

Court of Appeal
Supreme Court
New South Wales

Case Name: Builtcom Constructions Pty Ltd v VSD Investments Pty Ltd as trustee for The VSD Investments Trust (No 2)

Medium Neutral Citation: [2025] NSWCA 134

Hearing Date(s): 23 May 2025

Decision Date: 18 June 2025

Before: Leeming JA at [1]
Adamson JA at [106]
Free JA at [183]

Decision: (1) Appeal dismissed.
(2) Appellant to pay the respondents' costs, noting that the second and third respondents filed submitting appearances.

Catchwords: BUILDING AND CONSTRUCTION — adjudication — judicial review — whether adjudicator's opinion that a submission was not "duly made" was reviewable — whether the adjudicator erred in law — whether adjudicator's determination affected by jurisdictional error on the basis that he found certain submissions were not "duly made" — Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13, 14, 17, 20, 22, 26, 32A

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 8, 13, 14, 17, 20, 21, 22, 32, 32A, 34, Pts 2, 3
Supreme Court Act 1970 (NSW), s 69

Cases Cited: A-Civil Aust Pty Ltd v Meso Solutions Pty Ltd [2023] NSWSC 372
Australian Heritage Commission v Mount Isa Mines Ltd (1997) 187 CLR 297; [1997] HCA 10
Austruc v ACA; ACA v Sarlos [2004] NSWSC 131

Boensch v Pascoe (2019) 268 CLR 593; [2019] HCA 49
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport
(2004) 61 NSWLR 421; [2004] NSWCA 394
Carr v Western Australia (2007) 232 CLR 138; [2007]
HCA 47
Ceerose v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225;
[2023] NSWCA 215
Claire Rewais and Osama Rewais t/as McVitty Grove v
BPB Earthmoving Pty Ltd [2025] NSWCA 103
Construction Forestry Mining & Energy Union v
Mammoet Australia Pty Ltd (2013) 248 CLR 619; [2013]
HCA 36
Coordinated Construction Co Pty Ltd v Climatech
(Canberra) Pty Ltd & Ors [2005] NSWCA 229
Craig v South Australia (1995) 184 CLR 163; [1995]
HCA 58
David & Ros Carr Holdings Pty Ltd v Ritossa [2025]
NSWCA 108
Downer Construction (Australia) Pty Ltd v Energy
Australia (2007) 69 NSWLR 72; [2007] NSWCA 49
El Khouri v Gemaveld Pty Ltd (2023) 256 LGERA 24;
[2023] NSWCA 78
EnerMech Pty Ltd v Acciona Infrastructure Projects
Australia Pty Ltd (2024) 115 NSWLR 56; [2024]
NSWCA 162
House v The King (1936) 55 CLR 499; [1936] HCA 40
Hynash Constructions Pty Ltd v BRP Industries Pty Ltd
[2025] NSWCA 14
Icon Co (NSW) Pty Ltd v Australia Avenue
Developments Pty Ltd [2018] NSWCA 339
John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd
[2004] NSWSC 258
John Holland Pty Ltd v Roads & Traffic Authority of
New South Wales [2007] NSWCA 19
Kirk v Industrial Court of New South Wales (2010) 239
CLR 531; [2010] HCA 1
LPDT v Minister for Immigration, Citizenship, Migrant
Services and Multicultural Affairs [2024] HCA 12; 418
ALR 152
Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty
Ltd [2025] NSWCA 49
Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd [2009]
NSWCA 157

Plaintiff M1/2021 v Minister for Home Affairs (2022) 275
CLR 582; [2022] HCA 17
Probuild Constructions (Aust) Pty Ltd v Shade Systems
Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
R v Connell; Ex parte Hetton Bellbird Collieries Ltd
(1944) 69 CLR 407; [1944] HCA 42
Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR
82; [2000] HCA 57
Shade Systems Pty Ltd v Probuild Constructions (Aust)
Pty Ltd (No 2) (2016) 95 NSWLR 157; [2016] NSWCA
379
Style Timber Floor Pty Ltd v Krivosudsky (2019) 100
NSWLR 133; [2019] NSWCA 171
Vallance v The Queen (1961) 108 CLR 56; [1961] HCA
42
Wei v Minister for Immigration and Border Protection
(2015) 257 CLR 22; [2015] HCA 51
Witron Australia Pty Ltd v Turnkey Innovative
Engineering Pty Ltd [2023] NSWCA 305
Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61
NSWLR 707; [2004] NSWCA 422

Category:

Principal judgment

Parties:

Builtcom Constructions Pty Ltd (Appellant)
VSD Investments Pty Ltd as trustee for The VSD
Investments Trust (First Respondent)
Chris Thompson (Second Respondent)
Australian Building & Construction Dispute Resolution
Service Pty Ltd (Third Respondent)

Representation:

Counsel:
D Hume / A Khadra (Appellant)
G Sirtes SC / E Ball (First Respondent)
Submitting Appearance (Second Respondent)
Submitting Appearance (Third Respondent)

Solicitors:
Fortis Law (Appellant)
HWL Ebsworth Lawyers (First Respondent)
CTI Lawyers (Second Respondent)
Australian Building & Construction Dispute Resolution
Service Pty Ltd (Third Respondent)

File Number(s): 2025/146743

Decision under appeal:

Court or Tribunal: Supreme Court

Jurisdiction: Equity – Technology and Construction List

Citation: Builtcom Construction Pty Ltd v VSD Investments Pty Ltd atf The VSD Investments Trust; VSD Investments Pty Ltd atf The VSD Investments Trust v Builtcom Construction Pty Ltd [2025] NSWSC 250

Date of Decision: 11 April 2025

Before: Peden J

File Number(s): 2025/46823

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Builtcom (the appellant) and VSD (the first respondent) were parties to a construction contract for a 30-storey mixed residential-commercial development in Burwood, NSW. The contract was terminated by VSD for convenience on 25 October 2024. Subsequently, Builtcom submitted a final payment claim of approximately \$30.6 million under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act), and an adjudication application followed. On 3 February 2025, the adjudicator awarded Builtcom around \$8.5 million. However, the adjudicator declined to consider multiple claims, valuing them at nil on the basis they were not “duly made” as they relied on documentation not included in the original payment claim. The adjudicator justified this based on what he understood to be a rule established

in *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (*Cardno*).

Builtcom argued that this constituted jurisdictional error and sought relief in the nature of mandamus, injunction or remitter, requiring the adjudicator to determine those refused claims. At first instance, the primary judge concluded that no jurisdictional error had occurred. However, her Honour said that if this conclusion were wrong, she would not have remitted any affected part of the determination, and would likely have refused relief in the nature of mandamus in light of the parties' rights at law.

The issues which arise on appeal are whether the primary judge erred answering the following questions: (i) whether the adjudicator's opinion that Builtcom's submissions were not "duly made" was reviewable in the Court below; (ii) if so, whether that opinion was affected by an error of law; (iii) whether the error was jurisdictional; and (iv) what relief was appropriate.

The Court held (Leeming JA, Free JA agreeing, Adamson JA dissenting in relation to issue (iii)) **dismissing the appeal:**

This Court's jurisdiction to review an adjudicator's assessment of whether a claimant's submission has been "duly made"

(1) An adjudicator's opinion that a submission was or was not duly made is not immune from judicial review. Therefore, the primary judge erred in finding, at [24]-[26], the adjudicator's opinion that a submission was not duly made was unreviewable: [86] (Leeming JA); [150] (Adamson JA); [183] (Free JA).

(2) However, whether such an opinion is amenable to judicial review requires analysis of how that opinion was arrived at and whether it was a result of jurisdictional error: [87]-[88] (Leeming JA); [151] (Adamson JA); [183] (Free JA).

Ceeroose v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, applied.

Whether the adjudicator erred in law in the present case

(3) The adjudicator proceeded on the basis that if there were a new document which was supplied for the first time with the adjudication application, then he had to ask whether the presence of that document would have changed the valuation or reasoning in the payment schedule, and if so the new document was to be ignored: [32] (Leeming JA); [183] (Free JA).

(4) It is evident from the adjudicator's reasons that the adjudicator construed *Cardno* as requiring him to refuse to address those of Builtcom's claims which were supported by further material in the adjudication application, beyond that which was served as part of the payment claim: [157] (Adamson JA).

(5) Accordingly, the adjudicator did not refuse to value these claims based on what the Act did, or did not, provide. Rather, in deciding whether Builtcom's submissions were "duly made", the adjudicator applied the test which he understood *Cardno* to require. Therefore, the adjudicator acted inconsistently with the Act, amounting to an error of law: [35]-[43] (Leeming JA); [157] (Adamson JA); [183] (Free JA).

John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd [2004] NSWSC 258, applied.

Austruc v ACA; ACA v Sarlos [2004] NSWSC 131; *Hynash Constructions Pty Ltd v BRP Industries Pty Ltd* [2025] NSWCA 14, cited.

Whether the adjudicator's legal error was jurisdictional

(6) The error of law in applying "the *Cardno* test" was not jurisdictional. Builtcom's submissions based on the text and purpose of the statute were unpersuasive. Builtcom's submissions based on "subjective jurisdictional fact" did not avoid the effect of authorities holding that, generally speaking, whether a submission is "duly made" is a matter for the adjudicator, and any error is unlikely to be jurisdictional: [57]-[81] (Leeming JA); [183] (Free JA).

(7) To exercise the jurisdiction conferred on the adjudicator, the adjudicator was obliged to consider the adjudication application, including materials which substantiated the claims for payment in the payment claim. By refusing to adjudicate on the claims in the *Cardno* category on the basis that they were

not, for that reason, “duly made”, the adjudicator misapprehended his statutory mandate in s 22 of the Act: [172] (Adamson JA, dissenting).

(8) Therefore, the adjudicator misconstrued the Act and misapprehended his task. The result of this misapprehension was that he refused to determine a large part of Builtcom’s claim for a progress payment. Consequently, his error was jurisdictional: [173] (Adamson JA, dissenting).

Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4; *Ceeroose v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215; *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* (2024) 115 NSWLR 56; [2024] NSWCA 162; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, applied.

Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229, considered.

Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) (2016) 95 NSWLR 157; [2016] NSWCA 379; *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 42; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51; *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 418 ALR 152, cited.

Whether relief is appropriate

(9) It is preferable, in the absence of a notice of contention and in light of the possible significance of s 32A, not to express a view concerning the discretionary withholding of relief: [101]-[104] (Leeming JA); [183] (Free JA).

(10) The primary judge erred in provisionally declining relief if jurisdictional error had occurred on the basis that Builtcom had a suitable remedy under the common law, establishing a *House v The King* (1936) 55 CLR 499; [1936] HCA 40 error. Section 32A of the Act empowers this Court to set aside only that part of the determination which is affected by jurisdictional error while confirming

that part which is not. Therefore, the determination ought be declared invalid in so far as it is affected by the jurisdictional error identified above and the balance confirmed: [181] (Adamson JA).

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited.

JUDGMENT

1 **LEEMING JA:** I have had the advantage of reading the reasons for judgment of Adamson JA in draft. However, I would dismiss the appeal, for reasons which may be summarised as follows.

- (1) The adjudicator applied a rule derived from *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258, and in treating his determination as subject to that rule, he committed error of law, substantially as alleged in ground 2. However, mere error of law is not sufficient.
- (2) Contrary to ground 1, there was no jurisdictional error in the adjudicator's determination that submissions were not "duly made", and the contention that review is independently available on the basis of a "subjective jurisdictional fact" is wrong.
- (3) Ground 3 does not arise, and serves to distract from the only issue in this Court, which is whether or not a determination is affected by jurisdictional error. However, generally speaking, if an adjudicator is wrong in determining whether a submission is duly made, that will not without more invalidate the determination for jurisdictional error.
- (4) The primary judge did not need to determine, and did not finally determine even in the alternative, the question of remitter, and in the absence of a notice of contention, ground 4 does not arise.

Background

2 The construction contract giving rise to this litigation was based on the 2005 amendment to AS 4916-2002. It bound the appellant Builtcom as Construction Manager and the first respondent VSD as Principal. It provided for progress claims, including a final payment following termination for convenience for, inter alia "the cost of materials and equipment reasonably ordered by the Construction Manager for the project and which the Construction Manager is liable to accept, but only if they will become the Principal's property upon payment": cl 28.2(c). Any such claim was to be made within 28 days of receiving notice of termination and was required to comply with the provisions for other progress claims. One of those provisions (cl 25.1(g)) was for claims to

include, “on an open book basis”, “certified copies of all relevant documents to substantiate the value being claimed by it for each item of works within a trade package or Construction Manager’s trade works in excess of \$25,000.00 excluding GST in the progress claim (including time sheets, invoices, remittance advices, dockets, confirmations of orders, and photographs)”. The claim was expressly subject to VSD’s entitlement to set-off.

- 3 The contract was terminated for convenience on 25 October 2024. On 22 November 2024, Builtcom made a payment claim, seeking \$30,625,050.75. The claim was a two page letter attaching 9 pages of tables and the supporting statement required by s 13(7) that all subcontractors had been paid.
- 4 Builtcom’s payment claim included a claim for \$3.65 million for Tower Crane 2. That item, and three others (identified as “Pulzmeister”, “Tower Boom” and “Manitou”) were mentioned on p 2 of the claim as “Equipment” which Builtcom had reasonably ordered and which it was entitled to recover under cl 28.2(c). Otherwise, the claim for \$3.65 million was merely a line item on one of the tables attached to the letter.
- 5 VSD’s payment schedule was served on 4 December 2024. It was in a negative amount. VSD singled out the claim based on Tower Crane 2 for special complaint, saying it did not understand whether “Builtcom is claiming for the cost it has incurred in purchasing a tower crane or if Builtcom says that VSD is purchasing the tower crane”. It added:

That is but one example, but the Payment Claim as a whole is impacted by the decision not to include details. This is not a theoretical issue only, it created a real prejudice to VSD as VSD was not able to advance detailed reasons for non-payment to the extent that it wanted to. If an adjudication application is made under the Act, then no new reasons to support the Payment Claim will be permitted.

While Builtcom’s previous payment claims all contained hundreds of pages of supporting documents to substantiate those claims, Builtcom has chosen not to provide any supporting documents with its biggest ever payment claim, the Payment Claim (instead being a 15 page documents [sic] with the barest of line item descriptions), which both breaches the terms of the Contract (including clause 25.1) and the course of conduct between the parties, and has disallowed VSD from being able to fully understand and respond to the Payment Claim.

- 6 VSD provided a spreadsheet of 59 pages responding to line items in the payment claim. The document included six reasons for rejecting the entirety of the claim for Tower Crane 2, including:

Improper use of HC Clause 28.2(c): Cranes are a type of construction plant which do not form part of the project (as equipment and materials do). Construction plant is used as a separate reference to equipment and materials throughout the contract including being separately identified in clauses 2.2(l) and 11.2(f). Construction plant is dealt with under clause 28.2(e) which contemplates demobilisation. Construction plant is not included in clause 28.2(c). Tower Crane 2 ("TC2") was never delivered to site, so there are no costs of demobilising it claimable under cl 28.2(e), and because TC2 is not equipment or materials (but rather construction plant) is it not claimable or payable under 28.2(c) either.

- 7 VSD also said there was a breach of the Act, and breaches of various clauses in the contract, including:

Breach of HC Clause 25.1(g) – (m). Clause 25.1(g)-(m) requires Builtcom to issue progress claims on an open book basis, with all supporting documentation. Builtcom has failed to provide the documents necessary for VSD to verify purchase, registration, ownership and condition. We note all other payment claims to date have been provided with supporting documentation. Builtcom's failure to provide supporting documentation is a breach of clause 25.1.

Builtcom's adjudication application

- 8 Builtcom's application for adjudication was lodged on 17 December 2024. It reduced its claim by some \$8 million, although the entirety of the \$3.65 million for Tower Crane 2 was maintained. It was accompanied by 802 paragraphs occupying 171 pages of submissions. It was also accompanied by an expert report by Mr Elsom, a quantity surveyor, and hundreds of pages of supporting documents.
- 9 Builtcom's submissions emphasised that VSD was confined by s 20(2B) only to reasons for withholding payment which had been included in the payment schedule.
- 10 Paragraphs 124-129 developed the claim for Tower Claim 2, as follows:

Clause 28.2(c) entitles Builtcom to claim the cost of materials and equipment reasonably ordered by the Construction Manager for the Project and for which the Construction Manager is liable to accept, but only if they become the Principal's property upon payment.

Builtcom contends that Tower Crane 2 was reasonably ordered for the Project.

In the absence of a definition in the Contract, the term "equipment" should be given its ordinary English use and meaning. The Collins English Dictionary defines equipment as, "things which are used for a particular purpose". The Tower Crane was ordered for the purpose of use for the Project.

Builtcom refers to and relies on the Elsom Report in support of the quantum of this claim.

Upon payment of this sum by VSD, Builtcom will transfer title to Tower Crane 2 to VSD.

VSD is unable to complete the Project without Tower Crane 2. The foundations and base structure have been constructed for Tower Crane 2 which is a Jaso J438PA.2R. This is the only crane which is compatible with the foundation and base structure and which has been certified for use.

- 11 The submission was supported by two tax invoices and an "Asset Sales Agreement", all involving Titan Cranes and Rigging Pty Ltd. The expert opinion was that the claim fell within cl 28.2, although its weight was affected by the fact that the expert, Mr Elsom, had been instructed to assume that each of the four pieces of equipment claimed under cl 28.2(c) (including Tower Crane 2) fell within the definition of "materials and equipment" and that title would be transferred to VSD on payment.

VSD's response

- 12 In response, VSD said:

Ambush

VSD submits that the absence of such material from the Payment Claim in circumstances where Builtcom's previous 20 claims for payment each provided hundreds of pages of supporting documents must mean that Builtcom did not consider itself or a decision maker to be assisted by any supporting documents for this Payment Claim in determining any entitlement or quantum.

The absence of this material in the Payment Claim is not something that can be ignored – the Adjudicator must take this into account in assessing the strength of the Payment Claim.

- 13 VSD then submitted that:

- (1) the Crane was not "materials" or "equipment" which were reasonably ordered which VSD was obliged to accept and purchase but were instead "Construction plant" (ie "appliances and things used in the carrying out of the Services but not forming part of the project");
- (2) Builtcom had claimed for the hire of the same items of Construction Plant it now sought that VSD purchase in its Payment Claim;

- (3) The Construction Plant was to be hired under the Contract, not purchased, with the costs of hiring the plant included in Builtcom's monthly progress payments for "Preliminaries";
 - (4) "VSD is therefore at a loss as to why Builtcom is now claiming for the costs of purchasing the Construction Plant given (a) the Construction Plant was to be hired by reference to the Contract; and (b) Builtcom has in fact claimed for the hiring of the Construction Plant in its Payment Claim ...", giving as one of its examples item 1.0313 of the claim, being an amount for the hire of the Manitou forklift.
- 14 VSD's response commented on the claim for Tower Crane 2, including as follows:

Firstly, the Elsom Report has included a copy of what appears to be a tax invoice for the sale of tower crane Jaso-438PA.2R.

On 22nd of December 2024 VSD was provided with a contract between Titan Cranes and Rigging Pty Ltd and Conquest Group of Companies (NSW) Pty Ltd.

That contract [sic] is included in **AR-TAB Response-1.0302**. That contract shows that Conquest NSW purchased tower crane 2 (J438PA.2R New) and another tower crane (New J168HPA) which is not for this project and so Builtcom does not own tower crane 2 nor did Builtcom or Conquest NSW purchase tower crane 2 for \$3,650,000.00 as alleged in the payment claim. Builtcom is not able to convey title to something that it does not own.

This contract was not provided to Mr Elsom.

The contract that was provided to Mr Elsom appears to be a doctored document for the following reasons:

- The contract date (01/12/2024) and the date on the invoice (04/12/2024) are different.
- There is misalignment in text on the front page of the contract document.
- There appears to be pages from different agreements combined into 1 document.
- The signatures are a mix of screenshots overlaid onto the original handwritten scan copy.
- Did not contain details a breakdown of what was being purchased.

This item has been falsely claimed and Builtcom did not incur \$3,650,000.00 to purchase tower crane 2 or any cost for that matter because Builtcom did not purchase tower crane 2.

VSD outlines the following reasons as to why the crane was not procured for the project, or for VSD:

- Initially, the contract was a cost plus contract and later converted to a lump sum contract for preliminaries.
- At the time of being cost plus, Builtcom submitted an ATL (Refer to **AR-TAB Response- 1.0302** - Authority to Let) which included hire rates for tower crane 1 & 2. Builtcom's recommended that VSD proceed with Builtcom Plant and

Hire Pty Ltd. The hire rate for a week per crane is \$4,500, totalling \$2,400,000 for the duration of the project for tower crane 1 and 2.

- VSD responded via procore titled “STR-022 – Subcontract Tender Recommendation, Tower Crane Dry” dated 15/08/2024 stating that “The tower crane recommendation is not accepted.” For the following reasons (refer to **AR-TAB Response – 1.0302**):

- o Pre-approval is required to tender to a related entity, which was not provided by VSD.

- o Only three prices were received, two of the quotes were from Builtcom Plant (related entity) and Hire Pty Ltd and the other from Titan Cranes. It must be noted, that Titan Cranes has supplied Builtcom with the Crane in question. In addition, the related entity was using services from the other tenderer for erection.

- o Additional quotes were requested by VSD to substantiate the costs.

- o Cl 6.4 of the Head Contract states that “the *Construction Manager* must not call tenders from any corporation that is a related body corporate of the *construction Manager* Unless the relation is clearly and unequivocally disclosed to the *Principal or Principal’s Representative* and approval has been obtained ...)

- Builtcom refused to provide additional quotes and demanded a direction within 5 business days, refer to document in **AR-TAB Response- 1.032**. A direction could not have been provided due to the related entities.

Builtcom on its own accord has purchased a crane, unbeknown to VSD and without direction from VSD.

Further to the above, VSD has obtained a quote from Active Crane Hire via email tilted RE: Urgent Purchase Quote - JASOJ438PA.2R dated 20/12/2024 for the purchase of a similar size crane of \$1,100,000+GST plus shipping of \$80,000. This is included in **AR-TAB Response- 1.032**.

In the event that the adjudicator finds that Builtcom “purchased” a crane, which is denied, the reasonable cost of purchasing a crane would be \$1,200,000 + GST and not the claimed \$3,650,000 + GST by Builtcom. In any event, Builtcom did not purchase a crane.

VSD is a developer and has no need or interest in purchasing a crane and it is not credible that VSD would ever ask to purchase a crane.

- 15 VSD’s response also observed that no remittances for the \$3.65 million had been provided, nor a copy of the crane’s registration with SafeWork NSW, nor a certificate of ownership.
- 16 VSD also retained an expert, Mr Timothy Haynes, who produced a report which he said complied with the expert witness Code of Conduct. He disagreed with Mr Elsom. His disagreement was expressed to be based on the absence of remittances, the fact that Tower Crane 2 was in the contract a “Hire” item,

the fact that the drawdown schedule did not mention a drawdown of crane purchase costs, and the absence of evidence of title.

The balance of these reasons

- 17 The main issue in this appeal is whether part of the adjudicator's determination discloses jurisdictional error. An identical issue arose before the primary judge, who concluded that it did not. If her Honour's conclusion is correct, the appeal must be dismissed.
- 18 The most efficient course is to address the grounds of appeal in a slightly different order from the notice of appeal, and deal simultaneously with the aspects of the determination and the reasons of the primary judge. Before doing so, three points should be noted.

The parties' submissions stood and fell based on Tower Crane 2

- 19 The first is that both parties litigated the essential issue arising from the disparity between the material accompanying the payment claim and that accompanying the adjudication application by reference to the claim of \$3.65 million for Tower Crane 2. It was said without objection that:

[E]veryone accepted that because the adjudicator had adopted the same methodology in relation to a number of the claims, it wasn't necessary to slavishly go through each and every different claim. And that the tower crane stood as an exemplar of the problems that had given rise to the way in which our client responded.
- 20 So far as I can see, that was a sensible approach for the parties to take. For example, the largest single item in the payment claim was a claim for \$6,555,701.57 described as "Formcom Formwork Break Costs – Clause 28.2(e)". No details beyond that line item in a spreadsheet were provided in the payment claim. In the adjudication application, that claim was reduced to \$2,505,104.73 (see item 26 in paragraph 89 of the adjudicator's determination) and was supported by slightly more than 3 pages of submissions (pages 50-53 of the adjudication application). It was rejected in its entirety by the adjudicator at paragraphs 125-126, in language materially identical to the language rejecting the claim for Tower Crane 2 based on the *Cardno* test.
- 21 Similarly, paragraphs 107-109, 118-120, 132-134, 230-232 and 238-241 deal in essentially the same terms with numerous other aspects of Builtcom's claim.

- 22 These reasons proceed on the same basis, although I bear in mind that the parties' sensible, selective approach tends to conceal the magnitude of the task performed by the adjudicator.

The effect of s 32A

- 23 The second is that these reasons adopt the approach shared by the parties and put to one side the changes (some of which may be quite subtle) effected by s 32A. That section seems to proceed on the basis that a single certificate in a particular amount of dollars is to be treated divisibly so that components may, or alternatively may not, disclose jurisdictional error. That section may introduce some complexity into, amongst other things, questions of discretionary refusal of relief. These reasons should not be understood as bearing upon those issues.

The efficacy of cl 25.1

- 24 During the hearing there were exchanges with each side concerning the impact of s 13 of the Act upon cl 25.1, including as to what is meant by a contractual clause being "void". Mr Hume supplied a reference to *A-Civil Aust Pty Ltd v Meso Solutions Pty Ltd* [2023] NSWSC 372 at [85] where the conclusion that such a provision is void is expressed. The question is important and, in my respectful opinion, potentially more complex than the submissions received in this appeal where the issue does not arise. I prefer to reserve consideration of that question to a case where it is fully argued and the answer matters.
- 25 The relevant statutory provisions have been reproduced by Adamson JA. I shall not repeat them in these reasons.

Ground 2: The adjudicator's determination and the application of the "Cardno test"

- 26 The adjudicator sought and obtained two extensions of time, beyond the ten working days for which the Act provided commencing on 24 December 2024. It is to be borne in mind that the adjudicator had 157 disputed items and 37 claims of set-off, many hundreds of pages of single-spaced submissions, and thousands of pages of supporting documents including two expert reports and one statutory declaration each expressing divergent views on the majority of disputed items, to resolve a claim in excess of \$20,000,000. Section 21(3)

required him to make the determination as expeditiously as possible and in any event within ten business days (unless the parties agreed to an extension). The ten day period applies to the adjudication of all payment claims, large and small, and irrespective of the number of issues raised.

- 27 The determination, which is of 340 paragraphs plus annexures, was issued on 3 February 2025. Much is formulaic and repetitive, but that reflects the character of both sides' submissions on many dozens of claimed items. The adjudicator cannot fairly be criticised for departing from the promptness required by the statute.
- 28 The determination was in the amount of \$8,467,232.13. The adjudicator rejected many of Builtcom's claims on the basis of what he called "the *Cardno* test", based on *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258. The issue raised by ground 2 of this appeal is whether the adjudicator (a) inflexibly applied a strict rule, said to be derived from *Cardno*, or instead (b) deployed, as a rough heuristic in order to avoid a breach of procedural fairness, a test derived from *Cardno*.

Did the adjudicator apply the "Cardno test" as an inflexible rule?

- 29 The primary judge said that what the adjudicator did was to apply the "scope and ambit test". Her Honour said at [42]-[44]:

... the adjudicator must comply with s 22(2) SOP Act when determining the application, including considering "duly made" submissions.

The authorities about submissions being "duly made" share a single concern, namely:

- (1) If the applicant includes submissions in an adjudication application that go beyond what was raised in the payment claim, the respondent may be denied procedural fairness or natural justice.
- (2) That is because the respondent cannot properly respond to the applicant's "new points" in circumstances where s 20(2B) SOP Act prevents her from including in her adjudication response "reasons for withholding payment" that were not included in her payment schedule.

See *Cardno; Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd* [2005] NSWSC 1129 at [129] (Brereton J); *Parkview Constructions Pty Ltd v Sydney Civil Excavations Pty Ltd* [2009] NSWSC 61 at [22] (Brereton J); *Leighton v Arogen* [2012] NSWSC 1323 at [82] (McDougall J).

Read together, the decisions deal with that concern by setting out a general rule: where submissions included in an applicant's adjudication application go beyond the scope or ambit of his payment claim (as ascertained by the

adjudicator: see *Martinus* at [60], [80]), those submissions are not “duly made” within the meaning of s 22(2)(c) SOP Act.

- 30 Her Honour then observed that the scope and ambit test was merely a heuristic to ensure that the respondent was afforded natural justice: at [47]. Her Honour consequently said that there was no occasion to consider whether any “strict *Cardno* test” was “plainly wrong”: at [48].
- 31 I think that was an overly generous reading of the adjudicator’s reasons by the primary judge. In this respect I agree with the conclusion reached by Adamson JA.
- 32 The adjudicator’s reasons, read fairly and as a whole, suggest that in rationalising *Ceeroose v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 and *Cardno* (he considered that “these two decisions co-exist”), while he was “required to *determine the Claimant’s entitlement within the framework of the dispute that was propounded by the parties*”, that would be done by applying “the *Cardno* test”. He proceeded on the basis that if there were a new document which was supplied for the first time with the adjudication application, then he had to ask whether the presence of that document in the original payment claim would have changed the valuation or reasoning in the payment schedule, and if so the new document was to be ignored. For example, he said, referring to the four claims under cl 28.2(c) including Tower Crane 2:

In my view, the 4 claims (as set out in the table at paragraph 92 above) fall squarely within the ambit of *Cardno*. Clearly in relation to these 4 claims, the materials provided by [Builtcom] in its adjudication application go outside the scope and information provided by [Builtcom] in its payment claim. The *Cardno* test is, if there is a new document that is only advanced with the adjudication application, the adjudicator is required to consider whether the presence of the same document in the original payment claim would be enough to change the valuation or reasoning in the payment schedule.

In applying *Cardno* test to the present matter, it is irrefutable that the new documents, which were neither included, referenced or otherwise mentioned in the payment claim, were only advanced in the adjudication application. I am firmly of the view that had the new documents relied upon and included in the adjudication application been present in the payment claim, [VSD] would most likely have changed its valuation or reasoning in the payment schedule.

Further as referenced in *Cardno*, as in this current matter, [Builtcom] included a single figure in its payment claim and did not provide sufficient details in its payment claim to enable [VSD] to accept or reject or properly assess each claim as the missing details were only included in the adjudication application.

Unfortunately for [Builtcom] it can only blame itself for the manner in which it prepared the payment claim in relation to these items and in the circumstances, am of the view that the 4 claims (as set out in the table at paragraph 92 above) should each be valued at \$Nil and value each as such.

- 33 The adjudicator's reasons proceed on the basis that the application of the *Cardno* test was determinative. No other reasons for treating these claims as of nil value was given. I am conscious that the expressed reasons may be imperfectly drafted, and may not be the whole of the reasons. However, there is nothing to suggest that the adjudicator separately, after applying a heuristic or rule of thumb, then gave separate discretionary consideration to whether he should regard the relevant part of Builtcom's claim as duly made.
- 34 The adjudicator was entitled and obliged to proceed quickly and robustly. But there was no rigid, black-and-white rule that precluded his having regard to parts of Builtcom's materials in the way he said bound him. Instead, it was necessary for him to determine whether parts of the parties' submissions were "duly made", and it was necessary for the process to be procedurally fair.

Is the Cardno test an error of law?

- 35 On the approach taken by the primary judge, her Honour did not need to determine whether there was a "strict *Cardno* test" and if so whether it was plainly wrong, such that notwithstanding considerations of comity it ought not be followed: at [48].
- 36 In one sense the same is true in this Court, insofar as this ground falls short of alleging a failure to find jurisdictional error. I repeat (because it warrants repetition) that only if the adjudicator's determination (or part of it) is affected by jurisdictional error, can Builtcom's appeal be allowed. Nonetheless, I shall address this non-dispositive ground on its own terms.
- 37 I respectfully agree with Adamson JA that there is no test that *requires* an adjudicator to ask whether if a document had been included in a payment claim, the response of the other party would be different, and if so that document is to be disregarded. My reasons are as follows.
- 38 First, it is difficult to discern any such rule from the reasons in *Cardno* itself. Perhaps the closest is a statement about the adjudicator's power in [24]:

An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which *go outside* [ie fall outside the ambit or scope of] the materials which were provided in the payment claim, for the reason that the adjudicator only has power to make a determination based upon [the materials identified in s 22(2)]

- 39 That falls short of the “test” applied by the adjudicator.
- 40 Secondly, there are difficulties with a rule formulated in terms of a *likelihood* that, in the counterfactual scenario that a document had been supplied with a payment claim, the respondent would have changed its valuation or reasoning. That may be highly contestable in any particular case. In one sense, if the respondent adopts a comprehensive approach, addressing every aspect of a payment claim, then every new document will affect its submissions in response. But that cannot be what the adjudicator meant when formulating the test. However, once some threshold test of materiality is inserted into the rule, it may readily be seen how unpredictable its application may be.
- 41 Thirdly, any such inflexible rule would be inconsistent with the adjudicator’s power to request further submissions on a particular point. By way of example, there might be a finely balanced dispute as to whether more information on an important aspect of the claim should have been provided in the payment claim, or a real issue about whether proceeding on the basis of the adjudication application and the response would be procedurally fair. (Indeed, in the present case, if the adjudicator had acceded to VSD’s submission that the “Asset Sales Agreement” was a “doctored document” and the amount of \$3.65 million was “falsely claimed”, it is difficult to avoid the conclusion that it would have been procedurally unfair, for the submission was an invitation to find fraud, as to which Builtcom had not been heard.) One course which is open to an adjudicator, rather than rejecting that aspect of the claim entirely if it is considered that it is outside the scope of the dispute, is to give either or both sides a further opportunity to supply submissions and materials on that point pursuant to s 21(4). This is antithetical to the existence of an inflexible rule.
- 42 Fourthly, s 17(3)(h) of the Act, when read with s 22(2)(c), makes clear that when it comes to an adjudication application the claimant’s entitlement to include “such submissions relevant to the application as the claimant chooses to include” extends to include “relevant documentation”.

- 43 I conclude that there is no rule that prohibits an adjudicator having regard to material not supplied with a payment claim merely on the basis that the material would have (or to be precise if the adjudicator is of the opinion that it would have) altered the payment schedule. If *Cardno* is thought to stand for the proposition that that is what adjudicators must do, that proposition is not the law.
- 44 To anticipate what follows, that conclusion does not mean that the adjudicator's legal error amounts to jurisdictional error. Two points are worth making immediately.
- 45 First, the adjudicator's obligation is to determine the payment claim. In order to do so, the adjudicator must determine the scope and nature of the payment claim: see *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [66], or, as it was put by Giles JA writing for this Court in *Downer Construction (Australia) Pty Ltd v Energy Australia* (2007) 69 NSWLR 72; [2007] NSWCA 49 at [82], the "parameters" of the payment claim. If the matters sought to be put before the adjudicator give rise to substantial new issues, which could not have been anticipated prior to the adjudication application, then that may indicate that the moving party is seeking to have something which is outside the scope and ambit of its payment claim adjudicated.
- 46 Secondly, it is to be borne steadily in mind that "determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination": *Downer Construction (Australia) Pty Ltd v Energy Australia* at [87]. Further, part and parcel of the role of adjudicators is the resolution of disputes arising within the process as to whether submissions have been duly made. This part of the adjudicator's role is ordinarily well within his or her authority – which is to say that even if he or she gets it wrong, the error will not without more be jurisdictional.

Grounds 1 and 3: the need to establish jurisdictional error and its consequences

Introduction

- 47 Those seeking to challenge the determinations of adjudicators must bear steadily in mind that merely establishing legal error is not enough. That is so even if as here the determination will entitle one party to a construction contract to enforce, as if it were a judgment debt, a determination worth many millions of dollars and even if the practical reality is that there will not in the near future, and may never, be a judgment by a court on the contractual dispute.
- 48 Indeed, it is inevitable, and entirely forgivable, that the adjudicator who need not be legally qualified and who often needs to rule on dozens or hundreds of individual disputed items, without the benefit of an oral hearing and often without the benefit of any discipline in the length of submissions or the volume of material provided, in ten business days, will make material mistakes. This is an obvious consequence of the regime. As the High Court said in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4, material mistakes, whether of fact or law, do not without more lead to the determination being set aside, for that would undercut the mechanism for a swift extra-curial means of securing cashflow.
- 49 Another reason why such errors, even if they are material, do not invalidate the determination, is that the “determination” actually determines nothing finally. True it is that for some purposes a determination may be treated as if it were a judgment, but if payments are made by the party against which the determination has been made, “[t]he payments themselves are only payments on account of a liability that will be finally determined otherwise”: *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [51]. The entirety of Part 3 of the Act has no effect upon civil proceedings arising under a construction contract, except insofar as allowance must be made for the payments made pursuant to the expedited and non-curial procedures contained within it: see s 32(2) and (3) and *Style Timber Floor Pty Ltd v Krivosudsky* (2019) 100 NSWLR 133; [2019] NSWCA 171 at [41]. An important aspect of the High Court’s reasoning that jurisdiction to review for

error of law on the face of the record was ousted was the following passage in *Probuild* at [37]-[38]:

Second, it is important to appreciate the subject matter of the *Security of Payment Act*. The *Security of Payment Act* is not concerned with finally and conclusively determining the entitlements of parties to a construction contract. Section 8 confers an entitlement to a progress payment, which may be the final payment, a single or one-off payment or what is described as a “milestone payment”. Part 3 of the *Security of Payment Act* creates a distinct procedure for enforcing that statutory entitlement, which includes the making of a payment claim, the provision of a payment schedule in response and the determination of a payment claim by an adjudicator (at the option of the claimant).

The statutory entitlement to a progress payment and the procedure for recovery of a progress payment are separate from, and in addition to, a contractor's entitlement under a construction contract to receive payment for completed work. The statutory entitlement is predicated upon the existence of a construction contract, but the entitlement and the means available for its enforcement stand apart from the parties' rights under that contract. Indeed, the *Security of Payment Act* has effect despite any contractual provision to the contrary: any purported derogation is void. Moreover, the *Security of Payment Act* acknowledges and preserves parties' contractual entitlements. Importantly, the *Security of Payment Act* provides that in any proceedings before a court or tribunal in relation to any matter arising under a contract, the court or tribunal must allow for, and may make such orders as it considers appropriate for the restitution of, any amount paid under or for the purposes of Pt 3. (footnotes omitted).

- 50 In short, nothing in an adjudicator's determination stands in the way of an authoritative determination of the contractual dispute by a court.
- 51 As noted above, the adjudicator considered that the submissions in support of the claim for \$3.65 million based on Tower Crane 2 fell foul of “the *Cardno* test”, with the result that he attributed nil value to that claim.
- 52 The primary judge observed at [51] that even if the adjudicator applied the wrong legal test when determining whether Builtcom's contested submissions were “duly made”, this was not a jurisdictional error. Her Honour addressed submissions which appear to have been broader than those propounded by Builtcom in this Court (as well as a separate case for jurisdictional error advanced by VSD, which her Honour dismissed and from which no appeal has been brought).
- 53 In this Court, Builtcom acknowledged that mere legal error in applying “the *Cardno* test” was insufficient, and that it was necessary for it to establish jurisdictional error. Those concessions were properly made.

54 Grounds 1 and 3 of Builtcom's appeal were as follows:

1 Her Honour erred in concluding:

(a) at [24]-[26], that an adjudicator's finding that a submission is not "duly made" is unreviewable;

(b) at [52]-[59], that the formation, by an adjudicator, of an opinion, satisfaction or state of mind that a submission is not "duly made" is not a "subjective jurisdictional fact" amenable to judicial review for jurisdictional error in the formation of the state of mind.

3 Her Honour erred in concluding, at [37]-[51], that there is a general rule to the effect that, on the proper construction of the [Act], a submission is not "duly made" if the submission included in an adjudication application goes beyond the scope or ambit of the payment claim, as ascertained by the adjudicator.

Ground 1 and the reasoning it challenged

55 Builtcom needed to challenge [24]-[26] of the reasons of the primary judge, because her Honour regarded those paragraphs as dispositive. After a summary of authority to the effect that whether a submission is "duly made" is an issue for the adjudicator to determine, her Honour said at [23]-[26]:

The consequence is that an erroneous finding by an adjudicator that a submission is not "duly made" can lead to judicial intervention if, and only if, that finding was affected by jurisdictional error (if that can ever be the case). That is made clear by Payne JA (Ward ACJ and Basten AJA agreeing) in *Ceeroose v A-Civil Aus Pty Ltd* (2023) 112 NSWLR 225 (*Ceeroose v A-Civil*) at [52], that:

Because the adjudicator can err on questions of law and fact, mistakes as to what may be relevant and what may fall within the obligation for consideration [under eg s 22 SOP Act] will only be reviewable where the error is of the kind which is apt to invalidate the determination.

The Court of Appeal also observed that an "error in identifying a submission as having been 'duly made' is not jurisdictional": at [31]. Therefore, an adjudicator's erroneous finding that a submission is "duly made" is unreviewable, given how the SOP Act "evinces a clear legislative intention to exclude the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record": *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 (*Probuild*) at [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

It would be an odd result if the converse were not also true. An erroneous finding that submissions were not "duly made" must also be a non-jurisdictional error of law, which, by itself, does not allow for the adjudicator's determination to be quashed. This is supported by "the purpose of the legislative scheme established by the SOP Act [which is] best served by restricting the scope of intervention by the courts": *Martinus* at [57].

That conclusion is sufficient to dispose of Builtcom's claim.

- 56 Builtcom's submissions in support of ground 1 contained two main strands. One was directed to the fact that the conclusion of jurisdictional error ultimately turned on a question of statutory construction. The other was directed to reconciling the authorities relied on by the primary judge (to the effect that whether a submission was "duly made" was generally a matter for the adjudicator, such that any error was not jurisdictional) with a "distinct strand of authority" based on attacking the opinion of the adjudicator as a "subjective jurisdictional fact". I shall address them separately.

Builtcom's submissions on statutory construction

- 57 Builtcom identified six reasons why the adjudicator's error in rejecting its submissions based on the *Cardno* test, thereby departing from what the statute required when determining whether submissions had been "duly made", was jurisdictional.
- 58 The first was the absence of a power to discern implied constraints in the Act. The second was that because adjudicators need not be legally trained, Parliament would not have expected construction of the Act to be within their expertise.
- 59 Neither of those considerations is especially persuasive. Of course, adjudicators are bound by and have to apply the Act, no differently from thousands of public servants and others involved in the modern administrative state. It is with respect unreal to conclude that *any* error of law in applying the Act is one that is regarded as jurisdictional, with the effect that the purported determination on an interim basis of the amount of a progress payment is void.
- 60 The approach taken by courts in the large volume of decisions generated by the Act is much more nuanced. It has also been restrained. In *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* (2024) 115 NSWLR 56; [2024] NSWCA 162 at [9], Basten AJA said:

However, in the 24 years since the Act commenced (on 26 March 2000) there has been considerable judicial analysis, both of the specific issue as to the nature of a payment claim, and as to principles governing the construction of the Security of Payment Act. It will be necessary to address the cases in due course. However, it is convenient to note at the outset that for some 20 years, since *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*, this court has

been restrained in implying essential preconditions to the engagement of statutory powers, which would invite judicial intervention.

- 61 Some parts of the Act are regarded as being jurisdictional, including whether there was a payment claim and whether it was served on the other party. Other parts are not jurisdictional. This was the distinction to which Hodgson JA referred in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [55]. Generally speaking whether a submission is “duly made” is a matter for the adjudicator to determine and any error in doing so is unlikely to be jurisdictional. That was regarded as “well settled” by this Court in *Ceeroose* at [31]. It was endorsed by this Court in *Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd* [2023] NSWCA 305 at [23] and *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49 at [65].
- 62 Builtcom’s third reason was that the breach of the Act which it contended was jurisdictional was readily amenable to judicial enforcement. That consideration really says nothing about whether the error is a condition of jurisdiction, and is answered by what has already been said.
- 63 Builtcom’s fourth and fifth reasons were based on legislative purpose, namely, a general view that it should be construed in subcontractors’ favour and that there would be inconvenient consequences if the adjudicator were free to disregard information. Once again, none of those considerations are especially probative on the ultimate issue. It is axiomatic that the statute’s beneficial purpose in providing a mechanism for those seeking payment does not mean that every contestable question of statutory construction – including the circumstances when a determination is affected by jurisdictional error – is to be resolved favouring the party seeking payment. The position is no different from the proposition that a purposive approach to a taxation act, which is intended to raise revenue, does not result in every contestable question of construction being resolved in favour of the government, as Gleeson CJ explained in *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [6]. In *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40] it was said, by reference to *Carr*, that:

Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem.

- 64 It also needs to be firmly borne in mind that under this statutory regime, adjudicators who will tend not to be legally qualified and will produce a determination in challenging circumstances are authorised to make legal errors.
- 65 Further, the availability of review for jurisdictional error cuts both ways. In this case, slightly unusually, it is Builtcom which says it has been underpaid and asserts jurisdictional error. Probably more commonly it is the principal who claims jurisdictional error. But to the extent to which a determination is susceptible to challenge for jurisdictional error, the purpose of speedy interim determination of claims will be undercut.
- 66 Builtcom's sixth reason was that "[j]urisdictional error plays an important role in the Australian constitutional context", marking the limits of what is reviewable and what can be unreviewable, reflecting basal conceptions of the rule of law. "If adjudicators were free to misconstrue their empowering statute, they would or could become such islands of power", citing a familiar passage from *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1 at [99]. This is unpersuasive. The undoubted importance of "jurisdictional error" within the Australian legal system does not speak to whether in any particular case an error of law by an adjudicator is to be regarded as jurisdictional. It is open to the Parliament to establish a speedy, interim method of determining payment claims in the building industry, on the basis that it operates in parallel with and does not affect curial determinations, with the consequence that it is in large measure unreviewable.

Builtcom's argument of "subjective jurisdictional fact"

- 67 Confronted by a deal of authority holding that whether or not a submission was duly made was not jurisdictional, Builtcom seized upon an anterior step, namely, the adjudicator's *opinion* that a submission was duly made, and sought to challenge that opinion on the familiar lines identified in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; [1944] HCA 42.

- 68 The side-stepping of authority was neatly illustrated by Builtcom's submissions in chief:

An adjudicator has a power to form an opinion as to whether a submission is or is not duly made. That opinion is not reviewable on the basis that the Court, determining the matter for itself, is of a different view. But that opinion is reviewable if certain errors are committed in the course of forming an opinion. So, for example, if there is a denial of natural justice in the course of forming an opinion that a submission is (or is not) duly made, then that can vitiate the opinion.

- 69 In its submission in reply Builtcom maintained:

If the adjudicator forms an opinion that a submission is not duly made, but commits an error in the course of forming that opinion, the result may be to vitiate the adjudicator's opinion that the submission is not duly made and, in turn, to vitiate the determination in whole or part.

- 70 The opinion, so it was said, disclosed legal error through a rigid application of a rule derived from *Cardno*, and the result was that a deal of the application was not determined "on the merits", to which was added that "an error of law going to an essential task" may be jurisdictional. Aspects of those propositions may be accepted (although I shall return to "the merits"), but it does not follow that the determination of Builtcom's payment claim is invalidated for jurisdictional error. Builtcom's argument, which attempts to outflank authority by the device of attacking the adjudicator's *opinion* as to whether a submission was duly made, does not escape the established proposition that error in identifying a submission as having been "duly made" is not jurisdictional.
- 71 There is no legal distinction between the determination that a submission is duly made and the adjudicator's opinion that the submission is duly made. Authorities holding that the former generally does not give rise to jurisdictional error even if erroneous are not to be avoided by attention to the *opinion* of the adjudicator that a submission is not to be addressed, as opposed to the *fact* of the adjudicator's determination not addressing the submission.
- 72 Another way of making this point draws upon the circumstances in which the decisions relied on by Builtcom were based. A recurring issue of statutory construction turns on the nature of a precondition to an impugned exercise of power. The precondition may be a fact or it may be the decision-maker's opinion. An example is whether the power exercised by the Australian Heritage Commission to enter land on the register of the national estate turned on

whether the land satisfied the definition or whether the power turned on the Commission's opinion, or, as the High Court put it, whether the power "depended on the Commission's own view of the matter rather than the 'objective' ascertainment of a 'jurisdictional fact'": *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 304; [1997] HCA 10. If the precondition is a fact in the real world (as opposed to an opinion) and the exercise of power is only valid if the fact exists, then the fact is a "jurisdictional fact" and in proceedings for judicial review of the exercise of power evidence may be adduced (including evidence not before and perhaps not available to) the donee of the power in order to establish the non-existence of the fact. On the other hand, the precondition for the exercise of the power may instead be merely that the donee of the power has formed an opinion. Of course, whether or not the donee held a particular state of mind is, in a real sense, also a fact, and hence the language of "jurisdictional fact" may cause terminological confusion, as I sought to explain in *El Khouri v Gemaveld Pty Ltd* (2023) 256 LGERA 24; [2023] NSWCA 78 at [34]-[35]; this is what gives rise to the terminology of "subjective jurisdictional fact" invoked by Builtcom. That expression is far from ideal, not least for the reasons given by Windeyer J in *Vallance v The Queen* (1961) 108 CLR 56 at 83; [1961] HCA 42. But putting terminology to one side, where the validity of the exercise of power turns upon a donee's opinion, then the exercise of power may be impugned by contending that the opinion which is the precondition to the valid exercise of power is not one which has been formed properly in law.

- 73 There are many cases dealing with whether the validity of an exercise of public power turns upon a fact in the real world or alternatively the opinion of the donee, a question which is answered by a process of construction of the legislation conferring the power. *Australian Heritage Commission v Mount Isa Mines Ltd* is one; in this Court *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; [2004] NSWCA 422 is another. The nature of judicial review varies depending upon which category the power falls into. But it does not avail Builtcom to seek to deploy the concepts in those cases to the question whether a submission is "duly made" for the purposes of s 22. Section 22 is quite different from a power which is subject to a precondition which may be a fact in

the real world or alternatively an opinion held by the donee of the power. Section 22 imposes an obligation upon adjudicators. Every adjudicator is required to determine whether submissions are duly made (if so, regard must be had to them; if not, regard may not be had to them). This is well removed from a power which turns either on a fact in the real world or an opinion, and it does not assist legal analysis to seek to take the language drawn from judgments on questions of statutory construction concerning the preconditions of statutory powers to this different area.

- 74 That is sufficient to dispose of this submission. Nonetheless I shall engage with Builtcom's submissions. Builtcom sought to rely upon "a distinct strand of authority" in support of the reviewability of an adjudicator's opinion that a submission was not "duly made". Builtcom referred to no recent decisions of this Court. That is significant because the proposition that an adjudicator could make a material error of law which fell short of jurisdictional error and was for that reason unreviewable by this Court is relatively new. It was confirmed by the decisions of this Court (constituted by five judges) and of the High Court in *Probuild*.
- 75 Earlier decisions, including *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, upon which Builtcom placed heavy reliance, must be deployed cautiously on this point, because it may have been common ground that review lay for error of law on the face of the record, and accordingly there was no occasion for the reasons to distinguish jurisdictional error from non-jurisdictional error.
- 76 In *Coordinated Construction*, ground 9(b) of the notice of appeal (reproduced at [17]) was that the primary judge ought to have held that there was an error of law on the face of the record. There are two obstacles to Builtcom's reliance on Basten JA's statement at [47] that "[i]t does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review". The first is that Basten JA was speaking of s 13, not s 17. The second is that the statement is not authority for, and cannot safely be relied on to support, a legal argument based on jurisdictional error, as opposed to error of law on the face of the record.

Decisions are only authority for what they decide. The authorities were recently collected in *David & Ros Carr Holdings Pty Ltd v Ritossa* [2025] NSWCA 108 at [88], including the passage from an earlier decision of this Court which is apposite:

every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

- 77 Builtcom also sought to derive from what was said in *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19 at [57] the suggestion that “a decision would not be invalid if there was a ‘reasonable if erroneous decision that [submissions] were not duly made’”. What Hodgson JA said was:

Accordingly, even if RTA’s jurisdiction submissions were matters that should have been considered under s 22(2), the adjudicator’s failure to do so did not invalidate his decision. At worst for Holland, they were submissions as to which there were strong reasons to hold they were not “duly made”, the adjudicator made a reasonable if erroneous decision that they were not duly made, and the adjudicator took a reasonable if erroneous view that the matters raised were not of sufficient relevance to warrant express consideration under pars.(a) and (b) of s 22(2). Accordingly, if there was any breach of s 22(2), it was not of a kind that could invalidate the decision.

- 78 Contrary to Builtcom’s submission, the characterisation of the error by the adjudicator concerning s 22(2) as “reasonable if erroneous” does not entail or imply that a decision on s 22(2) which is erroneous and unreasonable is affected by jurisdictional errors. It was unnecessary for Hodgson JA to express any view on the legal status of a determination affected by an unreasonable opinion. Moreover, even if that were not so, it is not to the point, because Builtcom does not contend that the adjudicator’s decision was legally unreasonable.

- 79 Builtcom also invoked Basten JA’s reasons in the same appeal, saying:

In *John Holland*, Basten JA, writing separately, addressed the question of whether there was jurisdictional error in the adjudicator’s conclusion that submissions in the adjudication response were not “duly made”: at [71]-[72]. His Honour referred to his Honour’s earlier reasoning in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [43]-[48]: at [72]. In *Coordinated Construction*, his Honour addressed the question of whether non-compliance with s 13(2) was jurisdictional. His Honour held that mere error in the formation of an opinion by an adjudicator as

to the requirements was not jurisdictional (at [45]-[46]), but that it did “not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review”. His Honour then referred to the principle stated in *Bellbird Collieries*, including the proposition that an opinion could be vitiated if it was formed by “misconstruing the terms of the relevant legislation” at [47].

- 80 This passage does not assist Builtcom. *Coordinated Construction* does not assist; not only is it about s 13(2) rather than s 22(2), but it also does not address jurisdictional error as explained above. In *John Holland*, Basten JA regarded the first respondent as raising a number of false issues because of a false premise, which his Honour identified at [71]:

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.

- 81 In short, Builtcom’s submission based on “subjective jurisdictional fact” is, in my respectful opinion, a distraction in the present case. One does not escape from the conclusion that whether a submission is duly made is not jurisdictional by retreating to an attack upon the opinion necessarily formed by the adjudicator that the submission was not duly made, and then attacking that opinion, as if this legislative regime were one where the exercise of power turned on a precondition that might be a state of mind. The submission is not a logically valid means of side-stepping the proposition that it was within the adjudicator’s jurisdiction to determine whether or not a submission was duly made. What is more, if Builtcom’s submission was accepted, it would collapse the distinction between errors of law within jurisdiction and jurisdictional errors of law. If every conclusion by a decision-maker about a legal matter is treated as the formation of an opinion that is subject to *Bellbird Collieries* review, that would be a licence to treat every error of law in the formation of that opinion as a jurisdictional error.

The absence of a determination “on the merits”

- 82 The fact that there has been no adjudication of the payment claim insofar as it relates to Tower Crane 2 “on the merits” does not entail that there is jurisdictional error in relation to that aspect of the claim.
- 83 It may be dangerous to proceed by analogy from other areas of administrative law in relation to constructive failure to exercise jurisdiction in the special

circumstances of this Act. For example, if the adjudicator formed the view that the crane was not “materials or equipment” within the meaning of cl 28.2(c) and on that basis rejected the claim for \$3.65 million based on the crane, and even if that were wrong in point of law, it is well settled that, without more, the legally erroneous determination would not be affected by jurisdictional error. The adjudicator, despite not being legally qualified, is authorised to determine questions of construction of the construction contract, and in doing so is authorised to get it wrong. See *Probuild Constructions* at [79]-[80]; *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [16]; *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49 at [144]; *Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd* [2025] NSWCA 103 at [4].

- 84 Moreover, the adjudicator did not overlook the claim for Tower Crane 2. Instead, he explicitly addressed both sides’ submissions, including VSD’s submissions that this item should be rejected because of the lack of detail provided in the payment claim. That submission amounted to a submission that the submissions in support of the claim for the crane in the adjudication application were not “duly made”. The adjudicator had no choice but to address that submission. If he acceded to it, he had to disregard those submissions; if he rejected it, he had to have regard to those submissions: s 22(2). There was in fact a determination “on the merits”, but it was a determination of the parties’ logically anterior submissions as to whether the adjudicator was entitled to look at the claim for Tower Crane 2. There is no jurisdictional error if without more his answer to that submission was incorrect.

The possibility that a s 22(2) determination may involve jurisdictional error

- 85 The categories of jurisdictional error are not closed, and no rigid classification is possible: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 418 ALR 152 at [3] and [5]. But in most ordinary cases, even if an adjudicator wrongly treats a submission as duly made when it was not duly made, or vice versa, no jurisdictional error will be demonstrated. The oft-repeated proposition that whether a submission is duly made is not jurisdictional amounts to the propositions that (a) it is within the adjudicator’s authority to decide the payment claim to determine whether a

submission is duly made, and (b) the adjudicator is authorised to get that decision wrong.

- 86 I acknowledge that there could be occasions when an adjudicator's finding that a submission was not duly made would disclose jurisdictional error. Payne JA expressed the same reservation in *Ceeroose* at [69]. I respectfully disagree with the propositions in [24] and [25] of the reasons of the primary judge if they were intended to be treated as absolutes, to the effect that it was impossible for any determination of whether a submission was "duly made" ever to amount to jurisdictional error.
- 87 If an adjudicator, perhaps suffering from mental illness, formed the view that he or she would treat submissions as duly made if they were on white paper, or in 12 point typeface, and disregarded a party's submissions which were on blue paper or in 10 point typeface, then it would be tolerably clear that the determination was not one authorised by the statute, and one way of characterising the species of jurisdictional error would be that the adjudicator had formed an opinion about what it meant for a submission to be "duly made" which was wrong in law and which had the effect of preventing the adjudication of the claim required by the statute. That said, there are other, probably more apposite, ways of characterising such a decision. Again, if an adjudicator's personal assistant, without the adjudicator's knowledge, accepted a bribe and altered the date of a party's submissions and delayed their receipt, leading to a bona fide determination by the adjudicator that they were not duly made, the determination would be affected by jurisdictional error. The present case is far removed from such examples.
- 88 The difficulty with Builtcom's submissions is that they leap from error of law in the application of the "*Cardno* test" to jurisdictional error. Taking what was said by Basten JA in *John Holland* at its highest, an unreasonable determination that a submission was or was not duly made might amount to jurisdictional error. But Builtcom, aside from pointing to the *Cardno* test as an error of law, did not otherwise develop why there was jurisdictional error.
- 89 In particular, Builtcom did not contend that the adjudicator was doing other than seeking in good faith to resolve the parties' submissions as to the scope and

ambit of what was before him. There was good reason for Builtcom taking that course.

- 90 The adjudicator was required to determine whether a submission is duly made. In this Court, Builtcom accepted that there would be some submissions in an adjudication application which fell so far outside a payment claim that they could not be the subject of an adjudication. The example given in argument was of a second crane:

You cannot apply for adjudication of something other than the payment claim that was served under s 13(1), and that is an issue that could arise, for example, if, in my payment claim, I'd claimed for tower crane 1, and in my adjudication application, I claimed for tower crane 2. I would be applying for adjudication of something else.

- 91 The adjudicator will have to determine disputes which arise between the parties as to whether the other's claims are within the scope of the adjudication. His or her decision as to those claims will ordinarily be within his or her jurisdiction.
- 92 Builtcom's claim for \$3.65 million for Tower Crane 2 was plainly a claim made in its payment claim. But that does not mean that the adjudicator's decision to value it as nil was one he was not authorised to make. In the present case, there was nothing, nor could there be anything, on the face of the adjudication application, to indicate that the issues concerning Tower Crane 2 would extend to (a) whether the contract was a "doctored document", which had been "falsely claimed", (b) that Builtcom did not own the crane which it said VSD was obliged to purchase from it, (c) that the very crane had been purchased by another company, (d) that Builtcom's claim for rent was inconsistent with its claim that it had been obliged to purchase the items and to on-sell them to VSD, and finally (e) that if Builtcom was correct in all of the above, the amount claimed was more than triple the reasonable cost.

- 93 The adjudicator said, in the course of applying the "*Cardno* test", that:

Clearly in relation to these 4 claims, the materials provided by the Claimant in its adjudication go outside the scope and information provided by the Claimant in its payment claim.

- 94 I have accepted Builtcom's submission in ground 2 that the adjudicator was wrong in point of law in holding that any document supplied by Builtcom that

would have altered VSD's payment schedule had to be disregarded. However, his decision to proceed on the basis that the claims advanced by Builtcom were outside the scope of the payment claim, and therefore not to be determined by him, was one for him to make, and Builtcom has not pointed to any reason why the ultimate adjudication (or more precisely, parts of it) are void for jurisdictional error, save for its contention that legal error in applying the "*Cardno* test" amounted to jurisdictional error. To pick up on what Builtcom maintained was implicit in *John Holland* at [57], it was scarcely unreasonable on the face of the payment claim to conclude that questions of doctored documents, the sale of a crane which had been sold to another party, and a lively issue about quantum were outside its scope.

Ground 3 does not advance the analysis

- 95 Ground 3 does not advance Builtcom's position, because it does not undermine what has been said above. Whether or not there is a "general rule" is, once again, a false issue. The only issue which matters is whether the adjudicator's determination was affected by jurisdictional error.
- 96 However, it is for an adjudicator to determine whether a submission is duly made. That obligation is imposed upon the adjudicator by s 22. In order to discharge that obligation, the adjudicator will have to consider, inter alia, the scope and ambit of the payment claim. Builtcom acknowledges that there will be occasions when an adjudicator will be obliged to reject a submission as not duly made because it is outside the scope and ambit of the payment claim (giving the example of a claim for Tower Crane 1). Generally speaking, if the adjudicator is wrong in determining whether a submission is duly made, that will not without more invalidate the determination for jurisdictional error.
- 97 The difference between the proposition in the previous sentence and the contention in ground 3 reflects the fact that there is little utility in the context of an application for judicial review in speaking of a "general rule" which is derived from the Act to be applied in the determination of adjudication applications. No appeal lies from an adjudicator's determination to a court, either by way of rehearing, or confined to questions of law. And judicial review is not available for error of law on the face of the record. The only question when judicial

review is sought is whether a purported determination (or part of a determination, having regard to s 32A) is valid thereby giving rise to the limited rights and obligations for which the statute provides, or is void for jurisdictional error.

Conclusion on grounds 1 and 3

98 For those reasons, none of Builtcom's submissions lead to the conclusion that the determination was affected by jurisdictional error.

Ground 4: Discretion

99 Ground 4 of Builtcom's appeal does not arise in light of the absence of jurisdictional error. However, there is a separate reason why it does not arise.

100 Having concluded there was no jurisdictional error, the primary judge turned, explicitly in the alternative ("If that conclusion was wrong") to what would have occurred had jurisdictional error been found. She said that "it may well have been appropriate to set aside that part": at [83]. She expressed the view that the remitter sought by Builtcom would have been inappropriate because the application was not before the Court for de novo determination, but instead said the question was whether the adjudicator should be commanded to determine those aspects of the determination which were affected by jurisdictional error: at [84]. I did not understand Builtcom to challenge that aspect of the reasoning.

101 Instead, Builtcom's challenge was directed to what her Honour said about the exercise of discretion. Her Honour said at [85]:

It is likely that I would have refused to make such a discretionary order because a "more convenient and satisfactory remedy exists": *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ). That remedy is the final relief that the parties can obtain after "the common law rights of both parties [are] determined in the normal manner": *Probuild* at [44], [53].

102 That is not a finding that relief would have been refused. It is an indication of a provisional or tentative view, explicitly falling short of a concluded view.

103 VSD supplied no notice of contention, seeking to uphold the result reached by the primary judge on a different basis, namely, that even if there were jurisdictional error, the proceedings should be dismissed in the exercise of the

Court's discretion. Its counsel confirmed during the hearing that that was a considered position.

- 104 In those circumstances, there are two independent bases on which ground 4 does not arise. In addition to the ground not arising in the absence of jurisdictional error, it is preferable not to express views on the discretionary withholding of relief in the abstract, particularly because those views will necessarily be informed by the effect of s 32A, and perhaps also by the nature of the jurisdictional error. This should await a decision where it matters: *Boensch v Pascoe* (2019) 268 CLR 593; [2019] HCA 49 at [7]-[8].

Conclusion and orders

- 105 I propose that the appeal be dismissed. Builtcom's limited success on ground 2, which concededly was insufficient to warrant a different outcome, supplies no reason for departing from the usual rule. Accordingly, I propose these orders:

- (1) Appeal dismissed.
- (2) Appellant to pay the respondents' costs, noting that the second and third respondents filed submitting appearances.

- 106 **ADAMSON JA:** The appellant, Builtcom Constructions Pty Ltd (Builtcom), appeals against the dismissal of its claim for relief under s 69 of the *Supreme Court Act 1970* (NSW) by Peden J (the primary judge) in the Equity Division of the Supreme Court (the Court below). In the Court below, Builtcom argued that Chris Thompson, the second respondent (the adjudicator), had committed a jurisdictional error by refusing to value certain claims in the course of his adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) on the basis that Builtcom's submissions in its adjudication application had not been "duly made". In the Court below, Builtcom was unsuccessful in its application for orders that the determination be set aside in part and that the part affected be remitted to the adjudicator for determination under the Act.

- 107 The first respondent, VSD Investments Pty Ltd as trustee for The VSD Investments Trust (VSD), is the only other active party to the proceedings. The second and third respondents have filed submitting appearances.

- 108 All references to legislation in these reasons are to the Act, unless otherwise stated.

The factual background

The contract between Builtcom and VSD

- 109 By agreement dated 27 October 2022, Builtcom contracted with VSD to build a 30-storey mixed residential-commercial development in Burwood, NSW. The contract provided, by cl 25.1, that Builtcom's Construction Manager was entitled to make a claim for payment at certain times.

- 110 Clause 25.1 also provided:

The *Construction Manager* shall include with its progress claim, on an open book basis:

- g) certified copies of all relevant documents to substantiate the value being claimed by it for each item of works within a trade package or *Construction Manager's trade works* in excess of \$25,000.00 excluding GST in the progress claim (including time sheets, invoices, remittance advices, dockets, confirmations of orders, and photographs);
- h) all certificates required by clause 6.9 that relate to the *Services* the subject of that progress claim;
- i) a reconciliation of amounts claimed against the lump sum price for each subcontract;
- j) where requested by the *Principal* or *Principal's Representative*, sufficient evidence to verify that all labour utilised on the project has been charged under a subcontract or as *Construction Manager's trade work, variations* or *Actual Reimbursable Cost* but not double charged, double counted or double margins applied;
- ...; and
- m) any other information reasonably requested by the *Principal* or *Principal's Representative*.

- 111 Clause 28.2 provided in part for payment upon termination for convenience. It relevantly provided:

The *Construction Manager* must make its progress claim for payment in respect of any such amount due to it under this subclause 28.2 within 28 days after receiving the notice of termination referred to in subclause 28.1 or frustration of the *Contract*. Such progress claim must be in accordance with the requirements of clause 25 and will be dealt with in accordance with the terms of that clause.

The termination of the contract by VSD and the payment claim served by Builtcom

- 112 On 25 October 2024, VSD terminated the contract for convenience. On 22 November 2024, Builtcom served a payment claim under the Act on VSD,

claiming a total of \$30,625,050.75, including GST. On 4 December 2024, VSD served a payment schedule on Builtcom, scheduling an amount of - \$700,241.78.

The adjudication

Builtcom's application for an adjudication

- 113 On 17 December 2024, Builtcom lodged an adjudication application with the third respondent, the Australian Building and Construction Dispute Resolution Service. In its application, it provided further documentation to support its payment claim, including a report by a quantity surveyor, Wayne Elsom (the Elsom report) which addressed the detail of claims made in its payment claim.
- 114 Builtcom also made the following submissions, by reference to *Ceeroose v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 (*Ceeroose*), about the adjudicator's task:

71 The Adjudicator's task in this adjudication is informed by the recent decision of [*Ceeroose*]

72 *Ceeroose* concerned an appeal from a decision of the New South Wales Supreme Court declaring that an adjudicator had committed jurisdictional error. Relevantly, the adjudicator had rejected the respondent's reasons for withholding payment for certain claims. The adjudicator then awarded those claims to claimant. The primary judge decided that the adjudicator had committed a jurisdictional error because, even though they had rejected the respondent's reasons for withholding payment, the adjudicator had not considered the "merits" of the claims: *Ceeroose* at [70]-[71].

73 The Court of Appeal held that an adjudicator does not need to go any further than rejecting the respondent's reasons for withholding payment set out in the Payment Schedule. If the adjudicator does so, the adjudicator can award the amount claimed. There is no obligation on the adjudicator to determine the "merits" of the claims.

...

78 The effect of *Ceeroose* is that the Adjudicator is required to consider the dispute between the parties. If the Adjudicator dismisses VSD's reasons for withholding payment, then the Adjudicator can award the claimed amount.

79 *Ceeroose* was decided by the New South Wales Court of Appeal. It represents the law in New South Wales. The adjudicator is bound to follow the decision.

80 The decision in *Ceeroose* simplifies the task for the Adjudicator in this adjudication. The reasons given by VSD for disputing Builtcom's claims are scant.

81 Sometimes, the reasons given by VSD relate only to part of the disputed amount: no reasons are given for the remainder of the disputed amount. The

Adjudicator can immediately award payment to Builtcom for that part where no reasons are given.

82 Other times, VSD merely states that it disagrees with the claim. That may be so, but that is not a valid reason for withholding payment. That response does not raise any reason of fact or law why payment should not be awarded to Builtcom. The Adjudicator should reject those disputes and award the amounts claimed by Builtcom.

83 Once the adjudicator has rejected VSD's reasons for withholding payment, it should award the claimed amount to Builtcom.

84 Builtcom turns to each of the disputed claims in the sections below. Those submissions address the Adjudicator's task in respect of those specific items by reference to the decision in *Ceeroose*.

115 On 18 December 2024, the adjudicator accepted the appointment.

VSD's adjudication response

116 On 24 December 2024, VSD lodged an adjudication response in which it contested the substance of all of Builtcom's claims. It responded to the Elsom report by relying on a report from its own building expert, Timothy Haynes, who was assisted by Alan Leonard, a quantity surveyor. It did not contend that it was unable to respond substantively to any of Builtcom's claims.

117 In its response, VSD submitted that Builtcom's payment claim was not accompanied by the supporting documents required by cl 25 of the contract. For example, it said, by reference to claim 1.0302 – Tower Crane 2:

Breach of HC [Head Contract] Clause 25.1(g) – (m): Clause 25.1(g) - (m) requires Builtcom to issue progress claims on an open book basis, with all supporting documentation. Builtcom has failed to provide the documents necessary for VSD to verify purchase, registration, ownership and condition. We note all other payment claims to date have been provided with supporting documentation. Builtcom's failure to provide supporting documentation is in breach of clause 25.1.

118 VSD further submitted:

71 These materials were not provided to VSD as part of the Payment Claim (notwithstanding that clause 28.2 clearly requires that any claim under clause 28.2 be made in accordance with the requirements of clause 25, which requires that supporting documents be included as part of each progress claim) and were otherwise not available to VSD for review and consideration when preparing the Payment Schedule. This had serious practical consequences for VSD when preparing the Payment Schedule because, as repeatedly stated in the Payment Schedule, VSD was unable to fully or properly understand the Payment Claim including:

(a) whether the amounts or costs being claimed were contemplated by/fell within the permissible types of amounts and costs described in subclauses (a), (c), (d) and (e) of clause 28.2;

- (b) whether the claimed amounts and costs were in fact incurred; and
- (c) whether the claimed amounts and costs were reasonably incurred (this also being a requirement of clause 28.2).

...

76 VSD submits that Builtcom's decision to exclude the relevant supporting documents from the Payment Claim required by clauses 25 and 28.2 of the Contract has significant consequences for Builtcom in two respects, namely:

- (a) Builtcom has failed to establish VSD's liability to pay any component of the amounts or costs claimed under clause 28.2.
- (b) The Adjudicator is unable to consider the voluminous supporting documentation now included by Builtcom in the Adjudication Application for the first time because that documentation and all submissions in the Adjudication Application relating to that documentation are not "*duly made*" by Builtcom for the purposes of section 22(2)(d) of the Act.

...

90 VSD submits that the Adjudicator must not consider Builtcom's submissions and documents in support of the Adjudication Application to the extent they are, or relate to, the supporting documents required by clauses 28.2 and 25 of the Contract.

91 If the Adjudicator considers this information and documentation, VSD's position is that the Adjudicator would fall into error. VSD would be denied natural justice as VSD was deprived of the opportunity to provide further reasons for withholding payment in the Payment Schedule by reason of the missing supporting documents and is now prevented by section 20(2B) of the Act from including further reasons for withholding payment in the Adjudication Response.

- 119 VSD then referred to *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 (*Cardno*) and *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229 (*Coordinated Construction*) at [25], [26] (Hodgson JA) and [42] (Basten JA). Relying on *Cardno*, it submitted:

Having regard to the above, VSD submits that the Adjudicator should not consider the supporting documentation included in the Adjudication Application nor any submissions or additional documents relied upon by Builtcom relating to those supporting documents (including the Elsom Report) when determining the Adjudication Application.

The adjudicator's determination and reasons

- 120 On 3 February 2025, the adjudicator delivered a determination, determining an amount of \$8,467,232.13 in Builtcom's favour.
- 121 The adjudicator noted at [15] that VSD had raised the following jurisdictional issue:

- (1) until its adjudication application, Builtcom had failed to provide supporting documentation which would “allow for an integral view of the disputed payment claim”;
- (2) the requirement in s 22(2)(c) of the Act that submissions in support of an adjudication application be *duly made* “effectively limits the matters and submissions to be considered by an adjudicator to documentation that was readily available in support of a payment claim”; and
- (3) accordingly, the submissions (and documentation) included in Builtcom’s adjudication application were not duly made.

122 In his reasons for determination, the adjudicator referred to *Ceeroose* and *Cardno*:

69 The adjudicator in *Ceeroose* rejected [VSD]’s reasons for withholding payment for certain claims and awarded those claims to [Builtcom].

70 The primary judge decided that a jurisdictional error occurred because the adjudicator had not considered the “merits” of those claims.

71 That primary decision was overturned by the Court of Appeal because the Adjudicator had found the reasons for withholding payment were invalid, therefore nothing else was required from the adjudicator other than making the award.

72 [Builtcom]’s position is that the decision in *Ceeroose* simplifies the adjudication process, there is no obligation on the adjudicator to determine the “merits” of the claims.

73 [Builtcom] says [VSD]’s reasons are “scant” and if I dismiss [VSD]’s reasons for withholding payment, then I should award the claimed amount. [Builtcom] further states I am “bound” to follow this decision.

74 [VSD] on the other hand also refers to [Cardno]

a. *Cardno* deals with the issue of a payment claim that was found to have insufficient supporting documentation. *Cardno* did not provide the timesheets with its payment claim but did so as part of the adjudication application.

b. The plaintiff challenged the adjudication determination asserting there was a denial of natural justice because had the time sheets been included in the payment claim [VSD] would have provided a different payment schedule.

c. The Supreme Court agreed with the plaintiff and found there was a denial of natural justice, and at AR 92 [VSD] says these are precisely the same type of issues in the current matter; and on review I agree.

75 I am of the view that these two decisions co-exist, *Ceeroose* I am required to *determine [Builtcom]’s entitlement within the framework of the dispute that was propounded by the parties*.

76 There is a practical application from *Cardno*, **if there is a new document that is only advanced with the adjudication application, I am required to consider whether the presence of the same document in the original payment claim would be enough to change the valuation or reasoning in the payment schedule.**

(Bold added.)

- 123 On the basis of *Cardno*, the adjudicator rejected most of Builtcom's claims without dealing with them on the merits. His reasons in respect of each of the groups of claims were similar. The following example suffices:

98 In relation to the 4 claims ... [VSD] relies upon the principles set out in *Cardno* as reasons and grounds for non-payment.

99 In my view, the 4 claims ... fall squarely within the ambit of *Cardno*. Clearly in relation to these 4 claims, the materials provided by [Builtcom] in its adjudication application go outside the scope and information provided by [Builtcom] in its payment claim. The *Cardno* test is, if there is a new document that is only advanced with the adjudication application, the adjudicator is required to consider whether the presence of the same document in the original payment claim would be enough to change the valuation or reasoning in the payment schedule.

100 In applying *Cardno test* to the present matter, it is irrefutable that the new documents, which were neither included, referenced or otherwise mentioned in the payment claim, were only advanced in the adjudication application. I am firmly of the view that had the new documents relied upon and included in the adjudication application been present in the payment claim, [VSD] would most likely have changed its valuation or reasoning in its payment schedule.

101 Further as referenced in *Cardno*, as in this current matter, [Builtcom] included a single figure in its payment claim and did not provide sufficient details in its payment claim to enable [VSD] to accept or reject or properly assess each claim as the missing details were only included in the adjudication application. Unfortunately for [Builtcom] it can only blame itself for the manner in which it prepared the payment claim in relation to these items and in the circumstances, I am of the view that the 4 claims ... should each be valued at \$Nil and value each as such.

- 124 The adjudicator did not, however, find that VSD was prevented by s 20(2B) of the Act from addressing these matters in its adjudication response. Nor did he find that if he were to consider Builtcom's adjudication application, VSD would be denied natural justice. It appears from his reasons that the adjudicator has applied the so-called *Cardno* test without regard to whether it was necessary to avoid a breach of natural justice.

The proceedings in the Court below

- 125 On 5 February 2025, Builtcom commenced proceedings in the Technology and Construction List of the Court below. It claimed that the adjudicator had made a jurisdictional error in declining to consider its claims on the basis set out in the reasons (an example of which appears in the extract above) and sought an order pursuant to s 32A of the Act "and any other enabling power of the Court", setting aside those parts of the determination relating to those claims and

seeking an order in the nature of mandamus, injunction or remitter, that the adjudicator determine these claims. On 6 February 2025, VSD commenced separate proceedings in the same list, challenging the determination in so far as it determined an adjudication amount in the order of \$8.5 million in favour of Builtcom.

The orders

- 126 The two proceedings were heard together by the primary judge, who, on 11 April 2025, dismissed both Builtcom's and VSD's summonses and ordered each party to pay its own costs: *Builtcom Construction Pty Ltd v VSD Investments Pty Ltd attf The VSD Investments Trust; VSD Investments Pty Ltd attf The VSD Investments Trust v Builtcom Construction Pty Ltd* [2025] NSWSC 250 (PJ). VSD has not appealed against the dismissal of its summons.

The primary judge's reasons

- 127 The primary judge relevantly posited the following issues at PJ [15]: whether the adjudicator fell into jurisdictional error by finding that Builtcom's contested submissions were not "duly made"; and, if so, what relief ought be granted.
- 128 At [24], the primary judge cited *Ceeroose* for the proposition that an error in identifying a submission as having been "duly made" is not jurisdictional and reasoned, on that basis, that an adjudicator's erroneous finding that a submission is duly made is not jurisdictional. Her Honour concluded:

25 It would be an odd result if the converse were not also true. An erroneous finding that submissions were not "duly made" must also be a non-jurisdictional error of law, which, by itself, does not allow for the adjudicator's determination to be quashed. This is supported by "the purpose of the legislative scheme established by the SOP Act [which is] best served by restricting the scope of intervention by the courts": *Martinus [Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49] at [57].

26 That conclusion is sufficient to dispose of Builtcom's claim. ...

- 129 However, the primary judge also addressed the question from "first principles" and determined, also on this alternative basis, that Builtcom had not established jurisdictional error for the following reasons:

- (1) there is a "general rule" (other than where a respondent raises an issue in the payment schedule) that, "where submissions included in an adjudication application go beyond the scope or ambit of [a] payment

claim (as ascertained by the adjudicator ...), those submissions are not 'duly made': PJ at [44];

- (2) the adjudicator applied this general rule: PJ at [49]; and
- (3) in any event, mandamus should probably not issue because a "more convenient and satisfactory remedy" exists, namely, final proceedings on the parties' final rights: PJ at [84]-[85].

The statutory framework

130 Section 3 provides:

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 such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (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 progress payment so determined.
- (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 any such other entitlement.

131 Part 2 of the Act, entitled "Rights to progress payments", contains s 8(1) which provides:

A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.

132 Part 3 of the Act, entitled "Procedure for recovering progress payments", provides (in Division 1) for "Payment claims and payment schedules" (ss 13-16) and (in Division 2) for "Adjudication of disputes" (ss 17-26).

133 Section 13(2) provides:

(2) A payment claim—

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

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

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

134 The only other requirement as to what a payment claim must include is stipulated by s 13(7), which requires a principal to include in a payment claim a “supporting statement”, which is defined in s 13(9) to mean a statement declaring, in effect, that all subcontractors have been paid.

135 Section 14 provides in part:

14 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**).

(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.

136 Section 14(4) provides that if a respondent to a payment claim does not provide a payment schedule within the time required, 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.”

137 If, relevantly, the scheduled amount in the payment schedule is less than the amount of the payment claim, the claimant may make an adjudication application: s 17(1). The adjudication application must be in writing (s 17(3)(a)) and “may contain such submissions relevant to the application as the claimant chooses to include”: s 17(3)(h).

138 Section 20 provides for the respondent to make an adjudication response which must be in writing and “may contain such submissions relevant to the response as the respondent chooses to include”: s 20(2)(c).

139 Section 20(2B) provides:

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.

- 140 Section 22(1) requires the adjudicator to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount) and the date on which the amount becomes payable and the rate of interest.
- 141 Section 22(2) sets out various matters which an adjudicator is to consider in determining an adjudication application, which include “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 schedule”: s 22(2)(c). Similar wording is used in respect of the payment schedule and supporting submissions: s 22(2)(d).
- 142 Section 32 (which is relevant to ground 4) provides:

32 Effect of Part on civil proceedings

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract—
- (a) may have under the contract, or
 - (b) may have under Part 2 in respect of the contract, or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- 143 Section 32A, which is relevant to relief, provides:

Finding of jurisdictional error in adjudicator’s determination

- (1) If, in any proceedings before the Supreme Court relating to any matter arising under a construction contract, the Court makes a finding that a jurisdictional error has occurred in relation to an adjudicator’s determination under this Part, the Court may make an order setting aside the whole or any part of the determination.

- (2) Without limiting subsection (1), the Supreme Court may identify the part of the adjudicator's determination affected by jurisdictional error and set aside that part only, while confirming the part of the determination that is not affected by jurisdictional error.

144 Section 34 provides:

34 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement (whether in writing or not)—
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void.

The grounds of appeal

145 Builtcom relied on the following grounds of appeal:

- 1 Her Honour erred in concluding:
 - (a) at [24]-[26], that an adjudicator's finding that a submission is not "duly made" is unreviewable;
 - (b) at [52]-[59], that the formation, by an adjudicator, of an opinion, satisfaction or state of mind that a submission is not "duly made" is not a "subjective jurisdictional fact" amenable to judicial review for jurisdictional error in the formation of the state of mind.
- 2 Her Honour erred:
 - (a) in concluding, at [37]-[51], that the Adjudicator had applied a general rule to the effect that where submissions included in an adjudication application go beyond the scope or ambit of the payment claim, as ascertained by the adjudicator, then those submissions are not "duly made".
 - (b) in failing to conclude that the Adjudicator made an error in applying the "*Cardno* test" as understood by the Adjudicator.
- 3 Her Honour erred in concluding, at [37]-[51], that there is a general rule to the effect that, on the proper construction of the [Act], a submission is not "duly made" if the submission included in an adjudication application goes beyond the scope or ambit of the payment claim, as ascertained by the adjudicator.
- 4 Her Honour erred if and to the extent that her Honour reached the conclusion, or contingent conclusion, at [84] and [85] that remittal should not be ordered in the event that there were jurisdictional errors because:
 - (a) her Honour acted on a wrong principle, namely, that the final relief that the parties can obtain in final proceedings was a more a convenient and satisfactory remedy to mandamus or the Appellant's interim rights under the [Act];
 - (b) her Honour failed to take into account material considerations, namely:

- (i) the policy of the [Act];
- (ii) the distinction between the statutory interim rights given by the [Act] and the “common law rights” of the parties;
- (iii) the length of time before final relief could be obtained;
- (iv) the cost that would be incurred before final relief could be obtained;
- (c) her Honour’s conclusion that final proceedings were more convenient and satisfactory to mandamus or interim rights was unreasonable or plainly unjust.

Consideration

146 The question which arises on this appeal is whether the primary judge was in error in her answers to the following questions:

- (1) whether the adjudicator’s opinion that Builtcom’s submissions were not “duly made” was reviewable in the Court below;
- (2) if so, whether, that opinion was affected by an error of law;
- (3) if so, whether the error was jurisdictional; and,
- (4) if so, what relief, if any, is appropriate.

147 Questions (1), (2) and (3) are the subject of grounds 1-3 and question (4) is the subject of ground 4.

Grounds 1-3: alleged errors in determining the limits of judicial review of an adjudicator’s determination whether a submission is “duly made” within the meaning of s 22(2)(c) of the Act

148 Grounds 1, 2 and 3 can be addressed together as there is considerable overlap between them.

This Court’s jurisdiction to review an adjudicator’s assessment of whether a claimant’s submission has been “duly made”

149 In *Ceeroose*, Payne JA at [31] summarised the effect of decisions of this Court on the status of an adjudicator’s opinion that a submission has, or has not, been “duly made” as follows:

It is now well settled that whether a submission referred to in s 22(2)(c) or (d) has been “duly made” is a matter within the jurisdiction of an adjudicator and error in identifying a submission as having been “duly made” is not jurisdictional: *John Holland Pty Ltd v Roads & Trac Authority of New South Wales* (2007) 23 BCL 205; [2007] NSWCA 19 at [57]; *Perform (NSW) Pty Ltd v MEV-AUS Pty Ltd* [2009] NSWCA 157 at [65]; *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* (2005) 21 BCL 364; [2005] NSWCA 229 at [24]–[26]. It may be accepted that, despite the apparently emphatic language (“consider the following matters only”) in s 22(2), an adjudicator may in some circumstances take into account other matters: *Minister for Commerce (formerly Public Works & Services) v Contrax Plumbing (NSW) Pty Ltd* [2005]

NSWCA 142 at [33]–[36] (Hodgson JA; Bryson JA and Brownie AJA agreeing). This does not mean, however, that a failure to do so will amount to jurisdictional error.

- 150 It does not, however, follow that the adjudicator's opinion that a submission was or was not duly made is necessarily immune from judicial review. In *Coordinated Construction*, this Court held that although the elements listed in s 13(2) properly depended on the satisfaction or opinion of the adjudicator (as did the opinion in s 22(2)(c) or (d) as to whether a submission had been duly made), this opinion was held not to be beyond judicial review. Basten JA said, at [47]:

It does not follow that the formation of a relevant opinion by an adjudicator with respect to compliance with s 13(2) will in all circumstances be beyond review. The principle stated by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1994) 69 CLR 407 at 432, as applied by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [133], was to the following effect:

"If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide."

Thus, as noted in *Brodyn*, an essential element in the formulation of such an opinion is that it must be undertaken in good faith, but that is not a sufficient condition of validity.

(Emphasis added.)

- 151 On the basis of authority, I consider that the primary judge was in error in finding, at [24]–[26], the adjudicator's opinion that a submission was not duly made was unreviewable. The assessment of whether such an opinion is amenable to judicial review requires analysis of how that opinion was arrived at and, importantly, whether it was arrived at as a result of jurisdictional error.

Cardno

- 152 Because of the centrality of *Cardno* to Builtcom's challenge to the determination in the Court below, it is necessary to consider it in some detail. In *Cardno*, Einstein J addressed the lack of symmetry between s 20(2B) (which confines a respondent to the reasons given in the payment schedule) and the absence of any corresponding provision with respect to the adjudication application. His Honour accepted that the effect of s 13(1) was that a payment

claim was valid even if it did not provide supporting materials: [21]. However, his Honour considered that an applicant who fails to include such materials with the payment claim may, nonetheless, suffer adverse consequences.

Einstein J said:

Approaching the question in terms of section 20 (2B)

22 The primary touchstone it seems to me, is section 20 (2B). Whilst a claimant which provides the most minimal amount of information in its payment claim may even so, be seen to technically comply with section 13, such a claimant will expose itself to an abortive adjudication determination if it be that:

- the respondent is simply unable to discern from the content of the payment claim, sufficient detail of that claim to be in a position to meaningfully verify or reject the claim: hence not then being in a position to do otherwise than to reject the whole of the claim on the basis of its inability to verify any part of the claim;
- the claimant then elects to include the missing detail in the adjudication application with the inexorable consequence that the respondent is barred by section 20(2B) from dealing with that detail/matter in its adjudication response;
- the adjudicator relies in determining the adjudication application upon the detail supportive of the payment claim which first emerged as part of the adjudication application

23 For those reasons whilst it is not permissible to construe section 13 as providing that in order to be a *valid* payment claim, such a claim must do more than satisfy the requirements stipulated for by subsection 2 (a), (b) and (c), the consequence to a claimant which does not include sufficient detail of that claim to be in a position to permit the respondent to meaningfully verify or reject the claim, may indeed be to abort any determination.

Approaching the question in terms of the adjudicator's power

24 The matter may also be analysed by reference to the power of an adjudicator. **An adjudicator does not have the power to consider materials supplied by a claimant in its adjudication application which go outside [ie fall outside the ambit or scope of] the materials which were provided in the payment claim**, for the reason that the adjudicator only has power to make a determination based upon:

- The payment claim [together with the claimant's submissions (and relevant documentation) in the adjudication application, which submissions have to have been "*duly made by the claimant in support of the (payment) claim*": see section 22 (2) (c)].
- The payment schedule (if any) [together with the respondents submissions (and relevant documentation) in the adjudication response, which submissions have to have been "*duly made by the respondent in support of the (payment) schedule*": see section 22 (2) (d)].
- The provisions of the Act: see section 22 (2) (a).
- The provisions of the construction contract from which the application arose: see section 22 (2) (b).

- The results of any inspection carried out by the adjudicator of any matter to which the claim relates: see section 22 (2) (e).

25 The emphasis upon submissions “*duly made*” makes clear that the scheme really addresses the issues which have been thrown up once the payment claim has been served and the responsive payment schedule then served. The steps which follow generally concern the materials to be exchanged and most particularly furnished to the adjudicator. The adjudication application will *relate* to a particular payment claim and payment schedule [section 17 (3) (f)]. The central significance of the entitlement of the applicant to include submissions as part of its adjudication application is because those submissions have to be supportive of the payment claim. Those submissions cannot *constitute* a payment claim or part of it. The central significance of the entitlement of the respondent to include submissions as part of its adjudication response is because those submissions have to be supportive of the payment schedule. Those submissions cannot *constitute* a payment schedule or part of it.

(Emphasis added.)

- 153 The primary judge rejected Mr Hume’s submission that the adjudicator applied *Cardno* as if it were a rule. Her Honour regarded *Cardno* as an example of the application of a “scope and ambit ‘test’ [that was] merely a heuristic that an adjudicator may comfortably apply in most cases to ensure that the respondent is afforded natural justice”: PJ at [47]. I reject this description. For the reasons which follow, I consider that the adjudicator regarded *Cardno* as a rule which he was required to apply.

Whether the adjudicator erred in law in the present case

- 154 Mr Sirtes SC, who appeared with Mr Ball for VSD, submitted that the purpose of qualifying the word “submissions” with the words “duly made” in s 22(2)(c) was to ameliorate the asymmetry in the Act between, on the one hand, the right of a claimant to put material in the adjudication application which was not included with the payment claim and, on the other, the prohibition against the respondent including in its adjudication response any reason which was not included in the payment schedule (s 20(2B)). He submitted that the asymmetry created an “inbuilt statutory unfairness” and an “unequal playing field” which was manifested in the consequence (which he described as “Draconian”) that, if no payment schedule was served, the payment claim became a statutory debt which could be enforced as a judgment. He submitted that where a payment claim contains such little detail that the respondent cannot “meaningfully respond”, the adjudicator is entitled to disregard such of the

claimant's submissions in the adjudication application which serve to bolster an unsubstantiated payment claim by applying the "duly made" filter in s 22(2)(c).

- 155 Mr Sirtes accepted, in accordance with s 34, that the requirements of the Act cannot be modified by the parties' contract and that, accordingly, a payment claim, to be valid, need only comply with s 13. However, he submitted that since the adjudicator was obliged, under s 22(2)(b), to have regard to the provisions of the construction contract, the adjudicator could determine that a submission in a claimant's adjudication application was not duly made if it constituted substantiation of a previously unsubstantiated payment claim. He submitted that *Cardno* merely reflected the matters which can properly inform an adjudicator's consideration of whether a submission was "*duly made*" and that this evaluative exercise was "non-jurisdictional". He accepted that it was possible to read the adjudicator's reasons in [99] and [100] as applying a "rule" derived from *Cardno* but contended that the adjudicator had used *Cardno* "in a heuristic sense" (a description adopted by the primary judge) to give the adjudicator's task some meaning.
- 156 One of the questions for this Court is whether the adjudicator's opinion (that certain submissions by Builtcom were not "duly made" within the meaning of s 22(2)(c)) was affected by a misconstruction of the Act. These related to claims for which further "submissions" (specifically, documentation to substantiate the payment claim) had been provided in the adjudication application but which were not included with the original payment claim served to VSD. It appeared to be common ground that the word "submissions" in ss 17(3)(h) and s 22(2)(c) was not confined to arguments or contentions (as the term is commonly understood in litigation) but rather extended to supporting documentation, such as invoices, expert reports and so on: see *Austruc v ACA*; *ACA v Sarlos* [2004] NSWSC 131 at [66]-[67] (McDougall J).
- 157 In my view, it is plain from the adjudicator's reasons that he construed *Cardno* as *requiring* him to refuse to address those of Builtcom's claims which were supported by further material in the adjudication application, beyond that which was served as part of the payment claim. The adjudicator did not refuse to value these claims on the basis of what the Act did, or did not, provide. Rather,

in deciding whether Builtcom's submissions were "duly made", he applied the test which he understood *Cardno* to require. I reject Mr Sirtes' submission that the adjudicator's reasons ought be read otherwise.

- 158 The effect of Mr Sirtes' submissions was that the adjudicator was entitled (if not positively obliged) to ameliorate the harshness of the asymmetry in the Act. The adjudicator did so by incorporating into the evaluation of whether a claimant's submission had been "*duly made*" a comparison between the detail provided in an admittedly valid payment claim and the contents of the submission in the adjudication application. The adjudicator could then disregard any material which provided detail which was not included in the payment claim. I reject this submission.
- 159 I accept Mr Hume's submission that it would be open to a respondent to a payment claim to put in the payment schedule, in respect of a particular item or items, "\$0: I dispute this item as it is not adequately substantiated", since this would fall within the words "*any reason*" in s 14(3). In that event, it would also be open to the claimant, in its adjudication application, to provide such substantiation, within the time limits provided by the Act. The respondent, in its adjudication response, would be entitled either to accept that the item or items have been substantiated or to maintain its position that the item has not been substantiated. It would then be up to the adjudicator to determine the value of these items in the determination.
- 160 The Act does not impose the limitation on what may be included in an adjudication application as was imposed by the adjudicator or contended for by the respondent. Section 22(2)(c) obliges an adjudicator, in determining an adjudication application, to consider "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". It does not contain the gloss for which *Cardno* stands (that the adjudicator is not entitled to consider any part of the payment claim where the submissions contain material which was not served with the payment claim). Thus, in so far as this approach purported to be required by *Cardno*, it is inconsistent with the Act and amounts to an error of law.

161 Further, it follows from the principle of parliamentary sovereignty that it is neither for judges nor administrative decision-makers to subvert what is perceived to be an unfairness created by legislation by the creation of “rules” designed to ameliorate policy choices made by the legislature. References to “unlevel playing field” or “statutory unfairness” are unhelpful in this context. As this Court has noted elsewhere, a clear object of the Act, as is evident from s 3 and from a reading of the Act as a whole, is to pass the risk of insolvency “up the line” to the principal, not down the line to a sub-contractor: *Hynash Constructions Pty Ltd v BRP Industries Pty Ltd* [2025] NSWCA 14 at [42]. To the extent to which this can be described as asymmetrical, it is evidently the result of a deliberate legislative policy choice. Thus, someone who performs building work is entitled to receive progress payments on an interim basis under the Act, with the final balance to be ascertained later, if need be, in proceedings before a court or arbitrator.

Whether the adjudicator’s legal error was jurisdictional

162 The next question is whether the adjudicator’s error of law is jurisdictional, since this Court’s power to grant relief in respect of a determination depends on the establishment of that matter: *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379 (*Shade Systems*) at [85]-[86] (Basten JA, Bathurst CJ, Beazley P, Macfarlan and Leeming JJA agreeing).

163 Authorities which pre-date *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 (*Kirk*) are, in some cases, of less assistance, given the importance of that decision in defining and identifying the features of jurisdictional error. Authorities concerning other statutory contexts are not necessarily directly applicable since the Act creates a particular framework for interim decision-making which has few, if any, analogues.

164 In *Kirk*, the High Court referred to the difficulty (discussed in *Craig v South Australia* (1995) 184 CLR 163 at 175-176; [1995] HCA 58) of distinguishing between jurisdictional and non-jurisdictional error. It also referred to the following passage from *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [163]:

In deciding whether writs of prohibition and certiorari (and analogous forms of relief) should be granted, a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded. As was noted in *Craig v South Australia*, that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

165 In *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17, the High Court (Kiefel CJ, Keane, Gordon and Steward JJ) addressed the matters which “may give rise to jurisdictional error” at [27] and included, among such matters “if review of a decision-makers reasons discloses that the decision-maker ... misunderstood the applicable law ...”. The cases cited in support of that proposition included *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430; [1944] HCA 42 (*Bellbird Collieries*); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51 (*Wei*) at [33].

166 In *Bellbird Collieries*, Latham CJ said at 430

... where the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man **who correctly understands the meaning of the law under which he acts**. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist. A person acting under a statutory power cannot confer power upon himself by misconstruing the statute which is the source of his power.

(Emphasis added.)

167 In *Wei*, the High Court at [33] held that where the power depended on the decision-maker being satisfied of a particular matter, the state of mind must be formed “reasonably and on a correct understanding of the law”.

168 The distinction between an adjudicator’s non-jurisdictional error of law (in respect of which this Court lacks jurisdiction to grant relief), and a jurisdictional error (in respect of which this Court can grant a remedy) is thus critical in the present case. *Shade Systems* itself provides an example of the operation of

the distinction. This Court concluded, at [86], that because the adjudicator's errors of law on the face of the record in construing the contract (the provisions of which were a mandatory relevant consideration pursuant to s 22(2)(b)) were *within* the adjudicator's authority, the errors were not jurisdictional and this Court could not intervene. Probuild's appeal to the High Court was dismissed: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4.

- 169 In *Ceeroose*, this Court considered what constitutes jurisdictional error in the context of the statutory framework of the Act. Payne JA said at [77]:

It is the dispute between the maker of the payment claim and the recipient of that claim which is referred for adjudication. In the light of this express restriction on the contents of the adjudication response, an adjudicator is not required to go beyond the terms of the payment schedule, repeated in an adjudication response, in accepting all or part of the payment claim. The requirement in s 22(1), that the adjudicator is to determine "the amount of the progress payment (if any) to be paid" by the respondent to the claimant, in context, is a requirement to determine the amount of the progress payment arising from the dispute submitted by the parties for adjudication. The notion that it is jurisdictional error for an adjudicator to fail to address what the adjudicator considers to be the "true construction of the contract" and the "true merits of the claim" outside the limited issues presented by the parties for determination is an invitation for the reviewing court to embark on an impermissible merits review.

- 170 His Honour continued at [82]:

Section 22(1) does not create a freestanding jurisdictional obligation to consider the merits of a payment claim, and in particular whether the construction work identified in the payment claim has been carried out, and what is its value. The only matters an adjudicator is required to consider in determining an adjudication application are set out in s 22(2).

- 171 In *Ceeroose* the adjudicator had gone beyond the parameters of the parties' dispute, as delineated by a comparison between the payment claim and the payment schedule. As the adjudicator's jurisdiction was confined to that dispute, the adjudicator was found, in this respect, to have committed *jurisdictional error*.

- 172 In the present case, the adjudicator decided, in substance, that he was not entitled to consider the adjudication application in so far as it went beyond the materials served as part of the payment claim. He considered that since the payment schedule might have been different if those materials had been provided with the payment claim (the *Cardno* category), those parts of the

submissions in the adjudication application were not “duly made”. However, in order to exercise the jurisdiction conferred on the adjudicator, the adjudicator was obliged to consider the adjudication application, *including* materials which substantiated the claims for payment in the payment claim. By refusing to adjudicate on the claims in the *Cardno* category on the basis that they were not, for that reason, “duly made”, the adjudicator misapprehended his statutory mandate in s 22. The error in the present case is distinguishable from *Shade Systems*, where the adjudicator misconstrued the terms of the *contract* which was required to be taken into account. The error in the present case affected the ambit of the adjudication by limiting what the adjudicator was to consider which had no basis in the Act and which constituted an unwarranted gloss on the statutory words.

- 173 The adjudicator misconstrued the Act and therefore misapprehended his task. The result of his misapprehension was that he refused to determine a large part of Builtcom’s claim for a progress payment. For this Court to characterise an error which imposes a gloss on s 22 and which effectively undermines the scheme of the Act as *non-jurisdictional* would run the risk of creating “islands of power immune from supervision and restraint” (*Kirk* at [99]). I am persuaded that his error was jurisdictional. In my view, the primary judge was in error in finding to the contrary.

Conclusion

- 174 For the reasons given above, grounds 1, 2 and 3 have been made out. The question of appropriate relief will be addressed at the conclusion of these reasons.

Other matters

Floodgates arguments

- 175 Both parties relied on arguments which were appropriately categorised as “floodgates” arguments. Mr Hume submitted that if Mr Sirtes’ submissions were accepted, payment claims would become more voluminous in circumstances where they may never be disputed, either in whole or in part, and that this would create the unintended consequence of rendering the process of obtaining payment of a progress claim unduly costly. Mr Sirtes submitted that if

an adjudicator was not permitted to disregard submissions for the reason given by the adjudicator in the present case, there would be manifest unfairness because a claimant could give little or no information in a payment claim and then ambush a respondent in the submissions contained within its adjudication application.

- 176 Because the range of building disputes covered by the Act is wide and the sophistication of the principals, builders and sub-contractors variable, it is difficult to predict what consequences will ensue from any given interpretation of the Act. I do not consider the present case to be one in which recourse to floodgates arguments is of assistance and therefore would prefer not to express a view on the postulated consequences of orders which this Court might make.

Inconsistency between cl 25.1 of the contract and s 13 of the Act

- 177 As set out above, s 34 of the Act prohibits contracting out of the Act. A question arose whether cl 25.1 of the contract was inconsistent with s 13 of the Act and was, for that reason, void. Section 13 sets out the requirements for a valid payment claim in terms which are exhaustive and which cover the field. To the extent that a contract purports to add to these requirements, it is, by reason of s 34, void. While the terms of cl 25.1 were referred to by the adjudicator, Builtcom's grounds did not touch on this aspect, which accordingly need not be addressed further.

Ground 4: alleged error in concluding that if jurisdictional error had been established, no relief ought be granted

- 178 The primary judge, as set out above, said, by way of contingent conclusion, that had her Honour found jurisdictional error, she would still have declined relief on the basis that Builtcom had a suitable remedy under the common law, which was preserved by the Act. VSD had not raised this basis for resisting relief in either its pleading, its evidence or its submissions. Indeed, there was no evidence before the primary judge as to the time it would take to enforce rights preserved by s 32 of the Act.
- 179 In one sense, this observation by the primary judge can be disregarded since it was no more than a contingent conclusion which is inapplicable once

jurisdictional error has been found. Indeed, Mr Sirtes accepted the description put to him that the primary judge's observation was "really no more than a provisional indication of a possible inclination". However, if it is more than that, it may be necessary for Builtcom to establish *House v The King* (1936) 55 CLR 499 at 555; [1936] HCA 40 error.

180 If it were necessary to review the primary judge's observation, I consider a *House v The King* error has been established and ground 4 has been made out. A right under the general law to sue for damages for breach of contract is not a remedy for the right to a progress payment which Builtcom sought to enforce in its adjudication application. The former is a cause of action which merges into a judgment of the court (or an arbitral award); the latter is a right to an interim progress payment under the Act in an amount determined (solely and exclusively) by an adjudicator. I am not satisfied that there is any proper reason to refuse relief.

Relief

181 Section 32A empowers this Court to set aside only that part of the determination which is affected by jurisdictional error while confirming that part which is not. I consider that the determination ought be declared invalid in so far as it is affected by the jurisdictional error identified above and the balance confirmed.

Proposed orders

182 I propose the following orders:

- (1) Appeal allowed.
- (2) Set aside orders (1) and (3) made by Peden J on 11 April 2025 in so far as it relates to proceedings 2025/46823 and, in lieu thereof:
 - (a) Pursuant to s 32A of the *Building and Construction Industry Security of Payment Act 1999* (NSW), set aside the following parts of the second defendant's determination dated 3 February 2025:
 - (i) paragraphs 99-101, concerning Items 1.0302, 1.0304, 1.0305 and 1.0306 in the Payment Claim dated 22 November 2024 (Payment Claim);
 - (ii) paragraphs 107-109, concerning Items 1.0307-1.0315, 1.0318, 1.0320 and 1.0322 in the Payment Claim;

- (iii) paragraphs 118-120, concerning Items 1.0323 and 1.0324 in the Payment Claim;
 - (iv) paragraphs 125 and 126, concerning Items 1.0326-1.0328 in the Payment Claim;
 - (v) paragraphs 132-134, concerning Item 1.0329 in the Payment Claim;
 - (vi) paragraphs 230-232, concerning Items 2.01, 2.05, 2.07, 2.18, 2.21 and 2.23 in the Payment Claim;
 - (vii) paragraphs 238-241, concerning Items 3.3, 3.34, 3.5, 3.6, 3.7, 3.9, 3.10 and 3.4.1 in the Payment Claim;
 - (viii) paragraph 247, concerning Item 4.3 in the Payment Claim; and
 - (ix) the Adjudicated Amount.
- (b) Otherwise confirm the second defendant's determination dated 3 February 2025.
 - (c) Remit the plaintiff's claims referred to in order (2)(a) above to the second defendant for determination in accordance with law.
 - (d) Order the first defendant to pay the plaintiff's costs of proceedings 2025/46823 in the Court below.
- (3) Order the first respondent to pay the appellant's costs of the appeal.
- 183 **FREE JA:** I agree with Leeming JA.

Amendments

19 June 2025 - [80] - "appellant" replaced by "first respondent"