

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

Not Restricted

S ECI 2024 01997

HANSON CONSTRUCTION MATERIALS PTY LTD
(ACN 009 679 734)

Plaintiff

v

DECMIL AUSTRALIA PTY LTD
(ACN 116 776 991)

First Defendant

-and-

WILLIAM TIMOTHY SULLIVAN

Second Defendant

JUDGE: Stynes J

WHERE HELD: Melbourne

DATE OF HEARING: 5 June 2024

DATE OF JUDGMENT: 25 June 2024

CASE MAY BE CITED AS: Hanson Construction Materials Pty Ltd v Decmil Australia Pty Ltd

MEDIUM NEUTRAL CITATION: [2024] VSC 361

ADMINISTRATIVE LAW – Judicial review – Review of adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether adjudicator erred by taking into account an excluded amount within the meaning of s 10B of the *Building and Construction Industry Security of Payment Act 2002* (Vic) in determining the adjudication application – Whether rectification costs for allegedly defective works are a debt due and payable under the terms of the construction contract or a claim for damages within the ambit of s 10B of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether payment schedule constitutes a demand for payment under the construction contract – Finding rectification costs an excluded amount – Relief – Severance and partial remitter – Section 23(2B)(b) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Adjudication determination quashed only to the extent it took into account an excluded amount – Adjudication application remitted to the adjudicator for the purpose of determining the adjudicated amount in accordance with the law - *Junemill Limited v FAI General Insurance Co Ltd* [1999] 2 Qd R 136, considered – *Shape Australia v The Nuance Group* [2018] VSC 808, considered – *Richard Crookes Construction Pty Ltd v CES Projects (Aus) Pty Ltd*

(No 2) [2016] NSWSC 1229, distinguished – *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294, applied – *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243, applied - *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [No 2] [2010] VSC 255; 30 VR 141, applied - *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, applied - *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd* [2021] VSCA 44, distinguished.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Michael Roberts KC Alyse Mobrici	Cornwalls
For the First Defendant	Roman Rozenberg	Corrs Chambers Westgarth
For the Second Defendant	No appearance	No appearance

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HER HONOUR:

A Introduction

- 1 The plaintiff, Hanson Construction Materials Pty Ltd (**'Hanson'**), seeks judicial review of an adjudication determination made by the second defendant, Mr Sullivan (**'Adjudicator'**), on 21 March 2024 (**'Adjudication Determination'**).
- 2 The Adjudication Determination concerns a subcontract entitled 'Major Works Subcontract – 10223-204' (**'Subcontract'**) between Hanson (as subcontractor) and the first defendant, Decmil Australia Pty Ltd (**'Decmil'**) (as contractor), executed on around 13 May 2021.
- 3 The Subcontract obliged Hanson to supply and deliver concrete and associated mixing, testing and pouring services to Decmil for the construction of 52 wind turbines at the Ryan Corner Wind Farm, Port Fairy in the State of Victoria.
- 4 The Adjudication Determination was delivered under s 23(1) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**) and is in relation to a payment claim issued by Hanson dated 2 February 2024 for \$1,811,247.65¹ (**'Payment Claim'**). The Adjudicator determined that Decmil was required to pay Hanson an adjudicated amount of \$704,028 (**'Adjudicated Amount'**), interest and 50% of the Adjudicator's fees. Among other things, the Adjudicator determined that:
 - (a) on 28 September 2023, Hanson delivered and poured approximately 60m³ of concrete which had an incorrect cement to slag ratio into the foundation of wind turbine generator B44 (**'WTG B44 foundation'**);²
 - (b) Hanson was liable to Decmil for Decmil's costs of rectifying the WTG B44 foundation in the sum of \$1,087,910.24; and

¹ All amounts are inclusive of GST unless stated otherwise.

² Although it is not necessary to determine the precise amount of incorrectly batched concrete for the purpose of my decision, I note that the Adjudicator refers to 60m³ of incorrectly batched concrete whereas Hanson refers to 40m³ of incorrectly batched concrete in its outline of submissions. This discrepancy was not addressed at trial.

- (c) the WTG B44 foundation rectification costs were to be valued under the Subcontract and set-off against the Payment Claim.

5 The primary relief Hanson seeks is an order quashing that part of the Adjudication Determination by which the Adjudicator took into account the WTG B44 foundation rectification costs. It relies on the following alternative grounds in support of this relief:

- (a) **Ground 1:** the Adjudicator erred because he took into account an “excluded amount” within the meaning of s 10B of the SOP Act (specifically the WTG B44 foundation rectification costs) when determining the amount of the progress payment to be paid by Decmil to Hanson.
- (b) **Ground 2:** the Adjudication Determination, to the extent that it took into account the WTG B44 foundation rectification costs, is infected by a substantial and material denial of natural justice to Hanson.

6 The critical issue in dispute between the parties is whether the Adjudicator, in determining the adjudication application, took into account an excluded amount, namely, the WTG B44 foundation rectification costs. For the reasons set out below, I have determined that he did and that an order should be made quashing the Adjudication Determination to the extent it is affected by that error. As a consequence, it is unnecessary for me to address or determine other issues raised by the parties, specifically:

- (a) whether the Adjudicator misconstrued the Subcontract and thereby failed to value the construction works in accordance with the terms of the Subcontract;
- (b) whether the Adjudicator’s decision was infected by a substantial and material denial of natural justice to Hanson.

B Background

B.1 The Subcontract

7 The following provisions of the Subcontract are relevant to my determination of this matter.

8 Clause 30.2 of the General Conditions provides:

Subject to Clause 30.6, should any part of the work under the Subcontract be found to be Defective at any time prior to the expiration of the Defects Liability Period, the Contractor may:

- (a) direct the Subcontractor to remedy such Defect at its own expense, as quickly as possible (and in any event not later than 10 Business Days after being instructed by the Contractor to do so), at times and in a manner which causes as little inconvenience to Third Parties as is reasonably possible and in accordance with the Contractor's instructions; or
- (b) give notice that it will accept the defective work, or any part of it, despite the Defect, in which case the Contractor will assess an amount that represents the cost of correcting the accepted defective work and that amount will be a debt due and payable by the Subcontractor to the Contractor upon demand.

9 Clause 30.3 of the General Conditions provides:

Should the Subcontractor fail to remedy a Defect in accordance with the Contractor's instructions, the Contractor may arrange for the Defect to be remedied by the Contractor or by others instead of the Subcontractor and the cost of doing so shall be valued under Clause 22.9 and shall be a debt due and payable by the Subcontractor to the Contractor upon demand.

B.2 The WTG foundation works

10 By September 2023, the works under the Subcontract were nearing completion.

11 The WTG B44 foundation required around 740m³ of 32MPa concrete in total. To achieve compressive strength of 32MPa within a particular period of time the concrete required a specific cement to slag ratio.

12 On 28 September 2023, Hanson delivered and poured approximately 40m³ of concrete³

³ See footnote 2.

with an incorrect cement to slag ratio into the WTG B44 foundation.

- 13 A project manager at Hanson (Michael Yee) alerted an engineer for Decmil (Conor Murtagh) of this issue before 7.45am on 28 September 2023, first by telephone and then by email. By the email, Mr Yee informed Mr Murtagh, amongst other things, that:

Lab is sure that it will still meet strength, just unsure of what age that will be.
There would have been quite a bit of mixing around the bolts with a mix that
has been sitting around the 48mpa[.]

- 14 Decmil instructed Hanson to deliver additional concrete (approximately 100m³ of 45MPa strength) to be placed over the non-compliant concrete. Decmil made this decision unilaterally. It was not based on Hanson's recommendation.

- 15 The parties are in dispute about the following matters at least (which are not the subject of this proceeding but which indicate the broad scope and complexity of the underlying dispute between them that relates to the WTG B44 foundation rectification costs):

- (a) the amount of incorrectly batched concrete delivered and poured;
- (b) the circumstances in which the pour occurred;
- (c) the implications of the pour, including:
 - (i) whether the pour constituted a defect under the Subcontract;
 - (ii) if the WTG B44 foundation is defective, whether it was caused by Hanson or Decmil;
 - (iii) what rectification works (if any) were required due to the pour.

- 16 On 21 December 2023, Decmil served on Hanson a notice under clause 30.2(a) of the Subcontract. That notice stated, amongst other things, that the concrete for the pour at the WTG B44 foundation was not compliant with the mix design specified under the Subcontract and directed Hanson to remedy the defective works by removing and replacing the WTG B44 foundation. The notice relevantly provided in part:

Pursuant to subclause 30.3 of the Subcontract, failure by [Hanson] to remedy the Defective works...may result in [Decmil] arranging for the Defective works to be remedied by [Decmil] or others instead of [Hanson], with the cost of doing so being valued under clause 22.9 of the Subcontract and becoming thereafter a debt due and payable by [Hanson] to [Decmil] upon demand.

B.3 The Payment Claim

17 On 2 February 2024, Hanson served the Payment Claim on Decmil under the SOP Act claiming \$1,811,247.65 (**'Claimed Amount'**).

18 The Claimed Amount comprised the following items:

- (a) \$542,526.70 for the supply of construction related goods and services in September 2023;
- (b) \$1,015,657.06 for the supply of construction related goods and services in October 2023; and
- (c) \$253,063.89 for the supply of construction related goods and services in November 2023.

B.4 The Payment Schedule

19 On 15 February 2024, Decmil served the Payment Schedule on Hanson which certified payment of a scheduled amount of \$0. The Payment Schedule comprised a four page covering letter and a number of different spreadsheets.

20 By the Payment Schedule, Decmil gave the following reason as one of the reasons for withholding payment:

The works undertaken by Hanson in relation to B44 foundation are defective. Decmil has given notice of the defective work to Hanson pursuant to clause 30.2(a) of the Subcontract. The defective work to B44 foundation has not yet been rectified by Hanson. Therefore, Decmil is entitled to set-off or deduct the estimated costs of rectifying the defective work for B44 foundation in accordance with clauses 30.2 and 24.20 of the Subcontract.

21 Decmil estimated the cost of rectification of the WTG B44 foundation to be \$2,633,235.61.

22 Further, in the covering letter Decmil repeated:

The Payment Claim purports to include a claim for payment in respect of the B44 foundation works which are defective. [Decmil] has given notice of the defective work to [Hanson] pursuant to clause 30.2(a) of the Subcontract. The B44 foundation works are yet to be rectified by [Hanson]. Accordingly, [Hanson] is not entitled to claim for payment or to receive payment for the B44 foundation works until the defective work is rectified.

In addition, [Decmil] is entitled to set-off or deduct the estimated costs of rectifying the defective work for the B44 foundation in accordance with clauses 30.2 and 24.20 of the Subcontract. The defect rectification costs are estimated to be in the order of \$2,633,235.61.

B.5 The Adjudication

23 On 28 February 2024, Hanson made an application for adjudication of the Payment Claim on the basis that the scheduled amount in the Payment Schedule is less than the amount claimed in the Payment Claim (**'Adjudication Application'**).

24 On 29 February 2024, the authorised nominating authority referred the Adjudication Application to the Adjudicator for determination.

25 On 4 March 2024, the Adjudicator requested Hanson's agreement to an extension of time of a further five business days for the Adjudicator to determine the Adjudication Application.

26 On 5 March 2024, Hanson agreed to the Adjudicator's extension of time request. The date by which the Adjudicator was required to make the determination following this extension was 22 March 2024.

27 On 6 March 2024, Decmil filed its adjudication response (**'Adjudication Response'**).

28 I set out the following events to explain the timeline between the date of the Adjudication Response and the date the Adjudication Determination was delivered. However, I have omitted the many factual details raised by the parties that are relevant only to Ground 2 of Hanson's claim (concerning the alleged denial of natural justice). As stated above, having determined Ground 1 in favour of Hanson, it is not necessary for me to determine Ground 2.

- (a) Later on 6 March 2024, the Adjudicator wrote to the parties stating that the Adjudication Response included reasons for withholding payment that were not raised in the Payment Schedule (**'Section 21(2B) Notice'**) and inviting a response from Hanson in two business days.
- (b) On 8 March 2024, Hanson filed submissions in reply to the Section 21(2B) Notice.
- (c) On 9 March 2024, the Adjudicator wrote to the parties indicating that he wanted assistance ascertaining which aspects of Hanson's reply submissions corresponded to which aspect of the Section 21(2B) Notice. He asked for submissions about (i) that issue; and (ii) whether, if he requested it, he would be entitled to a longer period than 15 business days from the date on which he accepted the Adjudication Application to make his determination.
- (d) On 12 March 2024, the parties exchanged submissions on these points. In its submissions, Hanson argued that the effect of late determination was not invalidity and that Hanson did not intend to withdraw its Adjudication Application if it was not determined within the prescribed time.
- (e) On 13 March 2024, the parties provided comments on the submissions exchanged the day before.

29 On 22 March 2024, the Adjudicator handed down his Adjudication Determination. He determined that the Adjudicated Amount payable to Hanson was \$704,028 (which sum is exclusive of the Adjudicator's fees and interest).

30 Relevantly the Adjudicator reasoned:

- (a) pursuant to s 11(1)(a) of the SOP Act, his task was to value the works in accordance with the terms of the Subcontract;
- (b) clauses 30.2, 30.3, 22.9 and 24.20 of the Subcontract, in combination, permitted Decmil to direct Hanson to remedy defective works, failing which it could

remedy the defect itself. Decmil could demand the cost of rectification as a debt due and payable and set off that sum against payments otherwise due to Hanson;

- (c) only the actual cost of remedying the work rather than the estimated cost of remedying the work could be set off;
- (d) Hanson had supplied approximately 60m³ of incorrectly batched concrete on the morning of 28 September 2023. This concrete did not achieve the required compressive strength and was therefore a defect;
- (e) there was no evidence, opinion, submission or proposal to show that the “defective concrete” could be remedied by any means that did not require removal of all of the concrete;
- (f) there was no evidence to support a view that Decmil did not act reasonably at the time of pouring the foundation (ie, by requesting that over-strength concrete be poured in an attempt to bulk out the under-strength concrete), nor in proceeding with the rectification works;
- (g) accordingly, Hanson was liable to Decmil for its costs incurred in rectifying the foundation of WTG B44, calculated to be \$1,087,910.24, which costs were to be valued under the Subcontract and set-off against the \$1,811,247.65 claimed in the Payment Claim. This yielded an Adjudicated Amount of \$704,028.

C Did the Adjudicator take into account an excluded amount?

C.1 How the issue arises

31 Hanson asserts:

- (a) the WTG B44 foundation rectification costs claimed by Decmil are an excluded amount for the purpose of s 10B of the SOP Act; and
- (b) by taking that sum into account in determining the Adjudication Application

the Adjudicator erred and the Adjudication Determination is void to that extent pursuant to ss 23(2A) and 23(2B) of the SOP Act.

C.2 The SOP Act

32 Section 1 of the SOP Act sets out its main purpose being to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

33 Section 3 sets out the object of the SOP Act which 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.

34 The object is implemented by:⁴

- (a) the granting of a statutory entitlement to that payment under the SOP Act; and
- (b) the establishment of a procedure for the speedy determination of any disputed claim by an adjudicator.

35 However, the SOP Act is not intended to limit:⁵

- (a) any other entitlement that a claimant may have under a construction contract;
or
- (b) any other remedy that a claimant may have for recovering that other entitlement.

36 Consequently, there are two regimes for the making of payment claims for progress payments: one under the relevant construction contract and the other under the SOP Act. Different rules may apply under each regime as to what is claimable and what

⁴ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 3(3) ('SOP Act').

⁵ *Ibid* s 3(4).

may be deducted.⁶

37 Section 9 sets out the entitlement to progress payments under the SOP Act. The entitlement to a progress payment is to be calculated by reference to a reference date, which is defined in s 9(2). The entitlement extends to a progress payment for work done up to and including the relevant reference date whether or not it had been performed since the preceding reference date or prior to it.⁷

38 Section 10(1) of the SOP Act provides for how the amount of a progress payment to which the claimant is entitled is to be calculated.

39 Section 10(3), provides that an 'excluded amount' must not be taken into account in calculating the amount of a progress payment.

40 Section 10B of the SOP Act defines 'excluded amounts'. Relevantly the definition includes "any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract".

41 Section 23 of the SOP Act requires an adjudicator to determine the amount of the progress payment. In relation to excluded amounts it provides:

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

(a) any part of the claimed amount that is an excluded amount;

...

(2B) An adjudicator's determination is void –

...

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

C.3 Submissions

42 Hanson says that if there was a defect in the works (which it denies), the WTG B44

⁶ *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd* [2021] VSC 625, [43] (*'Goldwind'*).

⁷ *Ibid* [44].

foundation rectification costs are an amount claimed for damages for breach of the Subcontract and are therefore an excluded amount under s 10B of the SOP Act.

43 Hanson submits, in summary:

- (a) the Adjudicator determined that certain provisions of the Subcontract (notably 30.2, 30.3, 22.9 and 24.20) informed his valuation exercise. Specifically, he reasoned that:
 - (i) clause 30.2 permitted Decmil, should any part of the works be found to be defective prior to the expiry of the Defects Liability Period, to direct Hanson to remedy the defect;
 - (ii) clause 30.3 permitted Decmil to arrange for the defect to be remedied and the cost of doing so would become a debt due and payable upon demand if Hanson failed to remediate the defect;
 - (iii) the cost of rectification is to be valued in accordance with clause 22.9;
 - (iv) clause 24.20 permitted Decmil to set-off the rectification costs against payments otherwise due to Hanson; and
 - (v) he was not deducting rectification costs because it was “loss or damage occasioned by breach of contract” but rather because they related to “entitlements arising under contract”;
- (b) clause 30.3 is relied on by Decmil to underpin its debt claim. While clause 30.3 provides a mechanism for how the alleged costs of rectification might be brought to account in the valuation exercise, that provision had not been engaged in a manner that would entitle Decmil to claim any deduction. Specifically, no entitlement to a set off or deduction had arisen under clause 30.3 because Decmil had not demanded payment of those costs from Hanson;
- (c) consequently, all Decmil had was an inchoate claim for damages for breach of Subcontract, not a claim for a debt due and payable; and

- (d) the Adjudicator therefore erroneously took into account an excluded amount within the meaning of s 10B of the SOP Act.

44 Decmil submits, in summary:

- (a) clause 30.3 of the Subcontract provides that where Hanson fails to remedy a Defect in accordance with Decmil's instructions, Decmil has the right to 'arrange for the Defect to be remedied by [itself] or by others', with the 'cost of doing so' to be: (i) valued under cl 22.9 of Subcontract; and (ii) a debt due and payable by Hanson to Decmil 'upon demand';
- (b) in relation to the requirement for a 'demand' under cl 30.3, the Subcontract does not define that term, nor impose any conditions as to how or when a 'demand' is to be made. Decmil says the term must be given an objective construction, giving effect to its text, context, subject-matter and purpose and that the key question is what a reasonable business-person would have understood the term to mean;
- (c) in *Junemill Limited v FAI General Insurance Co Ltd*,⁸ in the context of construing an insurance policy where the term 'claim' was defined as 'the demand for compensation', Fryberg J with whom McPherson JA agreed referred to the following Oxford English Dictionary definition of 'demand':

An act of demanding or asking by virtue of right or authority; an authoritative or peremptory request or claim; also transf., the substance or matter of the claim, that which is demanded.

- (d) the Payment Schedule constituted both Decmil's valuation of, and demand for, rectification costs within the meaning of cl 30.3 of the Subcontract. The substantive effect of the statements in the Payment Schedule was to assert Decmil's right or entitlement to an amount of \$2,633,235.61 which it had determined as being the value of the rectification costs. The assertion of entitlement is synonymous with a demand; and

⁸ [1999] 2 Qd R 136, 145.

- (e) the consequence of Decmil's demand was that cl 30.3 was enlivened with the effect of conferring an entitlement upon Decmil to the costs of rectification as a debt due and payable, not as a claim for damages within the purview of s 10B(2)(c) of the SOP Act.

C.4 Consideration

45 The critical issue in dispute is whether or not Decmil's claim for the WTG B44 foundation rectification costs was a claim for damages or a debt due under clause 30.3 of the Subcontract.

46 Decmil relies on clause 30.3 to assert that its claim for those costs was a claim for a debt due and payable. Decmil says the provisions of clause 30.3 were engaged by the Payment Schedule.

47 It was common ground that if Decmil's claim was not for a debt due and payable under clause 30.3, it would be an excluded amount for the purposes of the SOP Act.

48 It was also common ground that Decmil's entitlement to a debt did not arise under clause 30.3 unless Decmil had:

- (a) arranged for the Defect to be remedied and the cost of doing so valued under clause 22.9; and
- (b) demanded payment of those costs from Hanson.

49 Decmil relies on the Payment Schedule to constitute both its valuation of and demand for the rectification costs in the sum of \$2,633,235.61. It says the substantive effect of the statements in the Payment Schedule was to assert Decmil's right or entitlement to an amount of \$2,633,235.61.

50 The Payment Schedule was served on 15 February 2024 and expressly stated it was a payment schedule pursuant to s 15 of the SOP Act. That section mandates the requirements of a payment schedule in terms of form and content. Relevantly it requires:

- (a) the payment schedule to indicate the amount of the payment that the respondent proposes to make (the scheduled amount);⁹ and
- (b) if the scheduled amount is less than the claimed amount, the payment 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.¹⁰

51 By the Payment Schedule, Decmil relies on clause 30.2 (not clause 30.3) in support of the scheduled amount being less than the Claimed Amount and its reasons for withholding payment. Specifically, Decmil asserts that it is entitled to set-off or deduct the estimated costs of rectifying the defective work "in accordance with clauses 30.2 and 24.20 of the Subcontract". Clause 30.2 operates where Decmil gives notice that it will accept defective work or any part of it, despite the defect. I note that no such notice has been given in this case and Decmil does not seek to rely on a debt arising under clause 30.2 in this proceeding.

52 In my view the Payment Schedule does not constitute a demand under cl 30.3. The covering letter expressly identifies the letter and attachments as comprising "the Contractor's payment schedule pursuant to section 15 of the Act". There is no suggestion that it also serves a second purpose outside of the SOP Act, namely a demand under clause 30.3 triggering the significant consequences that would flow from it. There is no reference at all in the Payment Schedule to clause 30.3 of the Subcontract. Nor does the Payment Schedule use the term "demand", or the expression "debt due and payable".

53 It was submitted by Decmil that I should read the Payment Schedule in the context of the 30.2(a) notice served by Decmil on 21 December 2023. That notice (described in paragraph 16 above) directs Hanson to remedy the defective works by removing and replacing the WTG B44 foundation and foreshadows that clause 30.3 may be invoked if it does not. However, as stated above, there is no language employed in the

⁹ SOP Act, s 15(2)(b).

¹⁰ Ibid s 15(3).

Payment Schedule consistent with the invocation of cl 30.3.

- 54 Further and in any event, Decmil's assertion that the Payment Schedule constitutes a demand against Hanson under clause 30.3 is entirely undermined by an attachment to the Payment Schedule which was headed 'BOP Contractor Variation Proposal' and contained a reference description 'B44 Foundation remediation'. The lump sum value of the proposed variation was an estimate of \$2,633,235,61. Relevantly, Note 2 in that variation proposal reads that Decmil (as the BOP Contractor) "is of the opinion that this submission contains sufficient information for the Owner to assess. However if any further information is required please advise".
- 55 In my view the attachment of the variation proposal communicates that Decmil is seeking the payment of the rectification costs by the Owner as a variation, not demanding them from Hanson.
- 56 In the absence of any demand under cl 30.3 I find that Decmil's claim was not for a debt due and payable under that clause but a claim for an excluded amount for the purposes of the SOP Act. The Adjudicator took that amount into account in determining the Adjudication Application in breach of s 23(2A) of the SOP Act and, as a consequence, the Adjudication Determination is void to that extent.¹¹

D Remedy

- 57 Hanson seeks an order in the nature of certiorari quashing that part of the Adjudication Determination by which the Adjudicator took into account an excluded amount together with an order remitting its Adjudication Application for referral to the Adjudicator to be determined in accordance with law. This relief is opposed by Decmil.
- 58 The question arises whether or not remittal is available in respect of an adjudication determination under the SOP Act.

¹¹ SOP Act, s 23(2B).

- 59 The approach taken in Victoria and New South Wales is different.
- 60 This Court has on a number of occasions ordered the relevant adjudication application be remitted to the adjudicator. For example:
- (a) *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [No 2]*¹² in which the Court, having found a breach of the rules of natural justice in respect of an adjudication, quashed the adjudication determination and remitted the adjudication application back to the authorised nominating authority for reference to the original adjudicator to determine it in accordance with the law.
 - (b) *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors*¹³ in which the Court observed that remitter was the usual form of relief when certiorari was granted and made an order to that effect following a finding that an adjudication determination was affected by jurisdictional error. The Court considered whether ‘some elements of timing found in the provisions of the [SOP Act] would tend to suggest that the remedy of remitting a matter back to the original tribunal would not be open as a matter of implication’ but found that no such implication could arise.¹⁴ The Court concluded that an order for remitter was available (generally) and appropriate in the circumstances of the case.¹⁵
 - (c) *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*¹⁶ in which the court made an order for a partial remitter that reflected the Court’s finding that the relevant adjudication determination was invalid only insofar as it related to two components of the determination. The orders made by the Court were not disturbed by the Court of Appeal.¹⁷
- 61 By comparison, McDougal J in *Richard Crookes Construction Pty Ltd v CES Projects (Aus)*

¹² [2010] VSC 255; 30 VR 141, [18]-[19]

¹³ [2013] VSC 243, [72]-[76].

¹⁴ Ibid [73].

¹⁵ Ibid [75]-[76].

¹⁶ [2015] VSC 631.

¹⁷ *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119.

*Pty Ltd (No 2)*¹⁸ (*‘Richard Crookes’*) observed (at [73]) that:

where relief is granted in this Court (or an equivalent superior court of record) on the basis that the inferior court or tribunal lacked jurisdiction to deal with the matter, the only necessary order is that the decision be quashed. There is no point in remitting the matter, because the outcome is necessarily determined by the quashing order.

62 I note that:

- (a) his observations about remittal of an adjudication were obiter;¹⁹ and
- (b) he accepted, at the level of basic principle, that if the order of an inferior court or tribunal is called up into a superior court, and the decision is quashed (which is the process involved in certiorari), the matter may be remitted to the inferior tribunal or court to be decided according to law.²⁰

63 There is an important difference between the NSW and Victorian legislation. The SOP Act includes s 23(2B). Section 23(2B)(b) of the SOP Act relevantly provides that if an adjudicator’s determination takes into account an excluded amount, it is void to that extent. It has no counterpart in interstate legislation.

64 That provision, along with others concerning “excluded amounts” was inserted by the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic).

65 During the second reading speech for the relevant bill, the Minister for Planning explained:²¹

- (a) the main purpose of the amendments was to make the SOP Act more effective in enabling any person who carries out building or construction work to promptly recover progress payments;²²
- (b) the proposed amendments, amongst other things, make it clear that claims for

¹⁸ [2016] NSWSC 1229 (*‘Richard Crookes’*).

¹⁹ Ibid [58]-[59].

²⁰ Ibid [63].

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2006, 219-221 (Rob Hulls, Minister for Planning) (*‘Second Reading Speech’*).

²² Ibid 219.

damages, delay costs and latent conditions are “excluded amounts” and cannot be claimed under the SOP Act;²³ and

- (c) most significantly, the amendments would provide that an adjudicator’s determination, insofar as it takes into account matters that are not permitted to be claimed under the SOP Act, is void and of no effect. He stated:²⁴

This amendment will ensure that where an adjudicator steps beyond the scope of the [SOPA Act] those parts of the adjudicator’s determination that are within power can be saved.

66 In my view, remitter is the appropriate means to give effect to s 23(2B) and the expressed intention to preserve those parts of the adjudicator’s determination that are within power. To put it another way, remitter allows the Adjudicator to:

- (a) put a line through those portions of the Adjudication Determination where he has taken into account the excluded amount;
- (b) leave the valid portion of the Adjudication Determination without any material change; and
- (c) then recalculate the adjudicated amount in accordance with this decision.

67 The determination of the adjudicated amount is properly a matter for the Adjudicator and an essential step in the procedure that follows for its payment and recovery under the SOP Act. Remitting the matter thereby operates to promote the object of the SOP Act, being the prompt interim payment on account in favour of the subcontractor pending final determination of any disputes arising under a construction contract – more so than if the adjudication determination was quashed without remitter.

68 It is apparent from my decision that I reject Decmil’s submissions but there are three submissions that I will address directly.

69 First, Decmil submitted that I ought to be dissuaded from making any order for remittal having regard to the discretionary and other considerations referred to by

²³ Second Reading Speech, 219.

²⁴ Ibid.

McDougall J in *Richard Crookes* and by Digby J in *Shape Australia v The Nuance Group*.²⁵

I was directed to a number of paragraphs in each decision. The discretionary matters identified in those paragraphs can be summarised as follows:

- (a) the inability of the Adjudicator to comply with time limits imposed under the SOP Act;²⁶
- (b) whether remission would be futile;²⁷
- (c) whether the question of “clean hands” on the part of the claimant is relevant to the grant of relief;²⁸ and
- (d) the time elapsed between the date of the adjudication application and the application for remission.²⁹

70 Decmil did not develop its submissions in relation to any of those matters other than the time limits imposed on an adjudicator under the SOP Act. In summary, it was submitted that:

- (a) remission will be contradictory to the purpose and intent of the SOP Act to enable speedy resolution of disputes about payment claims according to a procedure that is subject to tight time-frames; and
- (b) there are no time limits imposed by the SOP Act in relation to remitted applications and the time limit imposed on the Adjudicator in relation to the determination of Hanson’s Adjudication Application has clearly passed.

71 However, I note that a determination made out of time is not invalid.³⁰ The actual consequence of a late adjudication determination is that a claimant (here Hanson) may withdraw the application.³¹ In this case I was informed by Hanson by its senior

²⁵ [2018] VSC 808 (*‘Shape’*).

²⁶ Ibid [105].

²⁷ *Richard Crookes* [86]-[87].

²⁸ Ibid [88]-[92].

²⁹ *Shape* [105].

³⁰ *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 (Maxwell P, with whom McLeish and Niall JJA agreed) [66]-[78].

³¹ SOP Act, s 28(2).

counsel that if the Adjudication Application is remitted to the Adjudicator, Hanson will not seek to withdraw that application pending its determination.

72 Second, Decmil submitted that a partial remitter would be inconsistent with the scheme of the SOP Act. I was directed to the decision of the Court of Appeal in *Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd*³² (*'Yuanda'*) that if a payment claim contains excluded amounts, the entire payment claim is invalid. That is, in the context of s 16 of the SOP Act, the doctrine of severance does not apply and the Court cannot sever any offending portion of the claim. Decmil's reliance on *Yuanda* is inapt. As submitted by Hanson, *Yuanda* did not relate to an adjudication determination but concerned the interpretation of s 16(4)(a)(ii) which prevents the Court from giving judgment unless the Court is satisfied that the claimed amount does not include any excluded amount.

73 Third, Decmil submitted that Hanson should have availed itself of the review process provided for in SOP Act. The review process is for aggrieved parties to seek review of an adjudicated determination by a single adjudicator. The review process is only available in limited circumstances. A respondent (such as Decmil) may apply for a review of an adjudication determination only on the ground that the adjudicated amount included an excluded amount.³³ By contrast a claimant (such as Hanson) may only apply for review on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.³⁴ Having regard to the very limited grounds for review, it was not available to Hanson.

E Orders

74 Subject to the parties' further submissions, I propose to:

(a) order:

³² [2021] VSCA 44.

³³ SOP Act, s 28B(3).

³⁴ Ibid s 28C(2).

- (i) the Adjudication Determination be quashed only in so far as the Adjudicator took into account the costs of rectification of the WTG B44 foundation; and
 - (ii) the Adjudication Application be remitted to the Adjudicator for the purpose of determining the adjudicated amount in accordance with the law (**'Second Adjudication Determination'**); and
- (b) declare the Second Adjudication Determination, when delivered, shall stand as the adjudication determination in place of the Adjudication Determination dated 21 March 2024 for all purposes under the SOP Act.

75 I will hear from the parties as to the form of orders and costs.

CERTIFICATE

I certify that this and the 20 preceding pages are a true copy of the reasons for judgment of Justice Stynes of the Supreme Court of Victoria delivered on 25 June 2024.

DATED this twenty fifth day of June 2024.



Associate