Structure Solutions & Anor* (Supreme Court of Victoria, Delany J, 12 April 2022) ('Transcript'), 34.

> The claim was responded to via payment schedule on 2nd July 2021 and rejected in full – see attached.
>
> RK then formally withdrew payment claim 8 via email also on 2nd July 2021 and submitted a new claim 8.1 on the same day – see attached.
>
> In accordance with the Act the second claim is deemed to be invalid, and the first claim was responded to.
>
> Then RK submitted yet another Payment Claim (PC 09) on 12 July (again same claim period), which once again invalidates the claim.
>
> *****NOTE***** Multiple reasons exists in which Adjudication under SOPA may be deemed as jurisdictional error and should the matter be heard under the Act Argyle will contest any adverse decision on such a basis.[18]

The response attached a quantity surveyor's cost report dated 30 August 2021 prepared by AJL Consulting (Aust) Pty Ltd ('AJL Cost Report').[19]

First Adjudication Application

29 On 16 September 2021, RK applied under s 18(1) of the SOP Act for adjudication of Claim 9 ('First Adjudication Application'). RK relied on written submissions and a statutory declaration of Ronen Kavallero also dated 16 September 2021.

30 Argyle provided its adjudication response, pursuant to s 21 of the SOP Act, on 23 September 2021 ('First Adjudication Response'). The First Adjudication Response was supported by the AJL Cost Report and a statutory declaration by Sam Salloum.

31 On 28 September 2021, RK by its solicitor wrote to Mr McMullan submitting that in its First Adjudication Response, Argyle had raised new reasons for withholding payment which were not included in Argyle's payment schedule issued in respect of Claim 9.

32 RK asserted that, pursuant to the rules of natural justice and s 21(2B) of the SOP Act, it ought be provided with a fair and reasonable opportunity to respond to the matters raised. Mr McMullan was asked by RK to issue a notice pursuant to s 21(2B) of the SOP Act so as to provide RK with the opportunity to address the new issues.

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18 CB, 374 (emphasis original).
19 CB, 375, 279-345.

33 On 28 September 2021, Mr McMullan issued a notice citing s 21(2B) of the SOP Act identifying a number of matters which, in his opinion, were included in the reasons for withholding payment in the First Adjudication Response that had not been included in the payment schedule.

34 On 30 September 2021, RK provided submissions expressed to be made under s 21(2B) of the SOP Act. Those submissions were accompanied by a second statutory declaration from Mr Kavallero dated 30 September 2021 and reports from John Tamaressis, a consulting engineer, and Nathan Grimes, a quantity surveyor; in each case reports in response to the AJL Cost Report (albeit that report was by a quantity surveyor and was not supported by an engineer's report).

35 On 1 October 2021, Argyle made a request to Mr McMullan to respond to those submissions. Mr McMullan gave leave to Argyle to deliver further submissions pursuant to s 22(5) of the SOP Act.

36 On 4 October 2021, Mr McMullan emailed the parties and enquired of Argyle whether it would consent to extend the time for Mr McMullan to make his determination by five business days, pursuant to s 22(4)(b) of the SOP Act. In doing so Mr McMullan made note of s 22(4A) of the Act, which states that a claimant must not unreasonably withhold their agreement to such a request.

37 On 5 October 2022, Argyle provided Mr McMullan its further submissions.

38 On 9 October 2021, Mr McMullan informed the parties that he intended to allow the application for determination to 'time out' without making a determination within the time allowed by s 22(4) of the SOP Act, as extended. He advised the parties that, for the purpose of s 28(3) of the SOP Act, the date upon which the claimant, RK, would become entitled to withdraw the application for adjudication would be 11 October 2021. RK subsequently withdrew its First Adjudication Application in accordance with s 28(2)(a) of the SOP Act.

Second Adjudication Application and Adjudication Determination

39 On 15 October 2021, RK applied once again for the adjudication of Claim 9, pursuant

to s 28(3) of the SOP Act ('Second Adjudication Application'). The application was supported by submissions dated 15 October 2021 and statutory declarations made by Mr Kavallero, Mr Grimes and Mr Tamaressis.

40 Argyle provided an adjudication response on 22 October 2021 ('Second Adjudication Response'). Again, the response was supported by submissions, as well as a statutory declaration by Shiu (Louis) Ng, author of the AJL Cost Report, and an engineering report by Robert Talevski, both dated 22 October 2021.

41 On 26 October 2021, RK submitted to Mr McMullan that Argyle had again raised new reasons for withholding payment in its Second Adjudication Response.

42 On 26 October 2021, Mr McMullan responded to RK's correspondence by issuing the 21(2B) Notice in the form of a letter. It is this notice that forms the basis of Ground 2. The 21(2B) Notice included the following:

> 1. In my opinion, the Adjudication Response dated 23 September 2021 included the following reasons for withholding payment that were not included in the Payment Schedule dated 9 September 2021:
>
> 1. new matters raised within the statutory declaration of Shiu (Louis) Ng, including:
>
> a. replies to the Reports of Nathan Grimes and John Tamaressis dated 30 September 2021; and
>
> b. opinions as to alleged defects not previously raised including references to plans and cross sections;
>
> 2. new matters raised within the Report of Robert Talevski dated 22 October 2021, including replies to the Reports of Louis Ng and John Tamaressis dated 30 August 2021 and 30 September 2021, respectively;
>
> 3. new jurisdictional arguments, including those arguments set out in part 6B of the Adjudication Response;
>
> 4. a valuation of the original contracted works including the percentage of works completed as set out in part 8A of the Adjudication Response;
>
> 5. an assessment of defects, back charges and variations as set out in parts 9, 10 and 11 of the Adjudication Response;

plus related attachments.[20]

43 On 28 October 2021, RK responded to the 21(2B) Notice by providing Mr McMullan with submissions, a further expert report prepared by Mr Grimes (in response to Mr Ng's statutory declaration), a report from Mr Tamaressis (responding to the report of Mr Talevski) and a report from Trevor Jeffrey, a quantity surveyor.

44 On 29 October 2021, Argyle requested leave to respond to the further submissions and materials provided by RK under s 22(5) of the SOP Act, and invited Mr McMullan to conduct a site inspection of the property.

45 On 1 November 2021, Mr McMullan granted leave for Argyle to provide further submissions. On 4 November 2021, Argyle provided its further submissions. The further submissions were accompanied by quotations for allegedly defective works and copies of various drawings and plans relating to the works.

46 On 9 November 2021, Mr McMullan inspected the property.

47 On 9 November 2021, Mr McMullan made the Adjudication Determination. The adjudicated amount was $431,266.80, found to be due for payment by Argyle to RK as at 30 August 2021.

Ground 1(a): Calculation of the Reference Date

48 In *Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd*,[21] the High Court determined the existence of a 'reference date' is a precondition to making a valid claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the 'NSW Act'), New South Wales' equivalent to the SOP Act,[22] and is therefore a precondition to jurisdiction. A document purporting to be a payment claim that was not in respect of a 'reference date' was found in *Southern Han* not to be a payment claim under the Act.[23]

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20 CB, 2197-2198.

21 [2016] HCA 52; (2016) 260 CLR 340 (Kiefel, Bell, Gageler, Keane and Gordon JJ) ('*Southern Han*').

22 *Building and Construction Industry Security of Payment Act 1999* (NSW).

23 *Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 260 CLR 340, [62] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

49 The existence of a reference date is a 'jurisdictional fact', that is, a 'criterion, satisfaction of which enlivens the power of [a] decision-maker'.[24] Where the existence of such a jurisdictional fact is disputed on an application for judicial review, the Court must determine for itself whether a reference date exists.[25]

50 There are two provisions in the SOP Act by which a reference date may be determined. The first, s 9(2)(a), states that where the contract itself specifies a reference date (or manner of determining such a date), then that date shall be the reference date for the purposes of the SOP Act. The second, s 9(2)(b), provides a mechanism that sets a reference date (linked to the date on which work is first carried out) which applies where a reference date (or means of determining such a date) is not specified in the contract.

51 At [96] of the Adjudication Determination, Mr McMullan concluded, '[o]n the material before me, there was no clearly identified reference date under the Subcontract'.[26] He gave reasons in support of that finding including:

> [97] Firstly there are conflicting reference dates specified in the Subcontract: …
>
> …
>
> [100] Fourthly, in my view, the legal authorities are to the effect that the courts should not take an overly technical view of the Act ...
>
> [101] In my view, on this reasoning, to be consistent with the intent of the Act, I should prefer an interpretation of the subcontract that does not result in the Payment claim being claim [sic] should be invalid because the particular construction contract was unclear as to the time for making payment claims.[27]

52 Having determined that s 9(2)(b) had application to the subcontract, Mr McMullan went on to find that, because the works commenced on 15 December 2020, the reference dates under the subcontract were 15 January 2021, 15 February 2021,

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24 Ibid, [47], [62]; *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808, [40] (Digby J).

25 Ibid.

26 CB, 2271. See also [102], [106], [107] and [116] of the Adjudication Determination, at CB2272-2273, 2276 respectively.

27 CB, 2271-2272.

16 March 2021, 15 April 2021, 13 May 2021, 10 June 2021 and 9 July 2021. He determined the reference date in relation to Claim 9 was 9 July 2021.

The Submissions on Behalf of the Parties

53 Argyle submitted that there was a jurisdictional error by Mr McMullan:

(a) finding that reference dates were to be calculated by reference to s 9(2)(b) of the SOP Act, instead of s 9(2)(a); and

(b) failing to find that reference dates arose on a day to be selected by RK between the 21st day of the month before, to the 20th day of each month.[28]

54 In written submissions in the proceeding, Argyle submitted:

> 30. The subcontract makes express provision for the determination of reference dates under the Act even though the terms of the subcontract are inconsistent, in part: see Part A of the FIA and clause 37.1 of the GCs, which are identical in language and effect, compared with item 4.4 of the Scope of Works and then clause 37.2 of the GCs, which are not, at least in part.
>
> 31. But the existence of inconsistent terms does not displace the operation of section 9(2)(a) of the Act if, by adopting orthodox principles, the inconsistency can be fixed.
>
> …
>
> 35. In *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd* [2018] VSCA 298. There, McLeish, Hargrave JJA and Almond AJA said at [55]:
>
> > 'Where it is clear on a proper interpretation of a contract as a whole that 'something has gone wrong with the language' so as to indicate a mistake has been made, whether because the words do not make sense in context or because it is necessary to alter them to avoid absurdity or inconsistency, the Court may substitute words, insert words, delete words or rearrange words as necessary.'
>
> 36. Applying the[se] principles … a reasonable businessperson in the position of the parties at the time they entered into the subcontract would have understood that:
>
> (a) reference dates arose, monthly, on a date to be selected by RK between the 21st day of the month before to the 20th day of each month. In other words, one payment claim could be made by RK on any date between, relevantly, 21 June 2021 and 20 July 2020;

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28 Plaintiff, outline of submissions dated 11 March 2022, [22].

(b) RK could claim, each month, for works carried out or to be carried out up to the 25th of the month. Thus, RK could claim for works carried out or to be carried out up to 25 July 2021; and

(c) payment of a scheduled amount was to be made by Argyle to RK by the date that is 30 days after the end of the month in which the claim is made. In other words, payment of the scheduled amount for June and July 2021 was to be made by Argyle by 30 August 2021, being the date that is 30 days after 31 July 2021.[29]

55 Argyle concluded:

> 42. … It follows that the subcontract makes express provision for the determination of reference dates under the Act, and that each reference date arose on a date to be selected by the first defendant between the 21st day of the month before and the 20th day of the month.
>
> 43. While the construction of contracts in other cases is not always determinative, it is often illustrative. In *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VCC 1261, Woodward J held at [34] that clauses under two contracts that required payment claims to be made 'by the 25th day of the month with payment no later than 45 days after the end of the month in which the claim is made' and 'no later than the 25 [sic] day of the month' determined the 'reference date' for the purposes of section 9(2)(a) of the Act because:
>
> > 'In my view, on their proper construction, those agreements allow for a payment claim to be issued from the 26th day of the month before, up to the 25th of the relevant month, and that both INV-0489 and IV-0503 were so issued'.
>
> …
>
> 45. The same analysis should be applied in this case, too.[30]

56 Before Mr McMullan, RK submitted that the subcontract did not give rise to a specific date upon which RK is entitled to issue a payment claim; further, that the terms of the subcontract dealing with payment were conflicting and ambiguous. As a result, s 9(2)(b) had application.

57 In its written submissions in this proceeding, RK submitted that, as a matter of the proper construction of the SOP Act, a *single* reference date (for each progress

29 Ibid, [30]-[31], [35]-[36].

30 Plaintiff, outline of submissions dated 11 March 2022, [42]-[43], [45] (emphasis original).

payment) must be provided for or be capable of being determined in accordance with the terms of the contract in order for s 9(2)(a) to have application:

> The Contract provisions in respect to the possible reference date are ambiguous, or at the very least they conflict with each other in whole or in part. As a result, there is no single express provision of a single reference date as required by s 9(2)(a) of the SOP Act, so that the dates provided under s 9(2)(b) apply.[31]

58 During the hearing, RK accepted that, provided the contract specifies a reference date, or the period of time within which a claim must be made, s 9(2)(a) is satisfied. The approach adopted by Woodward J in *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd*,[32] where the claimant had the discretion to choose the day upon which to make a progress claim, as extracted at paragraph 55 above, was accepted by RK as correct.[33]

59 However, RK submitted that application of the *Cool Logic* approach in this case was impossible, as the inconsistency of the subcontract documents required the rewriting of express terms in order to identify a reference date (or time-frame for such a date). RK submitted that the clauses in the subcontract which required progress payment claims to be made 'by the 20th day of each month' and 'no later than the 21st day of each month' demonstrated that the subcontract did not provide 'with certainty or clarity' the date on which a progress payment claim is to be made. In RK's submission, the result is that the subcontract failed to specify a reference date as contemplated by s 9(2)(a) of the SOP Act.

60 During the hearing Argyle repeated its contention that a reference date is capable of being identified from the apparently conflicting or inconsistent contractual provisions:

> HIS HONOUR: … So just looking at the formal instrument of agreement and the [clause which states that a] claim [is to be] submitted by the 20th day of the month. Do you say that remains as it is?
>
> MR CRAIG: That remains as it is. That's the provision, Your Honour, which

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31 First Defendant, outline of submissions dated 11 March 2022, [17] (emphasis original).

32 [2020] VCC 1261 ('*Cool Logic*').

33 Transcript, 30. The 'single reference date' argument set out in RK's written submissions was not pressed by RK during the hearing.

directly engages with - look at the heading or on the side, time for payment claim. So Your Honour has a clear statement of a contractual intent documented there. You've got the initials of the first defendant next to it. If you then go to 37.2 as amended ...

The words, no later than, would be replaced with before. And then item 4.4 … the word, on, would be replaced with by.

HIS HONOUR: That's a reasonable amount of surgery though, isn't it?

MR CRAIG: Well, Your Honour, it's the surgery necessary to resolve the inconsistency and that's, with respect, Your Honour's task.[34]

Consideration

61 There are a number of reasons why, in my opinion, Ground 1(a) fails. In short:

(a) Only express terms of a construction contract that either specify or provide for the identification of a reference date (or range of dates) satisfy s 9(2)(a) of the SOP Act.

(b) If it is necessary in order to identify the reference date to imply terms into the construction contract, that is beyond the scope of s 9(2)(a) and beyond the task required of the adjudicator.

(c) The subcontract between Argyle and RK does not contain an express term or terms that satisfy s 9(2)(a).

(d) *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd*,[35] and the cases cited by the Court of Appeal in *MAAG*, are concerned with courts supplying words in a contract. That is not a task that the SOP Act requires be undertaken by an adjudicator who may or may not be legally qualified.

(e) Consistent with statements by the High Court in *Fitzgerald v Masters*,[36] the presence of s 9(2)(b) of the SOP Act means there is no necessity for the supply or correction of words in the construction contract so as to avoid absurdity or inconsistency.

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34 Transcript, 18-19.
35 [2018] VSCA 289 (McLeish, Hargrave JJA and Almond AJA) ('*MAAG*').
36 (1956) 95 CLR 420 (Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ).

62 When construing a section such as s 9(2) of the SOP Act, it is generally necessary to begin with the language of the section itself.[37]

63 The chapeau of s 9(2), particularly the word 'means', makes it clear that the definition of 'reference date' that follows in sub-ss (a) and (b) is exhaustive.

64 Section 9(2)(a) provides that a reference date may be specified in a construction contract in one of two ways. The first, a reference date 'determined by' the contract. The second, a date determined 'in accordance with' the terms of the contract.

65 Section 9(2)(a) does not say whether a determination 'in accordance with the terms of the contract' is intended to refer to a determination in accordance with contractual terms that are express or to be implied, or a combination of the two. However, the prospect of an adjudicator determining a reference date in accordance with s 9(2)(a) 'in accordance with' implied terms is removed when s 9(2)(a) is read in context.

66 Section 9(2)(b) begins substantively with the words 'if the contract makes no express provision with respect to the matter'. The reference to 'the matter' is a reference to the subject matter of s 9(2), being a 'reference date'. Where there is no express term in the construction contract that identifies how a reference date (or range of dates) is to be determined, either 'by' or 'in accordance with the terms of the contract', then s 9(2)(b) applies. In such a case, the 'reference date' for the making of a progress payment claim pursuant to s 9(2)(b) is 20 business days after the first date on which construction work was first carried out or materials were first supplied under the contract.

67 Section 9(2) of the SOP Act must be read and construed as a whole. The reference in s 9(2)(b) to contracts where there is no 'express provision' dealing with either of the two alternatives for the identification of a reference date in s 9(2)(a), dictates that the scope of s 9(2)(a) is confined to contracts where there *is* express provision. Where a

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37 Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd Ed, 2020) [1.140], [1.150]; see also *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 ('*Consolidated Media Holdings*'), [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1, [39] (French CJ).

need arises to imply a term, s 9(2)(a) has no application and s 9(2)(b) is to be applied. Section 9(2)(b) ensures that the purpose and object of the SOP Act, as stated in ss 1 and 3, are not thwarted in cases where the contract makes no express provision for a reference date.

68 By confining the operation of s 9(2)(a) to cases where the contract makes 'express provision', the legislature has recognised the nature of the adjudication provisions; it has recognised the need for prompt determination and certainty – objectives not always likely to be readily achieved if the adjudicator is called upon to both find and to construe implied terms. That is particularly the case where, as earlier noted, there is no requirement that the adjudicator appointed to determine the dispute is legally qualified. Section 9(2)(b) removes the prospect of the requirement that an adjudicator is to imply terms into a construction contract which falls within the ambit of the SOP Act.

69 Construing s 9(2) in this way is consistent with the purpose of the SOP Act more broadly, as summarised by Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*:[38]

> The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.[39]

70 In this case, Argyle did not contend for a construction of the subcontract falling within s 9(2)(a) based on the implication of terms. Argyle did not submit that express terms of the subcontract, without more, meant that s 9(2)(a) was satisfied. Rather, it submitted that s 9(2)(a) was satisfied as the inconsistencies in the express terms were capable of being reconciled as a matter of construction. Going further,

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38 [2009] VSC 156; (2009) 26 VR 112.

39 Ibid, [46]; see also *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570, [36] (Riordan J).

Argyle submitted that, consistent with the approach of the Court of Appeal in *MAAG* and the authorities there cited, the adjudicator (and the Court upon review) must undertake that task.

71 In *MAAG*, the Court of Appeal referred to earlier High Court and House of Lords authority:

> 53. As noted in *Update Constructions*, the governing authority in Australia is the decision of the High Court in *Fitzgerald v Masters*.[40] In that case, Dixon CJ and Fullagar J stated as a general principle that:
>
> > Words may generally be supplied, omitted or corrected, in an instrument, *where it is clearly necessary in order to avoid absurdity or inconsistency*.[41]
>
> 54. In England, the principle has been expressed in terms that clear mistakes may be corrected by this process. For example, in *Chartbrook Ltd v Persimmon Homes Ltd*,[42] Lord Hoffmann said that:
>
> > there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be *clear that something has gone wrong* with the language and that it should be clear what a reasonable person would have understood the parties to have meant.[43,44]

72 Argyle submitted that the task of the adjudicator under s 9 of the SOP Act is to apply those principles. In this case, applying the approach to which the Court of Appeal referred in *MAAG*, as urged by Argyle, requires what, in argument, was described as 'surgery' to both the substituted clause 37.2 and to clause 4.4 of the Scope of Works. In the case of the substituted clause 37.2, this 'surgery' is required to remove the words 'no later than' and replace them with the word 'before', and in the case of the Scope of Works, the 'surgery' must remove the word 'on' and to substitute the word 'by'.

73 Nothing in the SOP Act, or in subordinate legislation made thereunder, requires an

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40 (1956) 95 CLR 420.
41 Ibid 426–7 (emphasis added).
42 [2009] 1 AC 1101 ('*Chartbrook*').
43 Ibid 1114 [25] (emphasis added).
44 *MAAG Developments Pty Ltd v Oxanda Childcare Pty Ltd* [2018] VSCA 289, [53]-[54] (McLeish, Hargrave JJA and Almond AJA).

adjudicator to undertake the rewriting of a contract by supplying, omitting or correcting words expressly adopted by the parties. In that context it is important to bear in mind that the decision of an adjudicator, or indeed that of a court on review of such a decision, is not determinative of the rights of the parties to the contract. In *Protectavale Pty Ltd v K2K Pty Ltd*,[45] Finkelstein J described the relationship between rights conferred under the legislation and rights of the parties in contract:

> 7. The Payment Act places the claimant in a privileged position in the sense that he acquires rights that go beyond his contractual rights: *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, 50. The premise that underlies the legislation is that cash flow is the lifeblood of the construction industry (*Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856 at [27]) and that the principal under a construction contract should pay now and argue later (*Multiplex Constructions* [2003] NSWSC 1140 at [96]).[46]

74 A court called upon to determine the contractual right of a party to make a progress claim under a construction contract will, in appropriate cases, apply *MAAG* and the authorities relied upon by the Court of Appeal in that case. In that circumstance, the 'reference date' catch-all provided by s 9(2)(b) of the SOP Act will be irrelevant. The position is entirely different where an adjudication determination is concerned. The role of the adjudicator is to perform the function and to exercise the powers conferred by the statute, and no more. To require an adjudicator to proceed as contemplated by *MAAG* is to require them to act outside the role conferred by the SOP Act.

75 As implicitly recognised in the Argyle submissions, in this case the subcontract did not expressly provide for a reference date. Nor do the express contractual terms specify how the reference date is to be determined. The express terms are inconsistent.

76 If it is necessary in order to construe a contract to delete words, not from a standard form contract, but words that have been deliberately inserted by the parties in two separate parts in the contract documentation (first, in the substituted clause 37.2 and

45 [2008] FCA 1248.
46 Ibid, [7].

second in the Scope of Works) in order to arrive at a reference date, it is clear that the contract itself does not make 'express provision' for a reference date. If it made express provision there would be no need for surgical intervention.

77 I do not consider that, when s 9(2) is read as a whole, it is intended that a contract that requires such significant surgery to its language (that the parties themselves chose to adopt) in order to arrive at a consistent and identifiable reference date is a contract that makes 'express provision' for a reference date.

78 This subcontract does not include a term that establishes a hierarchy to be applied to the construction of its constituent documents. It does not contain a contractual mechanism for the resolution of inconsistencies between contractual provisions other than substituted clause 8.1. The mechanism for which that clause provides was not invoked. The operative part of clause 8.1 requires that the several documents constituting the contract shall be taken as 'mutually explanatory' of one another. The inconsistencies in the language in the three documents make that an impossible task. As a matter of construction, clause 8.1 of the subcontract stands in the path of Argyle's approach.

79 As the subcontract makes no express provision with respect to a reference date, the reference date is taken to be the date occurring 20 business days after the previous reference date, with the first reference date being the date which was 20 business days after construction work was first carried out under the contract or materials were first supplied. This was the conclusion of Mr McMullan in the Adjudication Determination.

80 Even if it were otherwise appropriate for an adjudicator to embark on the correction of 'clear mistakes'[47], and it is not, I do not consider that in light of s 9(2)(b) of the SOP Act the 'construction' for which Argyle contends is 'clearly necessary in order to avoid absurdity or inconsistency'.[48] Applying the language of the High Court in

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47 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, [25] (Lord Hoffman).

48 *Fitzgerald v Masters* (1956) 95 CLR 420, 426-427 (Dixon CJ and Fullagar J).

Fitzgerald v Masters, for the purposes of the statutory scheme it is clearly unnecessary to alter the language of the subcontract in order to find a reference date. That is so because s 9(2)(b) fills the void that exists in such cases.

81 Mr McMullan was correct to find that there was no single reference date under the subcontract. There was no jurisdictional error.

82 There was no disagreement between the parties that, if there was no reference date under the subcontract, then Mr McMullan correctly applied s 9(2)(b) of the Act to identify the 20 business day intervals at which reference dates arise under contract.

Ground 1(b): the Entitlement to Serve One Payment Claim Only

83 Separately, Argyle submitted that Mr McMullan committed a jurisdictional error by determining the 12 July 2021 progress payment claim was valid because RK had served multiple progress payment claims with respect to a single reference date.

The Submissions on Behalf of the Parties

84 In support of Ground 1(b), in its written submissions Argyle submitted that the 12 July 2021 payment claim was not a valid payment claim because:

> (a) the 2 July Payment Claim was issued 'on and from' the reference date between 21 June 2021 and 20 July 2021. A claimant cannot serve more than one payment claim in respect of each reference date and thus, RK had exhausted its statutory rights with respect to the 21 June 2021 to 20 July 2021 reference date before it issued the 12 July Payment Claim: see section 14(8) of the Act as construed by Digby J in *Valeo Construction v Pentas* [2018] VSC 243 at [30]; and
>
> (b) it was made before the next available reference date, being the reference date between 21 July 2021 and 20 August 2021. A payment claim issued prior to a reference date is invalid for the purposes of the Act: *MKA Bowen v Carelli Constructions* [2019] VSC 436 at [42] per Digby J.[49]

85 Argyle's submission depends on the correctness of its submission in Ground 1(a) that the subcontract specifies that each reference date was to be whichever date RK submitted a payment claim between the 21st day of a preceding month and the 20th day of the month following. Thus, in submitting a progress payment claim dated

[49] Plaintiff, outline of submissions dated 11 March 2022, [46].

2 July 2021 (Claim 8.1), RK had made its 'selection' of the reference date for the period 21 June 2021 to 20 July 2021. Because s 14(8) of the SOP Act prevents a claimant from serving more than one payment claim per reference date, RK did not have an entitlement to submit Claim 9 on 12 July 2021.

86 As Ground 1(a) is not made out, the premise upon which the submissions in support of Ground 1(b) are founded is not available.

87 Notwithstanding that the written submissions assumed success by Argyle on Ground 1(a), Argyle's Amended Originating Motion filed 23 February 2022 is more widely framed. As a result, Ground 1(b) must also be considered against the history of progress payment claims by RK and the reference date finding made in the Adjudication Determination.[50]

88 Key to Argyle's submissions is the contention that RK was not entitled to unilaterally withdraw Claim 8 and resubmit the claim as Claim 8.1. Argyle submitted that, as s 14(8) bars a claimant from serving more than one payment claim per reference date, the submission of Claim 9 was of no effect (and therefore, in adjudicating Claim 9, Mr McMullan made a jurisdictional error).

89 RK submitted that under s 14(4)(b), RK was entitled to serve Claim 8 or, if permitted, to withdraw and resubmit any replacement claim up until 21 September 2021.[51] Further, RK submitted that there was no basis on which Claim 8.1 (submitted 2 July 2022) could be construed as a duplicate claim for the period to which Claim 9 was referrable.[52]

90 In support of the submission that a party has no entitlement or ability to unilaterally withdraw the service of a payment claim, Argyle relied upon the decision of Marks J in *Citi-Con (Vic) Pty Ltd v Punton's Shoes Pty Ltd*,[53] where her Honour held:

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50 Mr McMullan determined reference dates under the subcontract to include 13 May 2021, 10 June 2021 and 9 July 2021.

51 Transcript, 31.

52 Ibid, 32.

53 [2020] VCC 804 ('*Citi-Con*').

57. The section does not say a claimant '*cannot rely*' on more than one payment claim in respect of each reference date under the construction contract at a time. The prohibition is on *service* of more than one payment claim. I do not consider this section allows for unilateral purported withdrawal of a payment claim which has been served, and service of another payment claim using the same reference date.

58. As occurred in the cases mentioned above, parties may choose not to take this point, and may agree to a substitution of a payment claim in particular circumstances. This will often be a cost effective, and expeditious way in itself of dealing with the disputes between them.

59. However, in this case there was no such agreement, the point is taken, and in my view, the October claim is invalid.[54]

91 RK submitted that in *Valeo Construction Pty Ltd v Pentas Property Investments Pty Ltd*,[55] Digby J accepted it was possible to withdraw a payment claim and to serve a replacement claim provided the withdrawal was done in clear terms.[56] In reply, Argyle disputed that *Valeo* stood for that proposition.

92 Argyle also relied on two New South Wales decisions: *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[57] and *Trustees of the Roman Catholic Church for the Diocese of Lismore v TF Woollam and Son*[58] in support of its submission that a claimant has a unilateral right to withdraw a payment claim. RK submitted that neither case addressed the question of the withdrawal and replacement of a payment claim.

93 Finally, RK submitted that Argyle clearly recognised that Claim 9 was served by RK with reference to the month of July.[59]

Consideration

94 I agree with RK that the New South Wales cases referred to, *Dualcorp* and *TF Woollam,* do not address the question of the withdrawal of a payment claim.

95 In *Valeo*, the parties accepted that withdrawal and resubmission was permissible.[60]

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54 Ibid, [57]-[59].
55 [2018] VSC 243 ('*Valeo*').
56 Ibid, [61]-[66].
57 [2009] NSWCA 69; (2009) 74 NSWLR 190 (Allsop P, Macfarlan JA and Handley AJA) ('*Dualcorp*').
58 [2012] NSWSC 1559 (McDougall J) ('*TF Woollam*').
59 First defendant, outline of submissions dated 11 March 2022, [31]; Transcript, 34.
60 *Valeo Construction Pty Ltd v Pentas Property Investments Pty Ltd* [2018] VSC 243, [51].

It was not necessary for Digby J to determine whether the statute permits unilateral withdrawal of a claim.[61]

96 In *Citi-Con* there was no acceptance or agreement between the parties about the right to withdraw and to resubmit a claim.[62] Marks J determined there was no such right.[63]

97 I agree with Marks J that, leaving agreement between the parties to one side, the statutory scheme does not contemplate the unilateral withdrawal or abandonment of a payment claim and the resubmission of a fresh claim in respect of the same reference date. I consider that is the result that flows from the text of s 14 of SOP Act.

98 Section 14(4) provides that 'a payment claim' may be served only within the period determined in accordance with the contract or within three months after the reference date referred to in s 9(2), whichever is the later. Section 14(8) provides that a claimant cannot serve more than one payment claim in respect of each reference date. Section 14(6) contains an express prohibition on the service of a further claim once a final, single or one off payment has been served, subject only to s 14(7). Section 14(8) does not use the same language as s 14(6) (which states that 'no further payment claim can be served' once a final, single or one-off payment claim has been served), but the clear meaning and intent of the text of s 14(8) is the same.

99 In the present case, the construction of s 14 that I prefer (the same construction adopted by Marks J in *Citi-Con*), means that Claim 8.1 is a nullity.

100 I agree with RK that if, contrary to its primary submission, there was no power to serve a replacement payment claim, and there was no power to do so because there was no power to unilaterally withdraw Claim 8, then Claim 8 would stand as RK's claim for the month of June. Claim 9 was made on 12 July 2021 for the month of

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61 Ibid, [63].
62 *Citi-Con (Vic) Pty Ltd v Punton's Shoes Pty Ltd* [2020] VCC 804, [59].
63 Ibid, [57]-[59].

July.

101 In accordance with *MKA Bowen Investments Pty Ltd v Carelli Constructions Pty Ltd*,[64] there was no submission of the June payment claim prior to the 10 June 2021 reference date. There was no contravention of s 14(8) when, on 12 July 2021, RK served Claim 9 in respect of the month of July, a claim which was clearly intended to apply to work for the month of July.

102 Ground 1(b) fails.

Ground 2: Taking into Account Submissions Not 'Duly Made' for the Purposes of s 23(2)(c) of the SOP Act

Background & the Parties' Submissions

103 Ground 2, as developed by Argyle in written and oral submissions, is founded upon Argyle establishing the following propositions:

(1) RK did not have a 'formal right' to make the submissions dated 29 October 2022 to Mr McMullan.[65]

(2) It did not have a right to do so because:

(a) the 28 October 2021 submissions were made in response to the 21(2B) Notice given by Mr McMullan;[66] and

(b) the 21(2B) Notice was issued in contravention of s 21(2B).[67]

(3) The 28 October 2021 submissions were not 'duly made' as required by s 23(2)(c) because they were made in response to a notice issued in contravention of s 21(2B). RK had no right to make submissions in those circumstances.[68]

64 [2019] VSC 436 (Digby J).
65 Plaintiff, outline of submissions dated 11 March 2022, [55].
66 Ibid, [56].
67 Ibid, [58].
68 Ibid, [59].

(4) Mr McMullan considered those submissions in the Adjudication Determination.

(5) Because Mr McMullan considered the 28 October 2021 submissions, he acted in contravention of s 23(2)(c), which permitted him to only consider submissions 'duly made'.

(6) The contravention of s 23(2)(c) has the consequence that the Adjudication Determination is void pursuant to s 23(2B).

(7) A declaration should be made that the Adjudication Determination is void in its entirety.

104 In response, RK submitted:

(1) The expression 'duly made' in s 23(2)(c) is not defined in the SOP Act.[69]

(2) For the purposes of s 23(2)(c), any submissions filed by a claimant are 'duly made' if filed with the adjudicator in accordance with s 21(2B). No greater formality is required.[70]

(3) Sections 23(2)(c) and (d) require the adjudicator to have regard to a submission filed by a party in the course of the adjudication.[71]

(4) The SOP Act does not limit a claimant's submissions to responding to the respondent's 'adjudication response'.[72]

(5) In this case, Argyle twice sought and was granted leave by Mr McMullan to file further submissions under s 22(5) (the first time in relation to the withdrawn First Adjudication Application). Accordingly, Mr McMullan (and RK) complied with the relevant requirements of s 23(2)(c).[73]

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69 First defendant, outline of reply submissions dated 25 March 2022, [14].
70 First defendant, outline of submissions dated 11 March 2022, [35].
71 Ibid.
72 Ibid, [38].
73 Ibid.

(6) Further, Argyle suffered no procedural unfairness, even if the 28 October 2021 submission was not 'duly made'. Mr McMullan gave procedural fairness to Argyle by giving it a right to respond.[74]

105 Both parties agree that, assuming Ground 2 were otherwise made out, relief based upon jurisdictional error is not available in these circumstances. It is accepted that the following statement by Henry J in *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd*[75] is correct:

> 38. The determination of the content of a payment claim, the nature and scope of a payment schedule, what a payment schedule indicates are the reasons for the scheduled amount being less than the claimed amount and whether a submission was duly made are matters for an adjudicator to determine. A mistaken or erroneous decision by an adjudicator about those matters does not involve jurisdictional error and will not invalidate a determination. It is not for the Court to objectively determine those matters or whether an adjudicator was correct in forming their opinion on them if they were lawfully made.[76]

106 Argyle seeks a declaration pursuant to s 23(2B) that the Adjudication Determination is void in its entirety. Section 23(2B)(a) provides that an adjudicator's determination is void 'to the extent it has been made in contravention of subsection (2)'. Section 23(2B)(b) refers to the adjudication determination being void to the extent that the determination is based on any matter which is prohibited by the SOP Act from being taken into account. Given the wording of the statute, the identification of 'the extent' to which the determination reflects or is the result of contraventions of s 23(2) or 23(2A) is critical.

107 RK submitted that the onus is on Argyle to show 'the extent' to which the Adjudicator's Determination is void, assuming, which RK does not accept, that the

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74 Ibid, [38].

75 [2020] NSWSC 1423.

76 Ibid, [38], citing *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339, [13]-[16], [27] (Basten JA, with whom Meagher and Leeming JJA agreed); *Iskra v MMIR Pty Ltd* [2019] NSWCA 126, [50]-[52] (Gleeson JA, with whom Bathurst CJ and Payne JJA agreed); *Perform (NSW) Pty Ltd v Mev-Aust Pty Ltd* [2009] NSWCA 157, [67] (Giles JA, with whom McColl JA agreed); *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19, [57] (Hodgson JA, with whom Beazley JA agreed); *Downer Construction (Aust) Pty Ltd v Energy Australia* [2007] NSWCA 49; (2007) 69 NSWLR 72, [86] (Giles JA, with whom Santow and Tobias JJA agreed).

adjudicator considered submissions which were not 'duly made'. RK submitted that Argyle failed to discharge that burden.

The Conduct of an Adjudication

108 It is convenient to begin discussion of Ground 2 by referring to the relevant provisions of the SOP Act that concern the conduct of an adjudication, and to highlight the issues that arise in this case in relation to Ground 2 in that context.

109 Section 14 is concerned with progress payment claims. Section 15 is concerned with payment schedules which a respondent may provide in reply to a claim. Section 15(3) provides if the scheduled amount is less than the claimed amount, the respondent 'must *indicate* why the scheduled amount is less and … the reasons for withholding payment'.[77]

110 Division 2 of Part 3 of the SOP Act is titled 'Adjudication of disputes'. Section 18(1) provides that a claimant may apply for adjudication of a payment claim. Section 18(3) provides, inter alia, that an adjudication application must identify the payment claim and the payment schedule (if any) to which it relates and may contain any submissions relevant to the application that the claimant chooses to include.

111 Section 21 is titled 'Adjudication responses'. A respondent to a payment claim may, in accordance with s 21(1), lodge with the adjudicator a response to the adjudication application. Section 21(2)(d) provides that the adjudication response may contain any submissions relevant to the response that the respondent chooses to include.

112 Section 21(2B) relevantly provides that:

> If the adjudication response includes any reasons for withholding payments that were not included in the payment schedule, the adjudicator must serve a notice on the claimant
>
> (a) setting out those reasons; and
>
> (b) stating that the claimant has 2 business days after being served with

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77 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 15(3) (emphasis added).

the notice to lodge a response to those reasons with the adjudicator.[78]

Section 21(2B) Notices

113 Argyle submitted the adjudicator has a mandatory obligation pursuant to s 21(2B) to serve a notice if the adjudication response includes 'any reasons' that were not included in the payment schedule. However, if no 'new reasons' were included in the payment schedule, the adjudicator had no power to issue a notice.[79] Argyle submitted that when providing the 21(2B) Notice, Mr McMullan did not identify reasons that were not included in the Payment Schedule. Further, Argyle submitted that Mr McMullan erroneously concluded that reasons were not included in the payment schedule which responded to Claim 9 when they, in fact, were. By way of example, it submitted that Mr McMullan included in the 21(2B) Notice matters relating to defects and rectification works required to a concrete slab of Units 1 to 5, which had been item 4 in the payment schedule.[80] Argyle submitted that because Mr McMullan did not properly identify new reasons not included in the Payment Schedule in the 21(2B) Notice, the consequence was to give rise to a right to RK to respond that was almost at large.[81]

114 During the hearing, Argyle developed the argument relating to the 21(2B) Notice by reference to the concrete slab of Units 1 to 5. It submitted that the reasons for withholding payment for this item in the payment schedule included reliance on the AJL Cost Report of which Shiu (Louis) Ng, a quantity surveyor, was the author. The reason given in the Payment Schedule was:

> Rejected – Paving slabs are incomplete for units 1-5. Refer to QS report for cost to complete works.[82]

115 RK contested the proposition that Mr McMullan had failed to comply with s 21(2B). RK submitted that although the entire AJL Cost Report was annexed to the payment

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78 There is no equivalent to this section in the *Building and Construction Industry Security of Payment Act 1999* (NSW) or other corresponding legislation.

79 Transcript, 43.

80 Transcript, 48-49.

81 Transcript, 45.

82 CB, 375; the reference to this item, referred to as incomplete or outstanding work in the AJL Cost Report, is at CB, 282.

schedule, the schedule did not itself refer to the whole of the Report under the heading 'Reason for Nonpayment of Claim'. Although items 2, 3, 4 and 12 of the payment schedule referred to the AJL Cost Report, that is not the case with respect to any of the other items in the payment schedule. The total of the amounts the subject of items 2, 3, 4 and 12 is $73,237.71.[83] That sum is to be compared to the sum of approximately $196,000 in defects referred to by Argyle in its Second Adjudication Response.[84]

116 Argyle responded by submitting that all of the topics canvassed in AJL Cost Report, annexed to the payment schedule, were defects 'embedded in the payment schedule'.[85] Argyle submitted that the payment schedule referred to $355,159.65 being owed by RK. The AJL Cost Report referred to a cost to complete of $1,349,968, excluding GST, and a total paid (to 30 August 2021, the date of the report) of $1,705,122.65.[86] Argyle submitted that although the payment schedule did not expressly cross-reference the AJL Cost Report in support of the reference to $355,159.65, when the AJL Cost Report's total estimated cost to complete is compared to the total amount paid to date, the dollar sum that appears in the payment schedule is the result.[87] Argyle submitted that because the amount of $355,159.65, referred to as the amount owed to Argyle in the payment schedule, was calculated by reference to the AJL Cost Report, then any reference to any of the matters dealt with in that Report in the 21(2B) Notice contravened s 21(2B) because any such matters were not 'new' reasons – that is, those reasons were not 'included in the payment schedule'. The submission did not descend to the detail of whether the fact the sum of $355,159.65 was the product of a calculation in the report annexed was sufficient to satisfy the requirement to 'indicate' in s 15(3).

Submissions 'Duly Made'

117 Section 23(2) of the SOP Act provides that in determining an adjudication

83 CB, 375.
84 Transcript, 64-66.
85 Transcript, 93.
86 CB, 283.
87 Transcript, 91-93.

application, 'the adjudicator *must consider the following matters and those matters only*', relevantly:

> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been *duly made* by the claimant in support of the claim;
>
> (d) the payment schedule (if any) to which the application relates, together all submissions (including relevant documentation) that have been *duly made* by the respondent in support of the schedule.[88]

118 Argyle submitted that s 23(2) requires that, when determining an adjudication application, the adjudicator is only permitted to take into account submissions that have been 'duly made'.[89] Argyle submitted that any submission made in response to an erroneous notice issued by an adjudicator is not a submission 'duly made'. It submitted that the prohibition upon considering submissions other than those 'duly made' will be breached by the adjudicator referring to or considering such impermissible materials in the adjudication determination. Argyle submitted that that is the case even if the adjudicator rejected any such submissions or material.[90]

119 Section 22(5) is also relevant to the question of what is meant by 'duly made' in s 23(2). Section 22 is titled 'Adjudication procedures'. Section 22(5) provides that for the purposes of any proceedings conducted to determine an adjudication application an adjudicator:

> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
>
> (b) may set deadlines for further submissions and comments by the parties; and
>
> (c) may call the conference of the parties; and
>
> (d) may carry out an inspection of any matter to which the claim relates.

120 RK sought to rely in the alternative on the power in s 22(5) as a basis to support a finding that submissions in response to the notice given by Mr McMullan on

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88 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 23(2)(c)-(d) (emphasis added).
89 Transcript, 42-43.
90 Transcript, 61.

26 October 2021 were submissions 'duly made'. It submitted that s 21(2B), and separately, s 22(5) of the SOP Act, provide an adjudicator with an unfettered 'discretion to deal with novel matters raised in submissions'.[91]

121 Argyle submitted that the purpose of the power to make a request in s 22(5) is to enable the adjudicator to clarify submissions previously given rather than allowing a right at large to make further submissions and to provide further evidence.[92]

Issues for Determination

122 The effect of Argyle's construction of the SOP Act is, in its submission, that the whole of the Adjudication Determination is void by operation of s 23(2B) because the Adjudication Determination referred to material provided by RK in response to the 21(2B) Notice and, as a result, Mr McMullan took into account submissions and material which are not prescribed by s 23(2).[93]

123 Argyle submitted that the issues for determination in relation to Ground 2 include:

(a) if a prohibition arises under s 23(2)(c) which prohibits an adjudicator from considering submissions not 'duly made';

(b) if that is the case, whether any submissions made by RK had not 'been duly made'; and

(c) if such submissions were made (in response to the s 21(2B) Notice), whether Mr McMullan considered them when making the Adjudication Determination.[94]

124 If the Adjudication Determination was made in consideration of submissions that had not 'been duly made' it is necessary to consider whether the whole or part of the Adjudication Determination is void as a result of the operation of s 23(2B).

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91 First defendant, submissions dated 11 March 2022, [38].

92 Transcript, 41.

93 Section 23(2B) provides that an adjudication determination is void to the extent that it has been made in breach of s 23(2) or has taken into account an amount or matter referred to in s 23(2A).

94 Plaintiff, outline of submissions dated 11 March 2022, [49].

What Approach Did Mr McMullan Adopt?

125 The following paragraphs, extracted from the Adjudication Determination,[95] bear upon the resolution of the issues raised by Argyle in relation to Ground 2:

> 27. By email dated 26 October 2021 (11:20am) from me to the parties, pursuant to Section 21(2B) of the Act, I notified the claimant that, in my opinion, the Adjudication Response included reasons for withholding payment that were not included in the Payment Schedule, as set out in my letter dated 26 October 2021 …
>
> …
>
> 30. By email dated 28 October 2021, the claimant delivered to me, … pursuant to my Section 21(2B) Notice dated 26 October 2021, a response to the reasons for withholding payment, provided by the respondent in the Adjudication Response, that were not included in the Payment Schedule.
>
> 31. By email dated 29 October 2021 … the respondent, inter alia, requested leave to make Further Submissions arising out of the claimant's Section 21(2B) response dated 28 October 2021, so far as relevant, as follows:
>
> > *We refer to the above matter and to the 21(2B) Submissions filed by RK on 28 October 2021.*
> >
> > *The Respondent would like an opportunity to provide brief submission in relation to the new information provided by RK in support of its claims for payment, in particular in relation to:*
> >
> > …
> >
> > *We note that, pursuant to section 22(5)(a) of the SOP Act, an Adjudicator may request further submissions from either party (and in that event must give the other party an opportunity to comment on those submissions).*
> >
> > ...
>
> 32. By email dated 1 November 2021 (10:22am) from the claimant to me … the claimant said …:
>
> > *…our client objects to the Respondent being provided any further opportunity to respond to and/or provide information and/or documentation pertaining to this Adjudication. …*
>
> 33. By email dated 1 November 2021 (10:41am) from me to the parties, I advised the parties …
>
> > ***I give leave to the respondent, by COB on Thursday, 4***

[95] In its Amended Originating Motion, Argyle expressly relied on (inter alia) paragraphs 30 and 48 of the Adjudication Determination, extracted below.

> ***November 2021, to deliver Further Submissions in respect of the following:*** …

34. By email dated 4 November 2021 (10:47pm) from the respondent to me … the respondent delivered Further Submissions in response to my leave given on 1 November 2021.

...

36. By email dated 5 November 2021 (12:34pm) from the claimant to me … the claimant said …:

> *… the Respondent expressly requested, "an opportunity to provide* ***brief submission*** *in relation to the new information provided by RK in support of its claims for payment", to which the Claimant expressly objected to.*
>
> …

37. By email dated from me to the parties, I advised the parties as follows:

> …
>
> 1. *In my view, I am to balance the requirements of the Act with the obligation to accord natural justice. In this instance, there is no time available to permit either party to make further submissions and/or deliver further material. ...*
>
> 2. *I do not give leave to the claimant to make further submissions arising out of the Further Submissions delivered by the respondent on 4 November 2021.*
>
> 3. *In making the Determination, I will take into account the extent to which new material has been delivered by either party to which the other party has not had an opportunity to respond.*
>
> *I will set out my reasons for taking this approach in the Determination.*

38. The Section 21(2B) Notice dated 26 October 2021, the respondent's request dated 1 November 2021 to deliver Further Submissions, and the claimant's request dated 5 November 2021 to deliver Further Submissions:

39. In my view, I am to interpret Section 21(2B) as requiring me to ensure that a claimant is able to address matters in the Application for Adjudication that were not raised in the Payment Schedule, for natural justice reasons. Further, to the extent that a respondent may introduce new material in an adjudication response, albeit that such new material may relate to reasons previously referred to in a payment schedule, then I prefer to err on the side of giving a claimant an opportunity to address such new material.

40. In this respect, I note the article by McDougall J, a very senior NSW Supreme Court Judge with very substantial experience in relation to

security of payment legislation, in which His Honour expressed the following views: …[96]

…

41. In *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor (No 2)* [2015] VSC 500, Vickery J said:

> …
>
> *132 In some cases, in order to satisfy this element of natural justice, in spite of the restriction imposed on a respondent in lodging and relying upon an adjudication response provided by s 21(2A), observance of the duty to give a party a reasonable opportunity to put its case may demand that an adjudicator utilises the procedure contemplated by s 22(5)(a) and (b) of the Act, and requests a respondent to provide further written submissions, in turn giving the claimant an opportunity to comment on those submissions.*[97]
>
> …

42. In my view, an adjudicator is required to balance the express language of the Act, and the requirement that he/she exercise a discretion to, consistent with those express provisions, ensure that each party is accorded natural justice. On balance, I would err on the side of allowing that material to be provided. In particular, where a respondent has referred to reasons in a general way in a payment schedule, in my view, the purpose of the Act would be best served by giving a claimant an opportunity to respond to more detailed arguments and facts, raised for the first time by a respondent in an Adjudication Response.

43. Firstly, if a respondent could leave out detailed arguments and facts from a payment schedule, and raise those detailed arguments and facts for the first time in an Adjudication Response, a claimant would not know the case that it had to address in the Application for Adjudication, and then be prevented from addressing that material when it came in the Adjudication Response. This seems, to me, unfair. Further, it seems inefficient in that such an interpretation would have the effect of putting every claimant to the task of anticipating every possible argument, and every possible fact, (including disputed facts).

44. Secondly, in my view, the text of Section 21(2B) permits the interpretation that I prefer, namely that, for the purpose of Section 21(2B), a general reference to a reason for withholding payment does not necessarily encompass more detailed arguments and facts, albeit that those detailed arguments and facts might come within that general description. In my view, this is the question to be decided by an adjudicator pursuant to Section 21(2B).

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96 Mr McMullan reproduced a number of passages from the article by Justice McDougall that are not reproduced here.

97 Mr McMullan reproduced a number of additional paragraphs from *Amasya Enterprises v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500 that are not reproduced here.

45. The Section 21(2B) Notice dated 26 October 2021:

46. In this case, for the reasons set out above, I determined that I should serve a Section 21(2B) Notice dated 26 October 2021 in respect of reasons for withholding payment included in the Adjudication Response dated 22 October 2021 that were not included in the Payment Schedule.

47. The respondent's request dated 1 November 2021 to deliver Further Submissions:

48. In this case, for the reasons set out above, I preferred to err on the side of allowing the respondent to provide further submissions in relation to the claimant's Section 21(2B) response dated 28 October 2021. In this instance, it seemed to me that the claimant had referred to new expert material in a Section 21(2B) response, and, in my view, the purpose of the Act would be best served by giving the respondent an opportunity to respond to that new expert material raised for the first time by the claimant in a Section 21(2B) response.

49. The claimant's request dated 5 November 2021 to deliver Further Submissions:

50. In this case, taking into account the competing factors …

…

I determined that I should not give leave to the claimant to make further submissions arising out of the Further Submissions delivered by the respondent on 4 November 2021 …[98]

Did the 21(2B) Notice Comply With s 21(2B)?

126 The basis of Argyle's submission relating to Ground 2 is that the 21(2B) Notice was issued in a way which contravened the SOP Act. Argyle submitted that if this is the case, it follows that any submissions made in response to the 21(2B) Notice would not be 'duly made' pursuant to the Act.

127 Mr McMullan interpreted s 21(2B) as requiring him to ensure that a claimant is able to address matters in the adjudication application that were not raised in the payment schedule 'for natural justice reasons'.[99] In particular, where a respondent has referred to reasons in a general way in a payment schedule, Mr McMullan considered the purpose of the SOP Act would best be served by giving the claimant the opportunity to respond to more detailed arguments and facts raised for the first

98 CB, 2255-2261 (emphasis original).

99 At [39] of the Adjudication Determination: CB, 2258.

time in an adjudication response.

128 Earlier authority establishes that it is a matter for an adjudicator to determine whether what a payment schedule sufficiently 'indicates' are the 'reasons' for the scheduled amount being less than the claimed amount.[100] An error in that respect does not invalidate the determination.[101]

129 In *Multiplex Constructions Pty Ltd v Luikens*,[102] Palmer J held in respect of s 14(3) of the NSW Act (the equivalent of s 15(3) of the SOP Act):

> 78 Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.[103]

130 While the payment schedule must 'indicate' the reasons for withholding payment, and while it is not necessary to provide full particulars of those reasons, the respondent may do so in a document incorporated by reference.[104] It follows that if a payment schedule incorporates, by reference, expert reports which support withholding payment for particular items in the schedule (for instance, a quantity surveyor's report identifying defects, and the method and cost to rectify those defects), then the reports and matters contained within those reports might be determined by an adjudicator to constitute reasons indicated in the schedule for the purposes of s 15(3).

131 Section 15(3) provides that if the 'scheduled amount' in the payment schedule is less than the amount of the claim to which it relates, the schedule 'must *indicate* … the

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100 *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, [38] (Henry J).

101 *Perform (NSW) Pty Ltd v Mev-Aust Pty Ltd* [2009] NSWCA 157, [67] (Giles JA, with whom McColl and Young JJA agreed).

102 [2003] NSWSC 1140 ('*Multiplex Constructions*').

103 Ibid, [78], cited (inter alia) in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391; (2005) 64 NSWLR 448, [27] (Mason P, with whom Giles and Santow JJA agreed).

104 *Perform (NSW) Pty Ltd v Mev-Aust Pty Ltd* [2009] NSWCA 157, [50] (Palmer J).

respondent's *reasons* for withholding payment'.[105] There is no definition of 'reasons in s 15(3), or in s 21(2B), and nor is 'reason' defined elsewhere in the Act.

132 I accept the submission by senior counsel for RK that the word 'reasons', in each of ss 15(3) and 21(2B), refers to all types of reasons; whether evidentiary, substantive, factual or legal.[106]

133 In this case, the payment schedule 'indicated' that, in relation to items 2, 3, 4 and 12, the reasons for withholding payment were to be found in the AJL Cost Report.

134 The difference in the language of s 15(3), which requires the schedule to 'indicate' reasons, and s 21(2B), which requires the notice to 'set out those reasons', is important. As Palmer J observed in *Multiplex Constructions*, an 'indication' is not the same as a 'setting out'.[107]

135 The task for the adjudicator posed by s 21(2B) is first to determine if the adjudication response 'includes any reasons for withholding payment that were not included in the payment schedule'. Ordinarily a comparison will be required between the reasons 'indicated' in the Payment Schedule and the submissions and other materials that form part of the adjudication response. The need for expedition that underpins the SOP Act informs the task to be performed. Having regard to the time constraints, a practical, and relatively robust and generous approach is warranted on the part of the adjudicator when determining if new reasons are included in the adjudication response beyond those 'indicated' in the payment schedule. To take too narrow a view of what is 'new' might be to deprive the claimant of a fair opportunity to meet the case against it.

136 As s 15(3) requires only that the payment schedule 'indicate' the reasons, it may often be the case that the 'adjudication response' will include expanded, better articulated or further particularised reasons. That outcome is made more likely

105 *Building and Construction Industry Security of Payment Act 2002* (Vic), s 15(3) (emphasis added).
106 Transcript, 69.
107 *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [78].

because, unlike s 15(3), which is silent about the inclusion of supporting materials or reports, s 21(2)(d) expressly provides that an adjudication response may contain 'any submissions relevant to the response that the respondent chooses to include'. Expanded, better articulated or further particularised reasons are 'reasons that were not included' in the payment schedule for the purposes of s 21(2B).

137 There is no requirement in s 21 of the SOP Act that an adjudication response and any submissions included in the response must be confined to the reasons earlier 'indicated'. Indeed, the existence of s 21(2B) expressly contemplates new reasons being put forward in the adjudication response. In that regard, the SOP Act is to be contrasted with the NSW Act. Section 20(2B) of the NSW Act, of which there is no equivalent in the SOP Act, states:

> The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.[108]

138 The absence of an equivalent to s 20(2B) of the NSW Act opens the door to the provision of wholesale 'new reasons' in the adjudication response, reasons well outside those 'indicated' in the payment schedule, as well as to further proof, evidence or submissions in support of those reasons earlier 'indicated'.

139 The complaint by Argyle concerning the 21(2B) Notice focused on items 1, 2 and, to a lesser extent, item 5 in the Notice. Items 1 and 2 refer to the statutory declaration of Mr Ng and report of Mr Talevski, respectively, with Mr McMullan inviting RK to respond to 'new matters' raised within those documents only. Item 5 refers to an assessment of defects, back charges and variations set out in certain parts of the adjudication response.

140 I agree with Mr McMullan that, as a matter of statutory construction, new expert material relied on in an adjudication response as a *new* reason to withhold payment in a payment schedule (or as a reason in support or amplification of a reason earlier

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108 *Building and Construction Industry Security of Payment Act 1999* (NSW), 20(2B).

indicated) meets the statutory threshold in s 21(2B) of 'any reasons for withholding payment that were not included in the payment schedule'. I also agree with the submission on behalf of RK that new evidence, even if in support of the same proposition (for example, engineering evidence filed as part of the adjudication response in support of previously submitted quantity surveying evidence incorporated into the payment schedule), constitutes a 'new reason'.[109]

141 The imperative to afford natural justice requires that the claimant has an opportunity to respond to detailed arguments and facts and evidence relied upon for the first time in the adjudication response. Those detailed arguments and facts, in this case in the form of an expert report by Mr Talevski, an engineer, and a statutory declaration by Mr Ng, the author of AJL Cost Report, constitute reasons relied upon by Argyle to withhold payment. To the extent they set out, deal with or contain matters which had not previously been indicated in the payment schedule, they are new reasons. The intent of the statutory scheme is that in such circumstances the claimant should be given an opportunity to respond. That is the purpose of the notice provision in s 21(2B). It is also why s 21(2B) imposes a mandatory obligation upon the adjudicator who 'must' issue a notice if the adjudication response includes new reasons.

142 Consistent with the proposition that it is a matter for the adjudicator to determine whether a payment schedule sufficiently 'indicates' the reasons for withholding payment, I consider that it is a matter for the adjudicator to determine whether grounds exist for the issue of a s 21(2B) notice and as to the scope and content of such a notice.

143 However, if I am wrong about that, in any case I consider that the 21(2B) Notice is valid and in conformity with the section.

144 This conclusion notwithstanding, it is appropriate to separately consider whether each of items 1, 2 and 5 in the 21(2B) Notice can be said to constitute reasons which

109 Transcript, 70.

are in Argyle's Second Adjudication Response but which were not in the payment schedule dated 9 September 2021.

Item 1

145 When the statutory declaration by Mr Ng dated 22 October 2021 (referred to in the 21(2B) Notice) and the AJL Cost Report (of which Mr Ng is the author) are reviewed and compared, particularly to the extent reliance on that report was 'indicated' in the payment schedule, it is apparent that Mr Ng's statutory declaration raises matters which were not 'included' in the AJL Cost Report. That is the case even assuming that the whole of the AJL Cost Report formed part of the reasons 'indicated' in the payment schedule, and I do not accept that to be the case.

146 I do not accept that, apart from the specific items cross-referenced to 'QS report' in the payment schedule (items 2, 3, 4 and 12 of the schedule) there was sufficient indication that the whole of the AJL Cost Report relied on was incorporated into the payment schedule. The arithmetic calculation relied on by Argyle is too obtuse to amount to an 'indication'.

147 Argyle submitted that the statutory declaration of Mr Ng 'merely contained a review of defective and incomplete works already identified in [the AJL Cost Report], a copy of which was included as an attachment to the plaintiff's payment schedule'.[110] It was said to follow that the 21(2B) Notice was invalid because it identified reasons that were not first raised in Argyle's Second Adjudication Response.

148 I do not agree with Argyle's description of the subject matter of the statutory declaration.

149 Mr Ng described the intended scope of his statutory declaration:

> 5 I have read the:
>
> (a) Statutory Declaration made by Nathan Grimes on 15 October 2021 (Grimes Declaration) and MQS Report (as defined in the Grimes Declaration – where I refer to the MQS Report in this

110 Plaintiff, outline of submissions dated 11 March 2022, [58].

declaration I refer to the MQS Report as defined in the Grimes Declaration);

(b) Statutory Declaration made by John Tamaressis on 15 October 2021 (Tamaressis Declaration) and the JTCE Report (as defined in the Tamaressis Declaration – where I refer to the JTCE Report I refer to the JTCE Report as defined in the Tamaressis Declaration); and

(c) Talcon Engineers report prepared by Mr Robert Talevski dated 22 October 2021 and which I understand appears at Tab 3 of Argyle's Adjudication Response (Talevski Report).

6 In this Statutory Declaration I respond to the documents referred to in paragraph 5 above. Where I have not specifically responded to matters raised in those documents I should not be taken to have agreed with their contents.[111]

150 Mr Ng set out new and, for the most part, further reasons why it was appropriate for Argyle to withhold payment. Returning to the example of the slab for Units 1 to 5; in his statutory declaration, Mr Ng noted that Mr Grimes (the quantity surveyor engaged by RK) had allowed $8,340 as the cost to rectify the slab, whereas he, Mr Ng, allowed $24,350 for the same item. Mr Ng set out the reason his allowance for this item was greater than that of Mr Grimes. These were new reasons:

36. The primary difference between my costing and that of Mr Grimes is based upon the number of hours required to complete the works.

37. The work associated with rectifying this defect is not simple work and cannot be predominantly achieved with the use of machines. I have allocated 80 hours at the rate of $110 per hour in respect of the defect rectification, reflecting that much of the work associated with the removal of concrete in relation to the rebates will need to be done by hand grinding, being difficult and time consuming work.[112]

151 That the responding material provided on behalf of RK was not a response 'at large' as submitted by Argyle is reflected by what occurred in relation to item 1 in the 21(2B) Notice, new material in Mr Ng's statutory declaration. A further report by Mr Grimes dated 28 October 2021 was relied upon by RK in response. Mr Grimes responded to Mr Ng's costing information; taking the slab for Units 1-5 as an example, as follows:

111 Supplementary Court Book, 17.
112 Supplementary Court Book, 20.

> 9. Item 11.1 – Slab Rebate U1-5: Sg states the price to rectify 5 slab rebates is $24,350 ex GST. Sg appears to allow complete demolition and replacement of the slab rebates which in my opinion is excessive and unreasonable. Sg includes for several lump sum items which provide no calculation methodology.[113]

152 What occurred concerning the slab for Units 1 to 5 shows a development of detail of information and opinion being exchanged amplifying and explaining the calculation of $24,350. Mr Ng provided new information: his statutory declaration showed the reason for his cost estimate was the adoption of specified rates and a specified number of hours to complete the work. Mr Grimes appropriately responded to that explanation of the previously undisclosed reasoning that underpinned Mr Ng's costings. The 21(2B) Notice did not cause the process to which s 21(2B) is directed to miscarry in relation to Mr Ng's statutory declaration. It afforded RK, through Mr Grimes, the opportunity to respond to the new, amplified reasons for refusing payment.

153 In addition, in his 22 October 2021 statutory declaration, Mr Ng provided his reasons why views expressed by others, including Mr Tamaressis, an engineer who had provided a report on behalf of RK, were not correct and therefore, why payment was appropriately withheld.[114] Mr Ng also referred to the engineering report by Mr Talevski, which was not in existence at the time of the payment schedule.

154 For the reasons discussed above, I consider that item 1 in the 21(2B) Notice met the requirements of s 21(2B) of the SOP Act.

Item 2

155 Item 2 in the 21(2B) Notice referred to the report of Mr Talevski dated 22 October 2021, included in Argyle's Second Adjudication Response. All opinions in that report constitute new reasons not included in the AJL Cost Report. Mr Talevski's report was expressed to be in response to the AJL Cost Report and Mr Tamaressis' report dated 30 September 2021; the issue of the appropriateness of works costed by

113 Supplementary Court Book, 72.

114 For example, as to percentage of work complete at [7]- [19] and defects at [25] - [32]: Supplementary Court Book, 17-19.

Mr Ng in the AJL Cost Report had been addressed for RK by Mr Tamaressis. The subject matter of Mr Talevski's report was rectification work required for identified defects. The purpose of this new report provided by Argyle was to substantiate the basis of rectification cost estimates contained in the AJL Cost Report. Prior to the report by Mr Talevski, the AJL Cost Report was not supported by the report of an expert qualified to opine about the appropriateness or reasonableness of the rectification works that had been costed. In those circumstances, the report by Mr Talevski dealt with in item 2 of the Notice clearly constituted 'new' reasons relied on by Argyle in its Second Adjudication Response for withholding payment which were not included in the payment schedule.

156 There can be no legitimate criticism of the approach which Mr McMullan adopted with regard to item 2 in the 21(2B) Notice.

Item 5

157 Item 5 of the 21(2B) report, to which brief reference was made by Argyle in submissions, comprised an assessment of defects, back charges and variations annexed to the Second Adjudication Response in Parts 9, 10 and 11. This assessment was not included in the payment schedule. Once again there is no legitimacy to the criticism of this item being included in the 21(2B) Notice.

Contents of 21(2B) Notice

158 Separate to the fact Mr McMullan issued the 21(2B) Notice, Argyle submitted that s 21(2B)(a) of the SOP Act is prescriptive in its requirements as to the contents of the notice and requires that the notice served by the adjudicator 'must set out those reasons'. It was submitted that for a s 21(2B) notice to be effective under the SOP Act, any new reasons included in the adjudication response should be specifically set out in the s 21(2B) notice itself.

159 I consider that the words 'setting out' in s 21(2B)(a) must be interpreted in a practical and common sense manner. The requirement for the adjudicator to '[set] out' certain reasons given by s 21(2B), might be satisfied in a number of different ways. It might be satisfied by the provision of a detailed explanation in the notice itself, it might

also be satisfied by the notice setting out by description. It might also be satisfied by 'setting out' information contained in documents incorporated into the notice by reference. Approaching s 21(2B) in this way is consistent with the language and purpose of the SOP Act as a whole.[115]

160 I do not agree with Argyle that the s 21(2B) process miscarried because Mr McMullan failed to identify with proper specificity the reasons for withholding payment which were new to the Second Adjudication Response and not in the payment schedule. The submission on behalf of Argyle takes too narrow a view of what constitutes 'new reasons'. It also seeks to impose too great a burden upon the adjudicator when 'setting out' those new reasons.

161 Concerning items 1 and 2 of the 21(2B) Notice, Mr McMullan identified the new materials. He included an express limitation upon the right to respond to both by restricting any response to 'new matters raised within' those documents. I reject the submission by Argyle that Mr McMullan gave a right to RK to respond that was 'almost at large'.[116] I consider Mr McMullan's approach and the wording of the 21(2B) Notice was effective to comply with s 21(2B).

162 For the reasons previously stated, I do not agree with the submission that the 21(2B) Notice included reasons that were not new, that it failed to identify the reasons that were not included in the Payment Schedule with sufficient specificity or that it otherwise failed in some way to comply with s 21(2B) of the SOP Act. The foundation for Ground 2, the attack on the validity of the 21(2B) Notice, is not made out.

Were RK's 28 October 2021 Submissions 'Duly Made'?

163 Because I have found the 22(2B) Notice issued by Mr McMullan to have been validly issued, and because the 28 October 2021 submissions on behalf of RK were in response to that Notice, it follows that those submissions were 'duly made'.

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115 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ); see paragraph 69 above.

116 Transcript, 45.

164 In any case, the complaint which Argyle seeks to press that submissions were not 'duly made' is not a matter for the Court.

165 Whether a submission was 'duly made' is a matter for an adjudicator to determine. A mistaken or erroneous decision by an adjudicator in relation to that question does not involve jurisdictional error and will not invalidate a determination.[117]

166 In *John Holland Pty Ltd v Roads and Traffic Authority of NSW*,[118] Basten J (with whom Beazley JA agreed) stated:

> 71 This argument is based on a false premise, and has given rise to this Court being invited to consider a number of false issues. The false premise is that the scope of the payment schedule and the identification of submissions "duly made" by the Respondent in support of the schedule are matters to be objectively determined by this Court. In my view they are not: they are matters to be determined by the adjudicator. If, as appears to be accepted by both parties, the adjudicator did not address the second response, it may have been for one of a number of reasons, namely:
>
> (a) he did not think it fell within the scope of the payment schedule and that to be taken into account it should have done;
>
> (b) it did not need to fall within the scope of the payment schedule, but for some other reason it was not "duly made";
>
> (c) The submission was inconsistent with the scheme of the Building Payment Act, which required the adjudicator to determine what work had been undertaken under the contract and what was the value of the work.
>
> So long as it is part of the function of the adjudicator to determine such matters and so long as it is within the power of the adjudicator to act in accordance with his own determination, even if a court might have reached a different conclusion, there is no basis for saying that the adjudication was invalid.
>
> 72 As I sought to explain in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [43]-[48], in my view the power to resolve these questions has been conferred on the adjudicator.[119]

167 If it were a matter for the Court to determine whether or not the responding

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117 *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, [38] (Henry J).
118 [2007] NSWCA 19 (Beazley, Hodgson & Basten JJA) ('*John Holland*').
119 Ibid, [72]-[73].

submissions dated 28 October 2021 were 'duly made', I consider the submissions in this case were duly made. That is the case, even if s 21(2B) did not provide a proper foundation for the notice that Mr McMullan issued.

168 If s 21(2B) does not provide a proper foundation for the notice, it is necessary to consider s 22(5). Section 22(5)(a) entitles an adjudicator to request further written submissions from either party. If that occurs, the adjudicator is required to give the other party an opportunity to comment on those submissions. I do not agree with Argyle's submission that the power in s 22(5)(a) is limited to seeking submissions to clarify.[120] The power to request 'any submissions relevant' is a very broad one. It is a power that the adjudicator may exercise in her or his discretion, subject only to the requirement that the request be in respect of the adjudication application under consideration.

169 While the 21(2B) Notice was expressly issued under s 21(2B), s 22(5) provided a separate head of power available to Mr McMullan to invite submissions from RK.

170 In *Australian Education Union v Department of Education and Children's Services,*[121] French CJ, Hayne, Kiefel and Bell JJ stated:[122]

> A mistake by an administrative decision-maker as to the source of his or her power to make a decision does not necessarily invalidate the decision if it is able to be supported by another source of power. Whether it can be supported by the other source of power will depend upon whether that power is subject to requirements which the decision-maker has failed to meet because of his or her belief as to the source of the power or for some other reason. As Heydon J said in *Eastman v Director of Public Prosecutions (ACT)*:
>
> > "If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power."

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120 This is unlike in New South Wales, where the scope of the adjudication process is governed by reasons identified in the adjudication response, and submissions are similarly restricted to clarify those matters. The SOP Act has no such limiting framework. See *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, [24]-[26] (Einstein J).

121 [2012] HCA 3; (2012) 248 CLR 1 (French CJ, Hayne, Heydon, Kiefel and Bell JJ).

122 Ibid, [34] (citation omitted).

171 The availability of s 22(5)(a) of the SOP Act in this case means that Mr McMullan's decision to issue the 21(2B) Notice and to rely on submissions made purportedly as a consequence of the notice was valid notwithstanding any non-compliance with s 21(2B).

172 After RK's response was received to the 21(2B) Notice, Argyle relied on s 22(5) when seeking an opportunity to respond to RK's submissions. Mr McMullan agreed to provide Argyle with that opportunity.

173 A submission may be 'duly made' if made pursuant to either of those sub-sections. A submission may be 'duly made' if it is made in response to a s 21(2B) notice. A submission may also be 'duly made' under the broad power in s 22(5).

174 Mr McMullan, having acceded to the request by Argyle to have leave to reply to the RK material pursuant to s 22(5) of the SOP Act and Argyle having filed submissions and additional supporting materials, Mr McMullan was obliged by s 23(2)(d) to consider those materials. Argyle's 4 November 2021 submissions were in response to the RK submissions which Argyle contends were not 'duly made'. Argyle cannot have it all ways. Having requested and been granted leave pursuant to s 22(5) to respond to those materials and the adjudicator being obliged by s 23(2)(d) to consider them, it makes no sense to treat the RK submissions as not 'duly made' without also treating the 4 November 2021 Argyle submissions and materials in the same way.

175 For the reasons set out above, I am not persuaded that the RK submissions dated 28 October 2021 were not 'duly made'.

Section 23(2B)

176 There is a further reason why Ground 2 fails. I do not accept that Argyle has discharged the onus to identify, for the purposes of s 23(2B)(a), 'the extent' to which the Adjudication Determination is void.

177 As soon as it is acknowledged that items 3 and 4 in the 21(2B) Notice were not inappropriate for inclusion in the notice, as tacitly accepted by Argyle, it is difficult

to find that the process miscarried and that the whole of the Adjudication Determination is void as a result.

178 Both in its written submissions filed prior to trial, and in its oral submissions at trial, Argyle did not seek to identify the 'extent to which' the Adjudication Determination was infected by error, assuming items 1, 2 and 5 in the 21(2B) Notice should not have been included.

179 To establish 'the extent to which' an adjudication is void requires an applicant for relief to:

(a) identify the reasons that are not new in the 21(2B) Notice;

(b) establish that materials provided in response are directed to such impermissible reasons and are not otherwise justified, for example as a response to a s 22(5) request; and

(c) identify those parts of the Adjudication Determination that adopt or rely upon such impermissible materials in order to make the determination or a specific finding in the determination.

180 During the hearing, senior counsel for Argyle submitted that on the face of the Adjudication Determination in this case it was not possible to determine the extent to which the impermissible materials affected the determination.[123] It was submitted that 'to identify what parts of the reasons can be salvaged' cannot be a proper manifestation of the section.[124]

181 I do not agree with Argyle. Even if it is difficult to identify the parts of the determination impacted by breach of s 23(2) or s 23(2B), the obligation to only consider submissions 'duly made', and not to take into account any matter that is prohibited, the onus remains upon the applicant for relief. It is for the applicant for relief to show the extent to which the contravening conduct renders the adjudication

123 Transcript, 53-55.
124 Transcript, 55.

determination void. The statements by senior counsel for Argyle referred to above reflected an acceptance that at the time the hearing took place, Argyle had not discharged that burden.

182 During the hearing, the Court was not taken by Argyle to specific parts of the Adjudication Determination where it might be said Mr McMullan relied on the expert materials submitted by RK on 28 October 2021 to determine a specific sum, for example, the allowance in relation to the concrete slab for Units 1 to 5. RK submitted that Argyle had failed to identify where or how in the Adjudication Determination Mr McMullan had relied on the 'impermissible' materials.[125]

183 Upon the onus question being discussed, senior counsel for Argyle sought and leave to file further short submissions directed to that issue was granted. Leave was also granted for RK to file answering submissions.

184 The purpose of providing an opportunity for Argyle to file further short submissions was to afford Argyle a further opportunity to identify what part or parts of the Adjudication Determination were said to be infected by the process of which it complained.

185 The further submissions by Argyle sought to discharge the onus via two alternative paths. The first, a submission that the Adjudication Determination is void in full because Mr McMullan gave RK a 'general right of reply' to the payment schedule, and it was accordingly difficult to discern what determination Mr McMullan would have made had he not considered impermissible materials.[126] In the alternative, Argyle submitted that, with respect to both defects and back charges, the Court should declare various paragraphs of the Adjudication Determination void. Argyle submitted that the Court should accept the evidence on behalf of Argyle and determine the adjudicated amount to be $0.

186 As to the first submission, the 21(2B) Notice did not give a 'general right of reply'.

125 Transcript, 58-59.
126 Plaintiff, further submissions dated 19 April 2022, [4].

Otherwise the first matter is a repeat of the argument advanced during the hearing. It must be rejected for the reasons discussed above.[127]

187 The second submission, like the first, assumes that the 21(2B) Notice was invalid and that as a result the Adjudication Determination considered submissions and materials not 'duly made'. Argyle submitted that because the adjudicator considered such impermissible materials, where such consideration is identified in the Adjudication Determination, the determination is void.

188 Argyle sought a declaration that a large number of specific paragraphs in the Adjudication Determination be declared void.[128] Annexed to the submissions was a detailed schedule, relied upon to demonstrate 'the extent of all Mr McMullan's contraventions and the extent of his process under s 21(2B) of the Act miscarried'.[129]

189 The Adjudication Determination is over 100 pages in length. It is divided into sections with headings. The first series of paragraphs that Argyle contends should be declared void, paragraphs 27, 28, 30-34 and 36-50, form part of the first section of the Adjudication Determination titled 'General'.

190 Paragraphs 27, 28, and 30-34 are part of a chronology of communications relevant to the process of the Adjudication Determination. Assuming the validity of all arguments advanced by Argyle, it is difficult to see why any of those paragraphs should be declared void. Paragraphs 36-50 involved a consideration by Mr McMullan of what is required by s 21(2B) of the SOP Act, including by reference to authorities. No reason is articulated and it is not apparent why those paragraphs should be declared void.

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127 See at paragraphs 126-162 above.

128 Plaintiff, further submissions dated 19 April 2022, [5], Schedule A. Argyle submitted that the Court should declare the following parts of the Adjudication Determination as void: [27], [30] to [34], [36] to [50], [83(g)], [83 h)], [143], [144], [145] and [146]5, [147] and [148], [210], [218] to [221], the columns headed 'RK' and 'Adjudicator' in the table at [222], [223], [226] to [255], the columns headed 'RK' and 'Adjudicator' in the table at [257], [258], the relevant items in the column headed 'Claimant' in the table at [260], [261], [262] and the section titled 'Summary of Determination' on page 100.

129 Ibid, [4(a)].

191 Paragraphs 143-148 fall under the heading 'Issue 4: the competing Expert Reports and site inspection'. In substance, the section of the Adjudication Determination that includes these paragraphs sets out the competing views of the experts in reports prepared by them, including reports that were provided on behalf of RK following the 21(2B) Notice. These are not sections of the Adjudication Determination where findings are made by Mr McMullan. As earlier noted, I do not accept the submission that the mere reference to documents in an adjudication determination, assuming them to not have been 'duly made', constitutes a contravention of s 23(2). To adopt such an approach would result in absurd situations where the adjudicator could not even refer to such documents in his or her adjudication determination. It will only be to the extent that an adjudicator relies on such documents that the question of whether, as a result, a specific part of the determination is void arises.

192 Paragraph 210 falls under the heading 'Issue 8: the deduction (if any) to be made in respect of the claimed defective work'. Paragraph 210 is another paragraph that refers to and identifies materials relied on by the parties, including further reports filed after the 21(2B) Notice. For the same reasons as apply to paragraphs 143-148, no issue arises about whether that paragraph should be declared void.

193 Paragraphs 218-222 and 223 are in a different category. Those paragraphs involve the adjudicator expressing his view in relation to the amount to be deducted in respect of defective work rectification items, the result of which is set out in the table at paragraph 222. At paragraph 218, Mr McMullan stated:

> In my view, on balance, weighing the respective expert assessments, and taking into account the factors raised in those competing ports, I should adopt on the more conservative expert assessments of the estimated cost to rectify defective work, contained in the MQS reports [of Mr Grimes] and supported by the CAMC report [of Mr Jeffries].[130]

194 Mr Grimes authored two reports before Mr McMullan, the first dated 30 September 2021 and the second dated 28 October 2021. In the section of the Adjudication Determination describing the content of those reports, Mr McMullan dealt with both

130 CB, 2343.

reports in a combined manner. In paragraph 222, which sets out Mr McMullan's findings, he relied upon both of Mr Grimes' reports, reports written and submitted both before and after the 21(2B) Notice. The approach adopted by Mr McMullan has the result that, in my opinion, it is impossible to identify 'the extent' to which the Adjudication Determination has been made in contravention of s 23(2) in relation to the issue of cost of rectification of defective work. Mr McMullan's reference to the report of Mr Jeffries is such that it seems more likely than not that Mr McMullan would have reached the same result without reference to that report.

195 Paragraphs 226-255 fall under the heading 'Issue 9: the deduction (if any) to be made in respect of the claimed back charges'. Argyle submitted that back charges of $101,020.99 should be allowed in its favour. The reasons given by Mr McMullan for the rejection of each of the items claimed to make up the back charges[131] in each case included that there is 'insufficient material to support the entitlement to the back charge'.[132] That is, Argyle did not persuade Mr McMullan that the allowance for back charges for which it contended was appropriate because Argyle failed to prove that was the case.

196 In relation to the issue of back charges, there does not appear to have been any reliance by Mr McMullan in the Adjudication Determination upon any of the materials submitted by RK which for these purposes might be assumed to be impermissible materials.

197 Finally, it may be noted that the schedule to Argyle's further submissions refers extensively to the report of Mr Talevski. Until Mr Talevski's report was provided as part of Argyle's Second Adjudication Response on 22 October 2021, there was no substantiation of the need or the requirement to carry out the work the subject matter of the AJL Cost Report. It would not have been reasonable for an adjudicator to have deducted allowances, as determined by the AJL Cost Report, without persuasive evidence both that the defects existed and that the work which Mr Ng

131 With the exception of one item, in respect of which there was no dispute between the parties.
132 CB, 2345-2347.

had costed was reasonable or was required to remedy those defects.

198 In all the circumstances, the claim by Argyle that the cost of rectifying defects which Argyle contends should be allowed in its favour in accordance with its expert evidence at $367,710.20 must be rejected.

199 No matter whether the onus of proof issue is approached on the first or second basis put forward by Argyle, I am not satisfied the onus has been discharged. There is no proper basis to find the Adjudication Determination or selected paragraphs of it void pursuant to s 23(2B).

Disposition

200 I will order that Argyle's application in the nature of certiorari to quash the Adjudication Determination, and for declaratory relief, is refused.

201 If the parties are unable to agree about orders as to costs within seven days, then within a further seven days the parties should file and serve submissions in relation to costs of no more than four pages.

202 I anticipate dealing with any questions of costs on the papers.