

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

Not Restricted

S ECI 2023 06161

ALOIS BABICKA AS TRUSTEE FOR ALOIS
BABICKA FIRST TESTAMENTARY TRUST

Plaintiff

v

ASD CORPORATION AUSTRALIA PTY LTD
(ACN 167 889 992)

First Defendant

and

WILLIAM TIMOTHY SULLIVAN

Second Defendant

S ECI 2023 06162

NADIA ANNE MARIE BABICKA

Plaintiff

v

ASD CORPORATION AUSTRALIA PTY LTD
(ACN 167 889 992)

First Defendant

and

WILLIAM TIMOTHY SULLIVAN

Second Defendant

S ECI 2024 00299

MAZS INVESTMENT GROUP PTY LTD ATF
M&A FAMILY TRUST (ABN 843 476 589 34)

Plaintiff

v

ASD CORPORATION AUSTRALIA PTY LTD
(ACN 167 889 992)

First Defendant

and

WILLIAM TIMOTHY SULLIVAN

Second Defendant

<u>JUDGE:</u>	GARDE J
<u>WHERE HELD:</u>	Melbourne
<u>DATES OF HEARING:</u>	5 and 6 August 2024
<u>DATE OF JUDGMENT:</u>	23 September 2024
<u>CASE MAY BE CITED AS:</u>	Babicka v ASD Corporation Aust Pty Ltd & Anor
<u>MEDIUM NEUTRAL CITATION:</u>	[2024] VSC 587

BUILDING CONTRACTS – Warehouse development – Stages schedule – Reference dates – Structure stage – Lock Up stage – Payment claims – Adjudication – Judicial review – Construction of the contracts – Building’s structural steel frame – Whether metal steel framing for offices and mezzanines part of a building’s structural steel frame – Whether structural steel frame and concrete panel works were approved by a building surveyor – Whether completion of an earlier stage is a prerequisite for the completion of a later stage – Scope of exceptions in *Cardona v Brown* (2012) 35 VR 538 – Whether Court should grant relief – Exercise of discretion – Effect of privative clauses – *Building and Construction Industry Security of Payments Act 2002* (Vic) ss 1, 3, 9, 28R(5)(a)(iii); *Building Act 1993* (Vic) s 238(1)-(2); *County Court Act 1958* (Vic) ss 49, 77 – *Building Regulations* (Vic) r 167(c) – *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 – *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr R Andrew KC with Mr A Blunt	Best Hooper
For the First Defendant	Mr A Morrison	Ward & Co
For the Second Defendant	No appearance	

Introduction

- 1 The three proceedings in this matter are applications for judicial review commenced by originating motion and seeking relief in the nature of certiorari to quash, or declare void three adjudication determinations ('determinations') made by William Sullivan, the second defendant ('the adjudicator') on 26 November 2023, and to set aside the County Court judgments entered on 13 December 2023 ('judgments') following the determinations.
- 2 The plaintiffs in the three proceedings are the owners of lots located at 105 Newlands Road, Coburg North. Alois Babicka as trustee of the Alois Babicka First Testamentary Trust is the owner of Lots 3 and 4. Nadia Babicka is the owner of Lot 5. MAZS Investment Group Pty Ltd (ABN 843 476 589 34) ('MAZS') as trustee of the M & A Family Trust is the owner of Lots 11-14 (collectively 'the owners').
- 3 On 22 October 2022, each of the owners entered into similar but separate contracts ('contracts') with ASD Corporation Australia Pty Ltd (ACN 167 889 992) ('the builder') for the construction of warehouses on their respective lots. Mr Babicka agreed that the builder would construct four warehouses on his land for \$1,567,121.81. Ms Babicka agreed that the builder would construct two warehouses on her land for \$770,886.98. MAZS agreed that the builder would construct 11 warehouses on its land for \$3,148,976.35. All contracts were GST inclusive.
- 4 Each contract included:
 - (a) extensive plans and documentation provided by the owners;
 - (b) general conditions of contract in the form of AS4000-1997 (incorporating Amendments 1-3); and
 - (c) special conditions which provided for payment on completion of specified stages.
- 5 Special Condition 4 of each contract provided that the builder was entitled to claim

milestone payments in specified percentages of the contract price for the completion of stages.

- 6 On 8 August 2023, the builder issued Structure stage invoices for Lots 3-5. They were paid by the Babickas.
- 7 On 19 October 2023, the builder issued a Structure stage payment claim to MAZS in the amount of \$629,615.27 relating to work on Lots 11-14.
- 8 On 1 November 2023, the builder issued Lock Up stage payment claims to the Babickas in the amounts of \$235,068.37 and \$115,633.05 relating to work on Lots 3-5.
- 9 The three payment claims were disputed. On 26 November 2023, the adjudicator published determinations that the amounts claimed by the builder were payable by the owners and awarded interest. The determinations were made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('Act').
- 10 On 13 December 2023, her Honour Judge Kirton entered the judgments. They were in the amounts awarded by the adjudicator plus interest and costs. They were made in County Court of Victoria proceedings C-23-06731, C-23-06740 and C-23-06709.

Relevant statutory background

- 11 The main purpose of the Act is set out in s 1 and 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.
- 12 Section 3 sets out the object of the Act, and describes how the object of the Act is to be achieved:
 - (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 and 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; and
 - (b) any other remedy that a claimant may have for recovering that other entitlement.

13 The entitlement of a builder to progress payments is calculated according to ‘reference dates’, and is governed by s 9 of the Act, which relevantly provides:

- (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...

14 The legal principles that relate to ‘reference dates’ and the resulting jurisdiction of adjudicators may be summarised in the following way: ¹

- (a) the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under the Act;²
- (b) the making of a valid payment claim under the Act is a precondition to an adjudication application and to the jurisdiction of the adjudicator;³
- (c) the existence of a reference date is a jurisdictional fact as it is a criterion the existence of which enlivens the power of an adjudicator;⁴
- (d) the existence of an available reference date to found a payment claim is a condition precedent to the adjudicator exercising his or her power to make a determination under the Act;⁵
- (e) on an application for judicial review, the Court must determine for itself whether the reference date exists;⁶
- (f) determination of whether a stage is completed is a mixed question of fact and law determined on the evidence before the Court;⁷

¹ *Curtis v Ramsay Builders Pty Ltd* [2024] VSC 151, [15]-[16].

² *Southern Han Breakfast Point Pty Ltd (in liq) v Leweree Construction Pty Ltd* (2016) 260 CLR 340, 345 [2] (Kiefel, Bell, Gageler, Keane and Gordon JJ); *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd* [2022] VSC 22, [28] (Stynes J) (*‘Whitehorse’*).

³ *Whitehorse* [28]; *Shape Australia v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808, [40] (Digby J) (*‘Shape Australia’*).

⁴ *Whitehorse* [28].

⁵ *Shape Australia* [40].

⁶ *Ibid.*

⁷ *Saath Pty Ltd v Seascope Constructions Pty Ltd* [2021] VSC 358, [115] (Stynes J) (*‘Saath’*); *Watpac*

- (g) if an adjudicator purports to exercise power under the Act despite the non-existence of a jurisdictional fact, whether the non-existence of that part of the adjudicator's jurisdiction and base is ignored or wrongly determined by the adjudicator, the adjudicator will have committed a jurisdictional error;⁸ and
- (h) the Court has power to make orders in the nature of certiorari in respect of an adjudicator's erroneous determination of a jurisdictional fact.⁹

15 The principles which apply when it is alleged that jurisdictional error arises on a question of fact are:

- (a) the Court must determine the question of fact for itself on the evidence placed before it;¹⁰
- (b) the burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief;¹¹
- (c) the standard of proof is high, requiring 'clear proof leading unmistakably to [the] conclusion that there was an excess of jurisdiction';¹² and
- (d) the Court will hesitate before interfering if the adjudicator has investigated the relevant facts and the decision is not manifestly wrong.¹³

Contractual conditions relating to progress payments

16 General condition 37.1 of each contract provided:

The [builder] shall claim payment progressively in accordance with *Item 28*.

Constructions Pty Ltd v Collins and Graham Mechanical Pty Ltd [2020] VSC 414, [39]-[40] (Riordan J) ('*Watpac*').

⁸ *Shape Australia* [46].

⁹ *Shape Australia* [47]-[48].

¹⁰ *Saath* [47]; *Watpac* [39]-[40]; *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, 32 (Brooking J) ('*Marshall*').

¹¹ *Watpac* [39]; *Marshall* 32-33; *Saath* [48]; *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 153 (Dixon, Fullagar and Kitto JJ).

¹² *Saath* [47]; *Watpac* [39]; *Marshall*, 32-33.

¹³ *Watpac* [39]; *Saath* [47]; *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 92 (Fullagar J).

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the *Superintendent* and shall include details of the value of *WUC* done and may include details of other moneys then due to the [builder] pursuant to provisions of the *Contract*.¹⁴

- 17 The contracts contained special conditions. Special Condition 4 of each contract modified General Condition 37.1 and provided for the builder to claim milestone payments for the completion of specified stages. It provided:

The parties agree that the payment method provided by clause 37.1 and item 28 of the General Conditions of the Contract does not apply and the Contractor shall be entitled to claim milestone payments for the stages and percentages of the Contract Price as follows:

- 18 The special conditions of the contract included a stages schedule:

Name of Stage	Works involved in Stage	percentage of total contract price.	Amount in dollars. [omitted]
Deposit		15%	
Undergrounds	<i>Undergrounds stage</i> means all underground services works have been completed	10%	
Base	<i>Base stage</i> means all reinforced concrete strip and pad footing works have been completed and approved by a building surveyor	25%	
Structure	<i>Structure stage</i> means the stage when a building's structural steel frame and concrete panel works has been completed and approved by a building	20%	

¹⁴ General Condition 1 defines '*WUC*' to mean the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, remedial work, construction plant and temporary works.

	surveyor.		
Lock Up	Lock-up stage means the stage when the external wall cladding and roof covering is fixed, internal slabs installed and external doors and external windows are fixed (even if those doors or windows are only temporary).	15%	
Fixing	<i>Fixing stage</i> means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, basins, sinks, cabinets and cupboards are fitted and fixed in position. This stage also includes the completion of external paving.	10%	
Final	<i>Final stage</i> means practical completion	5%	

19 The relevant stages for the purpose of these proceedings are the Structure stage and the Lock Up stage.

The determinations relating to Lots 3 to 5

20 Before the adjudicator, the Babickas submitted that the works had not reached Lock Up stage. Their submissions were in substance:

- (a) the works were incomplete, and the reference date had not passed;
- (b) the builder had not provided documentary evidence of the payment of the monies due and payable; and
- (c) they were entitled to retention of 5% of the claimed amount and on previous payments to the builder.

21 In his determinations, the adjudicator held that a stages schedule produced by the Babickas was not that in Special Condition 4. The evidence before the adjudicator

supported the conclusion that the Lock Up stage was completed on 1 November 2023 entitling the builder to claim the milestone payment for that stage. The Babickas had not made good their contention that the relevant works were incomplete or that the reference date had not passed.

- 22 As to the second issue, the adjudicator held that in the absence of some indication that the Superintendent appointed under the contract had required some documentary evidence, the Babickas were not entitled to withhold payment.
- 23 As to the third issue, the contract did not provide for retention monies to be deducted from progress payments.
- 24 As a result, the Babickas were unsuccessful in the adjudication. The adjudicator determined that the amounts claimed by the builder should be paid together with interest and the adjudicator's fees.

The determination relating to Lots 11 to 14

- 25 Before the adjudicator, MAZS submitted that the work had not reached Structure stage. Its submissions were in substance:
- (a) the builder did not have a right to payment having regard to the provisions of a finance agreement and acknowledgment letter for a construction loan obtained in relation to the works;
 - (b) the builder was not entitled to payment under a payment schedule prepared in relation to the works;
 - (c) the Structure stage was not complete, and there was no valid and available reference date;
 - (d) there were problems with the development;
 - (e) MAZS had taken the remaining work out of the builder's hands;
 - (f) the builder had not provided MAZS with important information;

- (g) the Structure stage had previously been paid in part;
- (h) MAZS was entitled to retain 5% retention monies; and
- (i) the builder had not shown that it was solvent.

26 In his determination, the adjudicator rejected the submissions made by MAZS. As to the first two submissions, the adjudicator held that the provisions of the finance agreement, the acknowledgment letter and the payment schedule were not part of the contract and did not affect its application. As for the third, fourth and fifth submissions, the adjudicator held that the Structure stage had been reached and a reference date established. Whilst there were problems and MAZS had taken the remaining work out of the builder's hands, this did not affect the builder's entitlement to payment. As to the sixth submission, the adjudicator held that there had been no request by the Superintendent for more documentary evidence. In the absence of any indication that the Superintendent required more documentary evidence, MAZS was not entitled to withhold payment. As for the eighth and ninth submissions, the adjudicator determined that MAZS had no right to deduct retention monies from progress payments. Finally, MAZS had not shown any legal basis on which the builder was required to provide evidence of its solvency.

27 As a result, MAZS was unsuccessful in the adjudication. The adjudicator determined that the amount claimed by the builder should be paid together with interest and the adjudicator's fees.

Legal proceedings

28 Originating motions were filed in the Court by the Babickas on 22 December 2023, and by MAZS on 25 January 2024. In each case, the ground relied on was to the effect that the payment claim relevant to each determination was not made on and from a 'reference date' for the purposes of s 9(1) of the Act.

29 On 14 March 2024, the owners obtained expert reports from Benjamin Wood of Landa Consulting Group. The builder obtained expert reports from Trevor Jeffrey of Construction and Asset Management Consultants dated 17 April 2024 and from

Andrew Christoforou of Accord Building Consultants dated 26 July 2024.

30 In addition to the expert reports, the owners rely on affidavits from Neil Shafto, a building surveyor of long experience, and the relevant building surveyor appointed under the contracts ('relevant building surveyor') and from Daniel Muj, a building inspector who undertook inspections of the works on Lots 3-5 on 10 August 2023 and prepared a certificate of compliance for the structural steel frames for those lots. On 17 October 2023, Mr Muj inspected the works on Lots 11-14 preparing a certificate of compliance for the structural steel frames on those lots.

31 The owners also relied on affidavits of Mr Babicka, and of Mohammed Mohtadi, who is the husband of Amar Mohtadi, a director of MAZS. The builder relied on affidavits of David Sagor, its sole director, and of Shane Treacy, a plumber and site supervisor who was engaged by the builder as the plumber and site supervisor for the works on all lots.

Construction of the contracts

32 The principles for the construction of commercial contracts are well established. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*, a plurality of the High Court summarised the principles of construction of commercial contracts in these terms:

The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

However, sometimes, recourse to events, circumstances and things

external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating”. It may be necessary in determining the proper construction where there is a constructional choice.

...

Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties’ statements and actions reflecting their actual intentions and expectations.

Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption “that the parties ... intended to produce a commercial result”. Put another way, a commercial contract should be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”.¹⁵

33 The principles enunciated in *Mount Bruce Mining* have been consistently applied in Victoria.¹⁶

34 To like effect, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, the High Court said:

References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.¹⁷

¹⁵ (2015) 256 CLR 104, 116–7, [46]–[51] (French CJ, Nettle and Gordon JJ) (citations omitted) (*Mount Bruce Mining*’).

¹⁶ See *Perpetual Ltd v Myer Pty Ltd* [2019] VSCA 98, [75] (Whelan, Niall and Hargrave JJA); *PCCEF Pty Ltd v Geelong Football Club Ltd* [2019] VSCA 144, [27] (Whelan, McLeish and Emerton JJA); *Knights Quest Pty Ltd v Daiwa Can Company* (2018) 366 ALR 557, 578–9, [88] (Beach, Kyrou and Hargrave JJA); *Siemens Gamera Renewable Energy Ltd v Bulgana Wind Farm Pty Ltd* [2020] VSC 126, [87].

¹⁷ (2004) 219 CLR 165, 179 [40] (citation omitted).

35 Again, in *Maggbury Pty Ltd v Hafele Australia Pty Ltd*, Gleeson CJ and Gummow and Hayne JJ said that a court construing a contract will ascertain:

the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.¹⁸

36 These principles were summarised by the Court of Appeal in *Adaz Nominees Pty Ltd v Castleway Pty Ltd*,¹⁹ where the majority said:

To construe the terms of a commercial contract, the Court asks ‘what a reasonable businessperson would have understood those terms to mean’. To answer that question, ‘the reasonable businessperson [is] placed in the position of the parties’, and the Court applies the following principles:

- (i) The terms are construed objectively, and the subjective intentions of the parties are irrelevant.
- (j) The objective approach requires reference to the text and its ordinary meaning, together with:
 - (i) the context, being the entire text of the contract including matters referred to in the text; and
 - (ii) the purpose.

These matters will ordinarily be identified by reference to the contract alone, but evidence of mutually known objective background circumstances relevant to the purpose is admissible ‘no matter how clear the “ordinary meaning” of the words’. Identification of purpose may allow admission of evidence of the genesis of the transaction, the background, the context and the market in which the parties are operating.

- (k) Unless a contrary intention appears in the contract, the court is entitled to approach the task of interpretation on the assumption that the parties intended to produce a commercial result, and should construe it so as to avoid a commercial nonsense. However, the court does not weigh the commerciality of the agreement, and business common sense is a topic on which reasonable minds may differ.
- (l) If, after completion of this process, the language used in

¹⁸ (2001) 210 CLR 181, 188, [11], quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Hoffmann LJ).

¹⁹ [2020] VSCA 201, [70] (Whelan JA and Riordan AJA) (*‘Adaz’*) (citations omitted).

the contract 'is ambiguous or susceptible of more than one meaning', then evidence of surrounding circumstances external to the contract is admissible to assist with interpretation of the language in question.

- (m) However, 'evidence of the parties' statements and actions reflecting their actual intentions and expectations' is inadmissible. Although evidence of prior negotiations is admissible to establish objective background facts known to both parties and the subject matter of the contract, evidence of negotiations reflective of actual intentions and expectations is not receivable.
- (n) Post-contractual conduct is inadmissible to construe the terms of the contract. However, the parties' subsequent communications may be relevant to determine whether the parties intended to enter into a binding contract.

Key issues

- 37 The Babickas contend that neither the Structure stage or the Lock Up stage had been completed for the warehouses under construction on Lots 3-5 when the Lock Up payment claims were made on 1 November 2023. MAZS contends that the Structure stage had not been reached for any of the warehouses under construction on Lots 11-14 when the Structure stage payment claim was made on 19 October 2023. As a result, the owners submitted that the adjudicator had no power to make the awards that he did as the relevant reference dates had not been reached when the payment claims were made.
- 38 The key issues raised by MAZS in relation to the warehouses under construction on Lots 11-14 were:
- (a) the light gauge steel framing for the offices and mezzanine in the warehouses had not been completed or approved by a building surveyor;
 - (b) the concrete panels were not approved at all; and
 - (c) the structural steel frames and concrete panels were not approved by a building surveyor.
- 39 The key issues raised by the Babickas in relation to warehouses under construction on

Lots 3-5 were:

- (a) the contracts should be construed so as to require the consecutive and incremental completion of each stage of construction;
- (b) the works on Lots 3-5 had not reached Structure stage as at 1 November 2023 for the same reasons as the works on Lots 11-14;
- (c) the walls which separate the warehouse area from the office area should be treated as external walls for the purposes of the Lock Up Stage and were not complete; and
- (d) the roof hatches to the warehouses had not been completed.

Expert witnesses

- 40 Mr Wood is a building consultant who has completed successive diplomas in building design and building construction. From 2017, he was employed as a site manager and building inspector with various building companies commencing as a building consultant in August 2021.
- 41 Mr Jeffery is a qualified quantity surveyor, carpenter and building practitioner who was employed by numerous builders from 1976 until 2000. He has been a construction and asset management consultant for over 20 years.
- 42 Mr Christoforou qualified as a building surveyor in 2002 and is a senior building surveyor with over 20 years' experience. He is a registered building practitioner with Accord Building Consultants.
- 43 In general, I preferred the opinions of Mr Jeffery and Mr Christoforou to those of Mr Wood. Mr Jeffery has given evidence on many occasions and is very experienced. His evidence was accurate and helpful.

Was the light gauge steel framing for the warehouse offices and mezzanines part of the building's structural steel frame?

- 44 The Structure stage is defined by a 'means' definition and means the stage when a building's structural steel frame and concrete panel works has been completed and

approved by a building surveyor.

- 45 The Structure stage follows the Base stage which is defined in a similar way and means 'all reinforced concrete strip and pad footing works have been completed and approved by a building surveyor'. In turn, the Lock Up stage is defined to mean 'the stage when the external wall cladding and roof covering is fixed, internal slabs installed, and external doors and external windows are fixed (even if those doors or windows are only temporary)'.
- 46 The experts differed as to the meaning of the expression 'a building's structural steel frame' in the Structure stage definition. Mr Wood considered that complete framing packages could be made of a combination of products and could be part light weight framing and part heavy steel framing. He referred to the architectural drawings which specified the requirements for lightweight framing to the walls and ceiling of the warehouse and office areas as well as to the engineering drawings which specified the requirements for heavy steel framing for the columns, stairs and office floor structures. He noted that the lightweight steel frames required inspection by a building inspector and should be included in the structural steel framing works. He concluded that the structural steel frame was incomplete as the lightweight steel frames around the mezzanine and office had not been completed.
- 47 Mr Wood provided photographs of the structural works for the warehouses under construction. Particleboard flooring of the offices and mezzanines had not been installed, and the lightweight walls of the offices and mezzanines could not be installed until the floor was completed. At the lower level, lightweight walls between the mezzanines and the infill concrete slabs were not installed and could not be installed until the infill slabs were poured.
- 48 In cross-examination, Mr Wood agreed that the installation of internal slabs was listed as part of the Lock Up stage. Either the lightweight walls had to wait to the Lock Up stage, or the installation of the infill slab had to be brought forward into the Structure stage. Mr Wood agreed that he had taken the view that the laying of the infill slabs

should be brought forward. He agreed that the mezzanine stairs could not be constructed until the infill slabs were poured.

49 Mr Jeffery said that the building's structural steel frame comprised the steel frame members shown on the structural engineering drawings, and did not include the architectural light gauge steel or the metal items included in the architectural drawings. He said that this was standard industry practice. Light gauge metal framing was not required to be installed as part of the structural frame and could be installed and removed without affecting the structural steel frame or the structural integrity of the building. The building inspector approved the structural steel frame works for Lots 3-5 on 10 August 2023 and would not have done so unless satisfied that all the structural elements of the building, and the structural steel frame had been completed in accordance with the plans and building permit.

50 In cross-examination, Mr Jeffery said that the offices and mezzanines had lightweight steel framing known in the industry as metal stud framing. It was necessary to make sure that the connection between the metal stud partitions and the concrete panel walls was structurally sound so that some force against it did not push the metal stud walls off the concrete panel walls.

51 In re-examination, Mr Jeffery observed that a lightweight metal stud partition was not made of structural steel and was not shown on the structural drawings. Although the connection of the lightweight non-structural wall to the precast wall was important so that it did not fall over that did not mean that it was a structural steel frame wall.

52 Mr Christoforou set out the order of works for the Structure stage. He described the steel framework as including steel members connected to the precast concrete panels, steel columns supporting the Level 1 floor, the Level 1 steel framed door structure, the steel framed roof structure, roof bracing and external steel framework. He did not include the lightweight steel framing for the mezzanines and offices in the works to be completed as part of the Structure stage. He was not cross-examined.

53 The owners submitted that:

- (a) the Shorter Oxford Dictionary defined the word 'structural' as meaning 'of or pertaining to building or construction' and 'pertaining to the structure of a building etc as distinguished from its decoration or fittings';
- (b) the exclusion of the light gauge steel framing for the mezzanines and offices was contrary to the objective intention of the parties as reflected in the language used in the definition of Structure stage;
- (c) it was unclear what stage the offices and mezzanines would be if they were not part of the Structure stage;
- (d) it was unlikely that the parties intended that the offices and mezzanines would be completed as part of the Fixing stage;
- (e) the fact that the infill slab was included in the Lock Up stage did not mean that completion of the offices and mezzanines should be deferred to this or a later stage;
- (f) the inclusion of infill slabs in the Lock Up stage may simply be the result of bad drafting;²⁰
- (g) the steel framing for the offices and mezzanines was structural as it held up the walls of the offices. Without steel framing the walls would fall, and someone could be seriously injured;
- (h) the relevant building surveyor specified a mandatory inspection for 'Framework prior to lining' and required that the framework be inspected before it was concealed; and
- (i) the building inspection report of 15 January 2024, and the certificate of compliance for inspection of the light gauge steel framing respectively referred to a 'structural engineer' to confirm whether 'power fixing was acceptable' and to inspection of the light gauge steel framing as a structural matter.

²⁰ Referring to *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12, [98] (Nettle J).

Findings as to the works to be completed in the Structure stage

- 54 I accept the evidence of Mr Jeffery and Mr Christoforou as to the works to be completed in the Structure stage. The works necessary to complete a building's structural steel frame are the steel frame members set out in the structural engineering drawings prepared by the structural engineer. The steel frame members shown in the structural engineering plans are typically of those steel frame components which hold up the building, and without which the building would not have integrity. They do not necessarily extend to all steel components found in the architectural drawings which may be required for other purposes. They can be installed and removed without affecting the integrity of the building's steel frame.
- 55 I accept Mr Jeffery's evidence that the metal stud framing to be erected as part of the offices and mezzanines is not part of the building's steel frame as it can be erected or removed without affecting the integrity of the building's steel frame.
- 56 In relation to the owner's submissions, I observe:
- (a) the word 'structural' is a protean word and takes its meaning from its context. Here the word forms part of the expression 'building's structural steel frame' and it is this composite expression that stands to be construed in the stages schedule;
 - (b) the objective intention of the parties as reflected in the stages schedule was to have the structural steel frame and the concrete panel works of each warehouse reviewed and approved by a building surveyor. The exclusion of the light gauge steel framing for the offices and mezzanines is not contrary to the objective intention of the parties because the light gauge steel framing is not part of the building's structural steel frame and can be removed without adversely affecting the structural integrity of each building;
 - (c) the Lock Up stage is defined to include installation of internal slabs. The infill slab is a precursor to the construction of the offices and mezzanines. It is reasonable to conclude that the construction of the offices and mezzanines must

be completed no earlier than the Fixing stage;

- (d) there is no reason to conclude that the inclusion of infill slabs as part of the Lock Up stage was the result of bad drafting. It is logical and sensible that infill slabs be completed as part of this Lock Up stage and that the offices and mezzanines also be completed as part of this stage;
- (e) whilst it is true that the metal stud walls of the offices and mezzanines would stop people falling down and suffering injury, this is not the test which must be satisfied in determining whether this work is part of the Structure stage. The issue is whether the metal stud walls are part of the 'building's structural steel frame'. For the reasons that I have given this is not the case; and
- (f) likewise, the fact that the building inspector later examined the metal stud walls and was prepared to certify them does not mean that the walls were part of the building's structural steel framework.

57 I conclude that the metal stud walls of the offices and mezzanines were not part of the 'building's structural steel frame' and were therefore not required to be completed as part of the Structure stage.

Were the structural steel frame and the concrete panels works of the warehouse under construction approved by a building surveyor?

58 Section 238(1) and (2) of the *Building Act 1993* (Vic) ('the Building Act') provide:

- (1) ... a private building surveyor, in carrying out a function under this Act or the regulations, may rely on a certificate by a registered building practitioner in a prescribed category or class of practitioners...
 - (a) that proposed building work of a prescribed class complies with any provision of this Act or the regulations; or
 - (b) that building work of a prescribed class complies with any provision of this Act or the regulations.
- (2) A registered building practitioner or an endorsed building engineer must not give a certificate under subsection (1) in respect of building work unless the certificate states that the

registered building practitioner or endorsed building engineer
(as the case may be) has inspected that building work.

- 59 Section 238(1) applies to the performance of functions under the Building Act and regulations. It has no wider application. Under r 167(c) of the *Building Regulations 2018* (Vic) ('the regulations'), the completion of framework is a mandatory notification stage in relation to the construction of a new building.
- 60 As the relevant building surveyor for the project, Mr Shafto issued the building permits for the warehouses to be constructed on Lots 3-5 and Lots 11-14. He required a mandatory inspection of the 'framework- prior to lining'.
- 61 The mandatory inspections of the warehouses under construction were carried out by Mr Muj, a building inspector, who Mr Shafto stated, he often engaged to inspect building works on projects for which he was the relevant building surveyor.
- 62 Mr Muj was authorised to undertake the mandatory inspections under s 238(1) of the Building Act by the relevant building surveyor.
- 63 Under the Structure stage and under the Base stage, completed works have to be approved by 'a building surveyor'. The provisions are construed objectively. A reasonable businessperson would understand that they required the works to be inspected and approved by a building surveyor and would not have any doubt or ambiguity about what was required. The provisions have a clear commercial purpose. They are intended to ensure that the works are completed to a standard which is approved by a building surveyor. The provisions give assurance to the owners and their financiers. Approval by a building surveyor of the Structure stage or Base stage would ordinarily be in writing given its importance to the owners and builder.
- 64 While the relevant building surveyor under the contracts would be a most appropriate building surveyor to ask to give such an approval, the definitions in the stages schedule are satisfied if approval is given by any qualified building surveyor.

Inspection of 10 August 2023

- 65 On 14 July 2023, Nic Tassigiannakis, a subcontractor of the builder emailed Mr Muj

seeking a 'Precast Panel and Structural Steel' inspection of the warehouses under construction at Lots 3 and 4. On 10 August 2023, Mr Tassigiannakis confirmed that Mr Muj would be completing 'Lots 3, 4 & 5 Precast & Structural Steel inspection'. Later that day Mr Tassigiannakis met Mr Muj on site for the inspection. Shortly afterwards, Mr Muj issued a Certificate of Compliance for Building Work issued under s 238(1)(b) of the Act.

66 In his affidavit, Mr Muj said that on 10 August 2023 when he inspected the property with Mr Tassigiannakis his inspection was limited to an inspection of the structural steel frames of the warehouses being built on Lots 3 and 4. This was responsive to the requirement imposed by the relevant building surveyor in the building permit requiring an inspection of the framework prior to lining. The certificate of compliance for building work is consistent with Mr Muj's evidence and states that the building work inspected was 'the structural steel frame to Lot 3, Lot 4 & Lot 5 but excluding the stair stringers and related C2 columns'. The certificate states that it was issued under reg 167 of the regulations.

67 The inspection carried out by Mr Muj on 10 August 2023 was a mandatory inspection under a building permit which he as a registered building inspector carried out on behalf of the relevant building surveyor. While Mr Tassigiannakis emailed Mr Shafto and Mr Muj requesting an inspection of both precast panels and structural steel (presumably to establish that the Structure stage for the warehouses under construction on Lots 3-5 was complete), no such inspection took place. Mr Tassigiannakis did not give evidence.

68 Mr Shafto may not have appreciated that he was requested to inspect and approve the steel framework and precast concrete panels to establish that the Structure stage had been reached and not only to undertake or direct the inspection of steel framework prior to lining mandated by the building permit. There is no evidence of any conversation between Mr Shafto and anyone acting for the builder clarifying the nature of the approval that was sought or confirming that it had to be given by a building surveyor. Both Mr Shafto and Mr Muj understood that Mr Muj was

undertaking a structural steel inspection as required by the building permit which Mr Muj was authorised to do.

- 69 Mr Muj was not authorised to give the Structure stage approval under the contracts. He was not a building surveyor, and it was necessary that the Structure stage approval be given by a building surveyor. The contracts make no provision for the delegation of this responsibility.

Inspection of 17 October 2023

- 70 Mr Shafto also requested Mr Muj to carry out the mandated framework inspection of the warehouses being erected at Lots 11-14 on or about 17 October 2023. Mr Muj issued a Certificate of Compliance of the structural steel frame for these warehouses. There were errors in the Certificate of Compliance as to certain details, but this does not affect the position for the purposes of this proceeding.
- 71 Although in error as to whether Mr Sagor and Mr Treacy accompanied him in the inspection of 17 October 2023, Mr Muj maintained in evidence that he only inspected the steel frames on Lots 11-14 and not the precast concrete panels. He said that he did not discuss or make comments during the inspection concerning the precast concrete panels. He said that if it was for him to certify the concrete panels, he would have inspected them when they were being manufactured.
- 72 Mr Sagor said that he accompanied Mr Muj during the inspection on 17 October 2023. They inspected the inside and outside of buildings and the connection of the structural steel to the tilt up concrete panels. According to Mr Sagor, at the conclusion of the inspection, Mr Muj said to him that he was happy with the condition of the concrete panels and the structural steel and would be issuing a certificate that day.
- 73 Mr Treacy said that during the inspection on 17 October 2023, Mr Muj had open on his tablet a copy of the engineering drawings and referred to the panel layouts with fixing points. They walked around the inside and outside of the buildings standing in front of each of the precast panels to look at each of them and the structural steel fixings and connections to each.

74 Notwithstanding the evidence of Mr Sagor and Mr Treacy, it is plain that Mr Muj was carrying out a framework inspection as required by the relevant building surveyor in the building permit. This is what he had authority to do under s 238(1) of the Act and reg 167(c) of the regulations. He was not carrying out an inspection with a view to approval of the Structure stage. He was not a building surveyor and was not authorised under the contracts to approve the Structure stage of works.

Conclusion as to completion of the Structure stage

75 I conclude that the Structure stage was not approved on 10 August 2023 in relation to Lots 3-5 or on 17 October 2023 in relation to Lots 11-14. As of 19 October 2023, and 1 November 2023, when the respective payment claims were made, the structural steel frame and the concrete panel works had not been inspected or approved by a building surveyor.

76 It follows that the payment claim made in relation to the warehouses under construction on Lots 11-14 was prematurely made. Likewise, the payment claims for completion of the Lock Up Stage of the warehouses on Lots 3-5 were also prematurely made if the warehouses were required to be completed to Structure stage as a precondition of attaining Lock Up stage.

What is the effect on Lock Up stage of a failure to reach Structure stage?

77 In *Cardona v Brown*,²¹ the Court of Appeal considered whether it was necessary to complete a new home to 'frame stage' before the home could be at lock up stage'. Under s 40(1) of the *Domestic Building Contracts Act 1995* (Vic) ('DBC Act') 'frame stage' was defined as 'the stage when a home's frame is completed and approved by a building surveyor'.

78 The Court of Appeal held that the scheme for progress payments under the DBC Act and the contract was sequential.²² Both the DBC Act and the contract acknowledged that the builder's entitlement to percentage progress payments was staged. There were multiple indicia in the Act and contract that pointed to the builder's entitlement

²¹ 35 VR 538, 541, [6] (Tate JA, Bongiorno and Osborn JJA agreeing) ('*Cardona*').

²² Ibid 554, [67].

to make a claim for progress payments being dependent upon a consecutive and incremental completion of the construction of a home which triggered the builder's staged entitlement to payment.²³ The Court inferred from the scheme and provisions of the DBC Act that the regime of progress payments was more than sequential. It reflected the fact that the works were to progress consecutively through stages in the construction of a home.²⁴

79 *Cardona* and the other decisions that I have referenced show that the decision whether completion of an earlier stage is a prerequisite of reaching a subsequent stage is essentially a matter of statutory interpretation for domestic building contracts or construction of the terms of the contract for commercial building contracts. As Mr Jeffery said, commercial contracts can provide, and commonly do provide for a contractor to claim for any stage if it has satisfied the requirements of that stage of the works. It may prove cost and time efficient due to the supply and availability of labour and materials for a builder to complete a stage in a different order than the order noted within the contract. Unless the contract specifically disallows this, it is the contractor's prerogative to do so. Such a construction of the contract may be more apparent where different areas or parts of the works are to be completed at different times, or where the stages are not sequential or incremental.

80 In the present case, the stages listed in the stages schedule are sequential and incremental. Each is allocated a percentage of contract price leading up to the final stage, and payment of the total contract price. The stages apply to the construction of similar warehouses for each owner. Apart from the amount in dollars, the stages in the three contracts are identical and similarly defined. Mr Christoforou provided a detailed analysis showing the sequence of works necessary to complete the Structure stage.

81 The owners relied on the joint judgment of Edelman and Steward JJ in *Realestate.com.au*

²³ Ibid, [68].

²⁴ Ibid 554-555, [67]-[69] (Tate JA); *Maples Winterview Pty Ltd v Liu* [2015] ACTSC 88, [84] (Mossop AsJ); *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group* [2023] NSWSC 343, [21] (Stevenson J).

Pty Ltd v Hardingham where their Honours said:

Contract terms are either expressed in words or not expressed in words. If a term is expressed in words, whether written or oral, it is called an express term. If the term is not expressed in words, then it must be a term that is implied from the circumstances, including the conduct of the parties.

As to express terms, since language is imperfect, the meaning of many express terms will include implications, such as explicatures arising from the words expressed and implicatures supplementing the words expressed: "language itself could not function if it did not sit atop a vast infrastructure of tacit knowledge about the world". Nevertheless, the term, as a whole, remains an express term: the implication, from the words in their context, is "included in and part of that which is expressed", is "contained in the express words of the contract", or is a necessary supplement to the words of the term.

In interpreting an express term, implications derived from and "underlying the words" make sense of the "parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it". The process is still one of interpreting the words expressed between the parties. The term as a whole – including any implications from the words – remains an express term.²⁵

82 They submitted that there was by implication a pre-condition to satisfying a later stage under Special Condition 4 and the stages schedule that each earlier stage be completed.

83 I accept the owners' submission for the following reasons:

- (a) the stages are in all instances, sequential and incremental;
- (b) the stages and the allocated percentages add up to the totality of the works;
- (c) each contract concerns the construction of a single type of facility namely a warehouse, with 17 warehouses in total to be erected on Lots 3-5 and Lots 11-14;
- (d) Special Condition 4 provides the builder with an entitlement to claim

²⁵ [2022] HCA 39, [102]-[104] (citations omitted).

‘milestone payments for the stages and percentages of the Contract Price’;

- (e) the concept of milestone payments inherently refers to significant events or achievements that mark specific points in the completion of the works;
- (f) the relevant provisions in the three contracts (apart from monetary amounts) are identical and in a standard form; and
- (g) the stages schedule provides a regular and systematic methodology to achieve completion of the works.

84 For these reasons I conclude that the failure of the builder to achieve Structure stage for Lots 3-5 precludes the builder achieving the Lock Up stage. The Structure stage must be completed for the builder to be eligible for a Lock Up stage progress payment.

Does a failure to get works approval from a building surveyor fall within the Cardona exceptions?

85 In *Cardona*, the Court of Appeal held that trivial failures or failures borne of impracticalities do not preclude effective and satisfactory completion of a stage.²⁶

86 The builder submitted that a failure to get approval of the Structure stage from a building surveyor was a trivial failure, or a failure borne of impracticality.

87 I disagree. The requirement that works in the Structure stage (and the Base stage) be completed and approved by a building surveyor is intended to ensure that the works were completed and were completed to a quality and standard approved by a building surveyor. Such a requirement provides assurance to the owner, and in turn to the financiers of the owner. It provides predictability and certainty to the parties so that they have expert confirmation that the stage requiring approval is complete.

88 There is nothing impracticable about the builder arranging for a building surveyor to inspect and approve works when the builder considers that the Structure or Base stage is complete. If the relevant building surveyor is unavailable, another building

²⁶ *Cardona*, 554-555, [67]-[69].

surveyor can give the approval.

- 89 I reject the builder's submission that the failure to obtain building surveyor approval falls within the *Cardona* exceptions.

Were the warehouses on Lots 3 and 4 constructed to Lock Up stage?

- 90 Mr Wood advanced two additional reasons why the warehouses under construction on Lots 3 and 4 had not reached Lock Up stage on 1 November 2023. They were:

- (a) the walls between the warehouse and office areas were not complete; and
- (b) the roof hatches were not constructed.

External or internal walls?

- 91 The definition of Lock Up stage requires the external wall cladding, external doors and external windows (even if temporary) to be fixed. Mr Wood gave evidence that because each warehouse was classified both as a Class 5 office and as a Class 7b warehouse under the regulations, the walls internal to the building which separate the warehouse area from the office ought to be treated as external walls for the purpose of achieving Lock Up stage. Because the internal walls between the office and mezzanine and the balance of the warehouse area were not completed to Lock Up standard, he said that the Lock Up stage had not been reached.
- 92 I reject this view and accept Mr Jeffery's opinion. The office and mezzanine and the warehouse area are integral parts of the same building. The office and mezzanine area is not a second building separate from the warehouse area. The walls separating the office area from the warehouse area are plainly internal walls. They are under the same roof of the same building. The failure to complete internal walls does not mean that a building is not at Lock Up stage.

Roof hatches

- 93 The definition of Lock Up stage requires that the roof covering, and external doors be fixed. Mr Wood believed the roof hatches should be considered as if they were external doors. Because the roof hatches were not constructed as of 1 November 2023,

it followed that the warehouses erected on Lots 3 and 4 had not reached Lock Up stage.

94 I reject this view and accept that of Mr Jeffery. A roof hatch is a hatch and not a door. The installation of roof hatches would be properly undertaken following the construction of the offices and mezzanines. This sequence of work creates a safe working platform for the roof plumber to undertake the installation of the hatches. Significantly, Mr Jeffery assessed the cost of installation of each roof hatch as in the order of \$695 being two hours of a plumber's time at \$90/hour plus the \$450 cost of each hatch and \$65 flashing materials. I conclude that the construction of roof hatches does not form part of the Lock Up stage.

95 A failure to construct a roof hatch would in any event fall within the *Cardona* exceptions both because the item is trivial and can be completed at low cost, and because it would be impractical to construct a roof hatch until the office and mezzanine have been completed so that the plumber has a safe platform on which to install the hatch.

Conclusion

96 I reject Mr Wood's two additional reasons as to why the warehouses under construction on Lots 3 and 4 were not at Lock Up stage on 1 November 2023.

Should the Court exercise its discretion and grant relief?

97 I have found that the warehouses under construction on Lots 3-4 were not at Lock Up stage on 1 November 2023 because a building surveyor's approval had not been obtained to the works completed in the Structure stage. I have also found that the warehouses under construction on Lots 11-14 were not at Structure stage on 19 October 2023 for the same reason.

Builder's submissions

98 The builder submitted that even if the Court were persuaded that the owners had demonstrated that the owners had demonstrated that the Lock Up stage had not been reached in the case of the warehouses under construction on Lots 3-5 as at 1 November 2023, or that the Structure stage had not been reached in the case of the warehouses

under construction on Lots 11-14, the Court should nonetheless decline to exercise its discretion to grant relief.

99 The main points advanced by the builder were:

- (a) the owners must show the absence of jurisdiction by clear facts leading unmistakably to that conclusion;
- (b) the owners' arguments put to the adjudicator were substantially different from those now pressed;
- (c) the Court has a discretion to refuse relief if the challenger has withheld evidence relevant to the jurisdictional issue from the relevant decision maker;
- (d) if there were objections to jurisdiction the owners should have put their objections in a payment schedule to give the builder and adjudicator the opportunity of considering them;
- (e) the owners ought to be estopped from now challenging the existence of a reference date; and
- (f) courts refused to set aside determinations on grounds not raised before the adjudicator in *Transgrid v Walter Construction Group*,²⁷ *Kembla Coal & Coke v Select Civil* ²⁸ and *Oppedisano v Micos Aluminium Systems*,²⁹ which should be applied here.

Owners' submissions

100 The main points advanced by the owners in submitting that relief should be granted by the Court were:

- (a) the builder has an advantage under the security of payment regime because it has the complete initiative as to when it will make a claim;

²⁷ [2004] NSWSC 21, [67] (*'Transgrid'*).

²⁸ [2004] NSWSC 628, [110] (*'Kembla Coal'*).

²⁹ [2012] NSWSC 53, [43] (*'Oppedisano'*).

- (b) the builder engaged lawyers experienced in security for payment matters and adjudication, and Mr Jeffery to help it prepare for the adjudications;
- (c) the prospect of applications for adjudication and future litigation were unknown to the owners;
- (d) the owners were represented by a small firm of solicitors who were not experienced in adjudications or security for payment matters;
- (e) the Act imposes a very tight timeframe especially given the inequality of opportunity that is provided;
- (f) the adjudicator had a certificate of compliance from a building inspector, but not from a building surveyor;
- (g) the adjudicator did not have the benefit of the extensive expert evidence before the Court;
- (h) the amounts in dispute are substantial, as are the risks that are shifted to the prejudice of the owners; and
- (i) the cases of *Transgrid*, *Kembla Coal* and *Oppedisano* are very different from the present case and should be distinguished.

The cited cases

101 In *Transgrid*, the plaintiff, TransGrid, contended in an application for judicial review that there had been a denial of natural justice by the adjudicator in failing to give TransGrid a further opportunity to make submissions as to the value of the work, or to supplement its material. McDougall J rejected these complaints holding that it was open to TransGrid to take whatever approach it wished at the adjudication. His Honour determined that TransGrid had taken a considered approach to the adjudication and should not under the guise of a protest against an alleged denial of natural justice be permitted to take another approach.³⁰

³⁰ [2004] NSWSC 21, [60]-[69].

- 102 In *Kembla Coal*, the adjudicator allowed an amount for preparation costs in respect of two variations. In a judicial review application, the plaintiff sought to characterise the claim for preparation costs as a claim for damages. McDougall J rejected this submission and held that the claim for preparation costs was a claim for a contractual entitlement. The adjudicator did not act in excess of his jurisdiction in awarding preparation costs. McDougall J added that even if he were wrong in this conclusion, he would not grant relief because the relevant challenge was not made to the adjudicator. The parties should be held, in substance, to the case they sought to make out before the adjudicator. If this were not done, a party could hold back on a particular point before the adjudicator, and raise it in the Court, if the outcome of the adjudication were not to its liking.
- 103 *Kembla Coal* is a case where the preparation cost claim was made before the adjudicator and allowed, but the party seeking judicial review sought to recontest the claim by putting a new submission that would lead to a different result.³¹
- 104 In *Oppedisano*, a glazier agreed to provide glazing in respect of work carried out to premises consisting of four units separately occupied by Mr Oppedisano and members of his family for 27 years. Under s 7(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW), premises in which the respondent proposes to, or does reside are excluded from the legislation.³² Mr Oppedisano did not submit to the adjudicator that the premises were excluded, although he was familiar with the facts relating to his own and his family's occupation of the premises. As the issue was not drawn to the adjudicator's attention, the determination did not refer to the issue.
- 105 McDougall J stated that he was strongly inclined to withhold prerogative relief as a matter of discretion both because Mr Oppedisano knew the facts and chose not to raise the argument, and because of the relatively small amount of the claim (\$49,472).³³

³¹ [2004] NSWSC 628, [78]-[82], [110].

³² Section 7(2)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) has since been repealed.

³³ *Oppedisano*, [44].

Conclusions as to the exercise of discretion

- 106 The evidence shows that the Structure stage was never completed in the case of any of the warehouses under construction because no building surveyor approval was given of the building's structural frame and concrete panel works prior to the making of payment claims by the builder.
- 107 Building surveyor approval was an important protection and safeguard for the owners who were not required under the contracts to make the milestone payment for the Structure stage until it had been obtained.
- 108 In the determinations, there is no reference to the absence of building surveyor approval of the Structure stage. I am satisfied that if the adjudicator had been aware that no building surveyor approval had been given to the Structure stage prior to the payment claims, the result would have been different. It is a case where there is clear proof that leads unmistakably to one conclusion as there is no documentation or evidence of building surveyor approval of the Structure stage.
- 109 This is not a case where the critical issue of jurisdictional fact was debated once before the adjudicator and then again before the court. Rather, it is a case where the critical issue of jurisdictional fact was simply not identified or articulated before the adjudicator.
- 110 The proceeding is important to the parties with the builder's claims against the owners exceeding \$1 million in total, and interest continuing to run at the penalty interest rate on the judgments.
- 111 On balance, I am of the view that I should grant the relief sought by the owners. It is true that the builder may well have completed most or all of the work necessary to complete the Structure stage and has incurred considerable labour and materials costs. On the other hand, the parties expressly agreed that the Structure stage progress payment was payable when the building's structural steel frame and concrete panel works were approved by a building surveyor. The structural steel frame and the concrete panel works had not been inspected or approved by a building surveyor at

the time when the payment claims were made by the builder. The purpose of the requirement for building surveyor approval is to protect the owners and their financiers. A failure to get the works approved by a building surveyor is a basic omission when the contracts expressly require that this be done in order to complete the Structure stage. It would be unfair and unjust to the owners to in effect require them to make payment for the Structure stage even though the work had not been approved by a building surveyor which the parties expressly agreed was a prerequisite of the Structure stage progress payment.

- 112 I also consider that there is some merit in the owners' submission that they had limited time (which is not unusual under the scheme of the Act) to prepare for the adjudication. As a result, neither the owners nor the adjudicator identified the fact that no Structure stage approval by a building surveyor had been given prior to the making of the payment claims by the builder.

Are the owners estopped from challenging the reference date?

- 113 I do not accept the builder's submission that there is an estoppel which prevents the owners from challenging the existence of the reference date. No such estoppel has been shown to exist on the facts of the case, and none arises from the conduct of the adjudications.
- 114 The parties have brought other litigation which will determine the opposing claims made against each other. The builder submitted that findings by the Court might result in an issue estoppel or an Anshun estoppel³⁴ from findings made by the court in proceedings of this type. It referred to *Gemcan Constructions Pty Ltd v Westbourne Grammar School (Enforcement of Arbitral Award)*,³⁵ where Riordan J held that a prior decision of Robson J to quash an adjudicator's decision in a security of payment matter did not give rise to an issue estoppel precluding a subsequent determination of an arbitrator that a builder was not in substantial breach of their contract, as the question of substantial breach was not argued before Robson J. An Anshun estoppel did not

³⁴ Referring to *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

³⁵ [2022] VSC 6 (Riordan J).

arise as it was not unreasonable for the builder not to so contend before the adjudicator and before Robson J.³⁶

115 In the present case, the Court is asked to exercise its inherent power to quash three determinations made by an adjudicator, and the County Court judgments consequential to those determinations.³⁷

116 While it is conceivable that an issue estoppel or Anshun estoppel may arise in subsequent proceedings, s 10B of the Act excludes a wide range of claims from consideration in calculating the amount of a progress payment in a security of payment claim while s 47 upholds the rights of parties to construction contracts in certain circumstances in subsequent proceedings. The scope for subsequent issue estoppel or Anshun estoppel defences following a security for payment claim is low.

Does the Supreme Court have jurisdiction to grant relief?

117 In the landmark decision of *Kirk v Industrial Court of New South Wales*, the High Court said:

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions' And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant

³⁶ *Westbourne Grammar School v Gemcan Constructions Pty Ltd* [2017] VSC 645, [65].

³⁷ See *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.³⁸

118 *Kirk* clearly enunciates the constitutional significance of the Supreme Court's supervisory jurisdiction including its judicial review jurisdiction under order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules'). State legislative power cannot take from a State Supreme Court the power to grant relief on account of jurisdictional error. However, legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond the power of the State legislature.

119 In *Saville v Hallmarc Construction Pty Ltd*³⁹, the Victorian Court of Appeal noted the New South Wales case of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*:⁴⁰

Questions were removed into the New South Wales Court of Appeal specifically to consider whether determinations made by adjudicators are subject to the supervisory jurisdiction of the Supreme Court and amenable to orders in the nature of certiorari. The New South Wales Court of Appeal (Spigelman CJ, Basten JA and McDougall J) held that determinations made by adjudicators are reviewable by the Supreme Court for jurisdictional error and that an incorrect finding that s 17(2)(a) had been complied with is vitiated by jurisdictional error.⁴¹

120 In a discursive footnote to the above extract, the Court of Appeal (Warren CJ and Tate JA) noted, without apparent disagreement, that the Court in *Hamo* found that the ouster clause in the New South Wales security of payments legislation did not preclude judicial review:

The Court held that insofar as *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* ... ('*Brodyn*') held that an order in the nature of certiorari was not available to quash or set aside a decision of an adjudicator under s 17(2)(a) of the NSW Act, it was in error. (Vickery J had already held that *Brodyn* did not apply in Victoria ...) The Court also held that an ouster clause in the NSW Act did not preclude judicial review, especially in the

³⁸ (2010) 239 CLR 531, 581, [99]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

³⁹ (2015) 47 VR 177 ('*Saville*').

⁴⁰ (2010) 78 NSWLR 393 ('*Hamo*').

⁴¹ *Saville*, 201 [67].

light of [*Kirk*].⁴²

121 In reviewing authorities on the limits of legislative power to confer powers or functions upon a State Supreme Court, Redlich JA in *Nguyen v R*⁴³ referred to *Kirk* in these terms:

In [*Kirk*], the High Court held that it was necessary to construe legislation, which purported to oust the jurisdiction of the Supreme Court of New South Wales for judicial review of decisions of the New South Wales Industrial Court, as precluding the granting of orders for certiorari for errors of law on the face of the record but not so as to preclude judicial review for jurisdictional error. In applying *Forge*, the Court held that to construe the privative clause more broadly would have *distorted* the character of the Supreme Court such that it would fail to meet the constitutional description of a State Supreme court. This was beyond the legislative power of the State Parliament:

Chapter III of the Constitution requires that there be a body fitting the description 'the Supreme Court of a State'. It is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. (citations omitted)⁴⁴

The effect of two privative clauses

122 There are two privative clauses which might provide a barrier to the grant of relief.

123 They are:

- (a) s 28R(5) of the Act; and
- (b) s 77 of the *County Court Act 1958* (Vic) ('CC Act').

Section 28R(5)(a)(iii) of the Act

124 Section 28R(1) of the Act empowers a person to recover as a debt due to that person in any court of competent jurisdiction the unpaid portion of the amount payable under an adjudication certificate provided under s 28Q of the Act.

125 Section 28R(5) provides:

If a person commences proceedings to have the judgment set aside, that

⁴² Ibid, 202 note [72] (citations omitted).

⁴³ (2016) 311 FLR 289.

⁴⁴ *Nguyen*, 342-343, [197].

person –

- (a) subject to subsection (6), is not, in those proceedings, entitled –

...

- (iii) to challenge an adjudication determination or a review determination;

126 The effect of s 28R(5)(a)(iii) was considered by Vickery J in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd*, where his Honour said:

The conclusions in relation to s 28R(5)(a)(iii) of the Act are:

- (a) s 28R(5)(a)(iii) of the Act has been validly passed by the Legislature in accordance with s 85 of the Victorian Constitution;
- (b) it is a privative provision which operates in circumstances where a person commences proceedings to have a judgment entered under s 28R of the Act set aside;
- (c) in this case the Plaintiffs have commenced such proceedings, and s 28R(5)(a)(iii) of the Act applies;
- (d) section 28R(5)(a)(iii) of the Act is limited in its operation by the requirements of Chapter III of the Australian Constitution as found in *Kirk*;
- (e) section 28R(5)(a)(iii) of the Act cannot be applied to take from the Supreme Court of Victoria power to grant relief in the nature of certiorari on the basis of jurisdictional error on the part of an adjudicator appointed under the Act in challenging an adjudication determination which is the foundation of a judgment entered under s 28R;
- (f) the operation of the privative clause in s 28R(5)(a)(iii) is confined to denying relief being granted by a court in Victoria, including the Supreme Court, in the course of a proceeding to set aside a judgment entered pursuant to s 28R, where the error relied upon is an error on the face of the record in an adjudication determination which is the foundation of the judgment. In other words, pursuant to s 28R(5)(a)(iii) of the Act, it is not open to challenge an adjudication determination (or a review determination) in a proceeding to have a s 28R judgment set aside, on the basis or an error on the face of the record in the relevant determination.

It follows in this case that, if the Plaintiffs are able to establish a jurisdictional error in the Adjudication Determination, they are not precluded by the operation of s 28R(5)(a)(iii) of the Act from challenging the Adjudication Determination on that basis.⁴⁵

- 127 I agree with and adopt his Honour's conclusions as to s 28R(5)(a)(iii). As his Honour says, s 28R(5)(a)(iii) cannot be applied to take from the Supreme Court of Victoria the power to grant relief in the nature of certiorari on the basis of jurisdictional error.

Section 77 of the CC Act

- 128 The second privative clause is s 77 of the CC Act. Section 77 provides:

No judgment determination or other order given or made by the court in any civil proceeding before the court or pending in the court shall be removed by an application for an order in the nature of a prerogative writ, but every final decision by which the merits of the case may be concluded by judgment or order of the court given or made in any such proceeding before the court shall be subject to review by way of appeal as hereinbefore provided.

- 129 The scope of s 77 has been confined by judicial decision. In *Director of the Asset Confiscation Office v Van Nguyen* (which preceded *Kirk*), Ashley J held that it was doubtful that s 77 stood against a proceeding for judicial review, at least, in the case of a manifest defect of jurisdiction, a fortiori alleged wrongful refusal to exercise jurisdiction.⁴⁶

- 130 Likewise, in *Palmer Tube Mills v Semi*, Brooking JA held that even if s 77 applied to a claim arising from a denial of natural justice in a serious injury proceeding in the County Court, s 12 of the *Administrative Law Act 1978* (Vic) prevented s 77 from taking away the remedy of an order in the nature of certiorari.⁴⁷

- 131 In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Ventures*,⁴⁸ which also preceded *Kirk* and concerned a review under the Act, Vickery J held:

In *Brodyn*, the view was taken in relation to the NSW Act that, although there was not an explicit exclusion of the jurisdiction of the Court prior to obtaining of judgment, an intention was disclosed to exclude the

⁴⁵ (2015) 297 FLR 203, 222, [94]-[95].

⁴⁶ (2002) 128 A Crim R 531, [19] (citations omitted).

⁴⁷ (1998) 4 VR 439, 452 (Brooking JA, Tadgell and Buchanan JJA agreeing).

⁴⁸ (2009) 26 VR 172 ('*Grocon*').

curial intervention for errors of law in the adjudicator's determination. It followed that, under the NSW Act properly construed, relief in the nature of certiorari was not available to quash an adjudicator's determination which is not void and merely voidable.

In my opinion, this construction is not open under the Victorian Act.

The fundamental issue of construction of the Victorian Act in this context arises from the application of the *Constitution Act 1975* (Vic), insofar as it makes provision for the powers and jurisdiction of the Supreme Court...

...

Critically, there is no reference to the Act to altering or varying s 85 of the *Constitution Act* in relation to any other matter, including the grant of relief by way of certiorari. It follows, in my opinion, that no implication can arise in construing the Act which has this effect...

I am also mindful of reluctance of the Courts to impute to the legislature an intention to curtail fundamental rights in the absence of 'clear and unmistakeable language'...⁴⁹

New South Wales decisions

- 132 The law established in *Kirk* has been followed and applied in relation to s 176 of the *District Court Act 1973* (NSW) ('DC Act'), which provides:

No proceedings in the nature of certiorari

No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court.

- 133 In *Garde v Dowd*, Basten JA considered the effect of s 176 of the DC Act:

It is accepted that the effect of this provision is not to exclude proceedings by way of judicial review by this Court, but to limit their availability to cases involving jurisdictional error ... No greater intrusion on the powers of this Court would be constitutionally valid⁵⁰

- 134 The confined reading of s 176 accepted in *Garde* is cited in subsequent appellate cases in New South Wales.⁵¹

- 135 Since *Kirk* was decided, there can be no doubt that s 77 does not apply to an application

⁴⁹ *Grocon* 197-199, [93]-[98].

⁵⁰ (2011) 80 NSWLR 620, [10] ('*Garde*') (citations omitted).

⁵¹ See eg *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236, [18]; *Belan v Office of the Director of Public Prosecutions (NSW)* [2021] NSW 96, [29].

by way of judicial review for relief in the nature of certiorari on the basis of jurisdictional error by an adjudicator appointed under the Act in challenging an adjudication determination which is the foundation of a County Court judgment under the procedure found in s 28R of the Act. This is the basis of the three County Court judgments under challenge in this proceeding.

The County Court orders

- 136 Under r 56.01(2)(b) and (3) of the Rules, the County Court of Victoria should have been named as a defendant in this proceeding if the owners sought an order in the nature of certiorari in relation to an order of that court.
- 137 The relief presently sought in relation to the three County Court orders is that they be set aside. It is plain that if the determinations by the adjudicator are quashed by an order in the nature of certiorari no legal basis exists for the orders made by the County Court under s 49 of the CC Act or s 28R of the Act as the adjudication certificates which support the judgment have been quashed.
- 138 If the parties cannot agree, and it is necessary for the owners to have the County Court judgments set aside by court order, it will be necessary for the originating motion to be amended, the County Court of Victoria named as a party, and to have the opportunity of being heard. Judicial comity demands no less.

Conclusion

- 139 For the reasons that I have given, orders in the nature of certiorari will be made under order 56 of the Rules quashing the three determinations. I will hear counsel as to the other relief sought by the owners in relation to the judgments and as to costs.

CERTIFICATE

I certify that this and the 40 preceding pages are a true copy of the reasons for judgment of Justice Garde of the Supreme Court of Victoria delivered on 23 September 2024.

DATED this 23rd of September 2024.

Samuel Robert Patrick Gard
.....
Associate