

Supreme Court
New South Wales

Case Name: Tackelly No 8 Pty Ltd as trustee for Tackelly No 8 Trust
v Reward Interiors Pty Ltd t/as Reward Group

Medium Neutral Citation: [2025] NSWSC 300

Hearing Date(s): 20 March 2025

Date of Orders: 11 April 2025

Decision Date: 11 April 2025

Jurisdiction: Equity - Commercial List

Before: Peden J

Decision: At [138]

Catchwords: BUILDING AND CONSTRUCTION — adjudication —
Building and Construction Industry (Security of
Payment) Act 2021 (WA) — policy of security of
payment legislation — timeframes — rough and ready
— brutally fast — policy best served by restricting
judicial intervention — East Coast model —
jurisdictional differences and similarities

BUILDING AND CONSTRUCTION — adjudication —
Building and Construction Industry (Security of
Payment) Act 2021 (WA) — jurisdictional fact — where
statutory language objectively worded — subjective
opinion of adjudicator — release of performance
security bonds

BUILDING AND CONSTRUCTION — adjudication —
Building and Construction Industry (Security of
Payment) Act 2021 (WA) — whether service
requirement met by providing link within email —
meaning of “given” — whether strict compliance was a
precondition to jurisdiction

BUILDING AND CONSTRUCTION — adjudication —
Building and Construction Industry (Security of
Payment) Act 2021 (WA) — proper form of relief —
mandamus — whether adjudicator must determine
review application in accordance with law — where
other proceedings on foot

Legislation Cited:

Acts Interpretation Act 1954 (Qld) ss 38, 39
Building and Construction Industry Payments Act 2004
(Qld) s 21
Building and Construction Industry Security of Payment
Act 1999 (NSW) s 17
Building and Construction Industry Security of Payment
Act 2002 (Vic)
Building and Construction Industry (Security of
Payment) Act 2021 (WA) ss 3, 24, 36, 38, 40, 42, 43,
45, 46, 47, 48, 52, 56, 57, 58, 113
Building Industry Fairness (Security of Payment) Act
2017 (Qld) ss 21, 79
Electronic Transactions Act 2011 (WA) ss 9, 14, 24
Electronic Transactions (Queensland) Act 2001 (Qld) ss
11, 24
Interpretation Act 1984 (WA) s 18
Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW)
Jurisdiction of Courts (Cross-Vesting) Act 1987 (WA)

Building and Construction Industry (Security of
Payments) Regulations 2022 (WA) rr 22, 23

Cases Cited:

1155 Nepean Hwy v Promax Buildings [2020] VSC 398
AAI Ltd v Chan [2021] NSWCA 19
Cardinal Project Services Pty Ltd v Hanave Pty Ltd
(2011) 81 NSWLR 716
Clack v Murray [2017] WASCA 88 [2017] WASCA 88
Clough Engineering Ltd v Oil & Natural Gas Corp Ltd
[2008] FCAFC 136
Conveyor & General Engineering Pty Ltd v Basetec
Services Pty Ltd [2014] QSC 30
Coordinated Construction Co Pty Ltd v Climatech
(Canberra) Pty Ltd [2005] NSWCA 229
Craig v South Australia (1995) 184 CLR 163
Douglas Aerospace v Industri Engineering Albury [2014]
NSWSC 1445
EnerMech Pty Ltd v Acciona Infrastructure Projects

Australia Pty Ltd [2024] NSWCA 162
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Falgat Constructions Pty Ltd v Equity Australia
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Gedeon v Commissioner of the NSW Crime
Commission (2008) 236 CLR 120
Hanson Construction Materials Pty Ltd v Decmil
Australia Pty Ltd [2024] VSC 361
In the matter of Nicolas Criniti Pty Ltd (in liq) [2022]
NSWSC 1149
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
LPDT v Minister for Immigration, Citizenship, Migrant
Services and Multicultural Affairs [2024] HCA 12
Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty
Ltd [2025] NSWCA 49
McCarthy v TKM Builders Pty Ltd [2020] QSC 301
Minister for Immigration and Multicultural and
Indigenous Affairs v SGLB [2004] HCA 32
National Australia Bank v Joyce [2012] WASC 224
National Management Group Pty Ltd v Birieli Industries
Pty Ltd [2019] QSC 219
Niclin Constructions Pty Ltd v SHA Premier
Constructions Pty Ltd [2019] QSC 91
Parkview Constructions Pty Ltd v Total Lifestyle
Windows Pty Ltd [2017] NSWSC 194
Pino v Prosser [1967] VR 835
Probuild Constructions (Aust) Pty Ltd v Shade Systems
Pty Ltd [2016] NSWSC 770
Probuild Constructions (Aust) Pty Ltd v Shade Systems
Pty Ltd (2018) 264 CLR 1
Procon Developments (Australia) Pty Ltd v Hi-Cal
Bricklaying [2025] QSC 67
Prout v La Rosa [2007] WASC 63
QC Communications NSW Pty Ltd v CivComm Pty Ltd
[2016] NSWSC 1095
R v Commonwealth Court of Conciliation and
Arbitration; Ex parte Ozone Theatres (Aust) Ltd (1949)
78 CLR 389
R v Connell; Ex parte Hetton Bellbird Collieries Ltd
(1944) 69 CLR 407

Randall v Northcote Town Council (1910) 11 CLR 100
Richard Crookes Construction Pty Ltd v CES Projects
(Aust) Pty Ltd (No 2) [2016] NSWSC 1229
Rodger v De Gelder (2011) 80 NSWLR 594
Tasker v Fullwood [1978] 1 NSWLR 20
Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd
[2008] NSWSC 399
Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61
NSWLR 707

Texts Cited:

Building and Construction Industry (Security of
Payment) Bill 2021 (WA)

Category:

Principal judgment

Parties:

Tackelly No 8 Pty Ltd as trustee for Tackelly No 8 Trust
(Plaintiff)
Reward Interiors Pty Ltd t/as Reward Group (First
Defendant)
Max Tonkin (Second Defendant)
Adjudicate Today Pty Ltd (Third Defendant)
Resolution Institute (Fourth Defendant)
Neil Kirkpatrick (Fifth Defendant)

Representation:

Counsel:
M Christie SC and D Hume (Plaintiff)
S Robertson SC and AR Langshaw (First Defendant)

Solicitors:
Vincent Young (Plaintiff)
HWL Ebsworth (First Defendant)

File Number(s):

2025/00019382

Publication Restriction:

Nil

JUDGMENT

- 1 This is a dispute about the validity of two payment claim adjudications under the *Building and Construction Industry (Security of Payment) Act 2021* (WA) (SOP Act). This Court has jurisdiction to determine the dispute by reason of s 9 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) and s 4(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (WA).

- 2 On 22 December 2023, Tackelly No 8 Pty Ltd and Reward Interiors Pty Ltd entered into a building contract. Reward was to provide design and construction services for Tackelly in relation to a hotel redevelopment in Perth, Western Australia.
- 3 Reward last carried out work on the site on 31 August 2024 and Tackelly sought to take back the work from Reward. Reward considered Tackelly's conduct repudiatory, and, on 3 September 2024, Reward purported to terminate the contract.
- 4 On the same day, Reward made a payment claim for about \$10.6 million (including GST) under the *SOP Act* seeking a progress payment for the final work it had done (and would ever do), and the release of two performance bonds in the form of bank guarantees in the total sum of \$1,250,000.
- 5 On 17 September 2024, Tackelly's superintendent under the contract gave Reward a payment schedule under the *SOP Act*, which asserted that Reward owed over \$1.3 million to Tackelly and that there was no basis for the return of the bank guarantees to Reward.
- 6 On 16 October 2024, Reward made an adjudication application pursuant to s 28 of the *SOP Act*, seeking a determination of its payment claim and the return of the guarantees. On 31 October 2024, Tackelly gave an adjudication response pursuant to s 34.
- 7 On 25 November 2024, the adjudicator determined that Reward was entitled to payment of just over \$2.6 million and ordered the release of the guarantees. There is no dispute as to the quantum of the adjudicated amount, only the release of the guarantees.
- 8 On 2 December 2024, Tackelly made a review application concerning the adjudicator's determination under Part 3, Division 3 of the *SOP Act*.
- 9 At 7.33pm on the same day, Tackelly's solicitor sent an email to Mr Christopher Donohue, the managing director of Reward, and Mr Laurence Terret, Reward's solicitor for the adjudication process, which indicated that it was attaching another email with a "Mimecast" link to an online file repository containing the adjudication review application. On 4 December 2024, for the first time anyone

from Reward did so, Mr Donohue opened the email and downloaded the online file.

- 10 On 16 December 2024, Reward responded to the review application alleging that the review adjudicator lacked jurisdiction because the application had not been served within one day of lodging in accordance with s 42(3) of the *SOP Act*.
- 11 On 13 January 2025, the review adjudicator accepted Reward's submission that he lacked jurisdiction to determine the review application, because of Tackelly's failure to comply with s 42(3). His view was that s 42(3) was a jurisdictional pre-condition that had not been satisfied.
- 12 The three issues to be determined concern the proper construction of various sections of the *SOP Act*. They are:
 - (1) Was the original adjudication determination of Reward's payment claim affected by jurisdictional error, because the adjudicator determined that Reward's guarantees ought to be released, relying on s 58(3)?
 - (2) Did the review adjudicator fall into jurisdictional error in determining that he did not have jurisdiction because the review application had not been given in accordance with s 42(3)? Further, did Tackelly fail to give the review application at all to Reward, because it did not comply with s 113 of the *SOP Act* or s 14 of the *Electronic Transactions Act 2011* (WA) (*ETA*)? If the review adjudicator erred, ought the matter be returned to him?
 - (3) If the adjudication review application ought to have been determined, is Tackelly entitled to the injunction sought in relation to the moneys it had paid into trust in accordance with s 40 of the *SOP Act*?
- 13 A further issue has been separated to be heard later, namely, whether Reward was entitled under s 58(4) of the *SOP Act* and under the contract to have the guarantees released because of the efficacy or otherwise of Reward's termination of the contract.

Legislative background

- 14 In 2021, the *SOP Act* was enacted after an extensive review of earlier Western Australian security of payment legislation. It departs significantly from its predecessor, the *Construction Contracts Act 2004* (WA).
- 15 The *SOP Act* generally adopts what has been described as the "East Coast model" typified by the *Building and Construction Industry Security of Payment*

Act 1999 (NSW) (NSW SOP Act), the *Building Industry Fairness (Security of Payment) Act 2017 (Qld) (Qld SOP Act)* and similar legislation in Victoria, South Australia, Tasmania and the Australian Capital Territory.

16 Although there is not yet a body of case law dealing specifically with the *SOP Act*, there is a considerable body of case law dealing with the “East Coast model” of security of payments legislation. Some of that case law is of assistance in understanding the scheme and operation of the *SOP Act*. There are, however, differences between the *SOP Act* and the East Coast model legislation that are relevant to this case.

17 The explanatory memorandum for the bill that became the *SOP Act* described its purpose as:

to provide better payment protections to contractors working in WA's building and construction industry to ensure they get paid on time, every time.

18 Similarly, the object of the *SOP Act*, as described in s 3(1), is:

to provide an effective and fair process for securing payments to persons who undertake to carry out construction work ... in the building and construction industry.

19 In this regard, the *SOP Act* is no different to the East Coast model legislation. In *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49 (*Martinus*) at [292], in discussing the purpose of the *NSW SOP Act*, Payne JA (Gleeson JA and Griffiths AJA agreeing) stated that:

[The policy of the *NSW SOP 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 for carrying out that work and supplying those goods and services. The [*NSW SOP Act*] is intended to provide a speedy and effective means of ensuring cash flow to builders and trade subcontractors from the parties with whom they contract. The [*NSW SOP Act*] creates an entitlement that is to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in due course.

20 The time limits imposed in the *NSW SOP Act*, which has been followed by “closely equivalent statutes” in other jurisdictions, are “brutally fast”, but “carefully calibrated”: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 at [3] and [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Those prompt timeframes are consistent with a legislative scheme

that provides a swift and effective system to achieve commercial certainty about payments within the construction industry.

- 21 It has been said of the East Coast model that the legislative object is “best served by restricting the scope of intervention by the courts”: *Martinus* at [57]. In this regard, New South Wales courts have “been restrained in implying essential preconditions to the engagement of statutory powers, which would invite judicial intervention”: *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162 at [9] (Basten AJA, Meagher JA and Griffiths AJA agreeing).
- 22 The “rough and ready” adjudication process envisaged by security of payment legislation would be undermined by courts “readily” finding jurisdictional error based upon overly technical scrutiny of an adjudication determination: see eg *Martinus* at [117] and [237].
- 23 Here, the primary issue concerns whether the adjudicator and/or the review adjudicator committed a (different) jurisdictional error.

Adjudicator’s purported exercise of power under s 58(3)

- 24 The original adjudicator determined that Reward was entitled to the release of its performance security bonds, on the basis that s 58(3) of the SOP Act was satisfied.
- 25 The parties had agreed in clause 5 of their contract to Reward giving Tackelly security (*italicised emphasis in original*):

5.1 Provision

Security shall be provided in accordance with *Item 14* [2 x unconditional bank guarantees for 2.5% of the contract sum]. Notwithstanding any other provision of the Contract, compliance with this Clause 5.1 is a condition precedent to the entitlement of the Contractor to receive any payment from the Principal under the Contract and no payment shall be due and payable until this clause is satisfied.

- 26 Reward complied with that contractual obligation by providing Tackelly with two bank guarantees for \$625,000 each dated 15 May 2024, each of which relevantly included:

Bank Guarantee

To: Tackelly... (the Beneficiary)

For: Reward ... (The Customer)

Agreement: SECURITY FOR THE PERFORMANCE BY THE CONTRACTOR OF ALL OF THE OBLIGATIONS OF THE CONTRACTOR UNDER THIS CONTRACT FOR THE REFURBISHMENT OF THE SEASONS OF PERTH HOTEL ...

Amount: 625,000 ...

1. In consideration of the Beneficiary agreeing at the request of the Customer and the Bank to accept this guarantee in connection with the Agreement, the Bank undertakes to pay the Beneficiary an amount or amounts not exceeding the Amount in total. ...

2. Payment of the Amount ... will be made by the Bank to the Beneficiary:

(a) upon the Bank receiving ... an unconditional written demand from the Beneficiary accompanied by this guarantee; and

(b) without reference to the Customer; and

...

(d) irrespective of the performance or non-performance by the Customer or the Beneficiary of the Agreement in any respect ...

- 27 The parties had also agreed to terms concerning the reduction and release of the security (*italicised emphasis in original*):

5.2 Recourse

(a) Security will be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of its intention to have recourse....

5.4 Reduction and release

Upon the issue of the *certificate of practical completion* and the Contractor providing a Deed of Release a party's entitlement to *security* ... shall be reduced by [50%] ...

...

A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

SOP Act provisions

- 28 Division 6 of Part 3 of the *SOP Act* is entitled "Claimant's rights with respect to performance security". "Performance security" is defined to mean "retention money or a performance bond": s 56.
- 29 A "performance bond" is defined to mean:

... a legally binding instrument (whether described as a bond, guarantee or otherwise) issued by an authorised issuing institution to pay a party to a

construction contract named in the instrument an amount of money up to a specified limit on demand by that party, as security for the performance of obligations under the contract of another party to the contract.

- 30 I accept Reward's submission that the two guarantees were "performance bonds" within the meaning of s 56. I accept Tackelly's submission that the authorities have considered that guarantees or performance bonds may have multiple purposes, namely, to encourage or ensure performance, but also to allocate risk: see eg *Clough Engineering Ltd v Oil & Natural Gas Corp Ltd* [2008] FCAFC 136 at [80] (French, Jacobson and Graham JJ). However, I do not accept that the legislature intended a "performance bond" to only capture those that had a singular purpose of ensuring performance. The fact that Reward's guarantees did have the purpose of being "security for the performance of obligations under the contract" was sufficient for them to meet the legislative definition, irrespective of whether they also served another purpose.
- 31 Section 57 imposes constraints on a party's ability to call on performance security: a written notice of intention to have recourse to the performance security must be provided to the other party, after which time at least five business days must pass.
- 32 Section 58 then provides:

58 Right to release of performance security

- (1) A payment claim for a progress payment may seek the release of performance security to which the progress payment relates.
- (2) An adjudication application or adjudication review application may seek the release of performance security that was sought in a payment claim but which has not been released.
- (3) The determination of an adjudicator or review adjudicator may require the release of any performance security that is no longer required because the obligations secured by the performance security have been performed.
- (4) An adjudicator or review adjudicator may only make a determination for the release of any performance security if it is due for release in accordance with the relevant construction contract.

- 33 Here, Reward's payment claim included (emphasis in original):

Reward ... hereby submits its Progress Claim No: 8

Value of works performed to 31 August 2024 ...

Value of variations performed to 31 August 2024 ...

Delay Claim ...

Value of works completed to 31 August 2024 ...

Less previously paid ...

Claimed Amount including GST.... \$10,623,382.70

Additionally, the Contractor demands the release of the performance security, as further described in this document ...

Claim for release of Performance Security

Reward ... demands the release of the following performance security pursuant to clause 5.4 of the Contract and section 58 of the ... SOP Act: ... [the two bank guarantees] ...

The Bank Guarantees are 'performance bonds' as that term is defined by section 56 of the SOP Act. Reward ... provided the Bank Guarantees as security for the performance of its obligations under the Contract.

Reward ... is entitled to the release of the Bank Guarantees because:

1. the obligations secured by the Bank Guarantees have been performed;
2. on 3 September 2024 the Contract was terminated by Reward ... accepting the Principal's repudiation of the Contract and electing to terminate the [C]ontract;
3. by operation of clause 5.4 of the Contract, the Principal's entitlement to the Bank Guarantees ceased on 3 September 2024 by reason of the Contract being terminated; and
4. since the termination on 3 September 2024, there are no obligations security [sic] by the Bank Guarantees which have not been performed by Reward ...

Adjudicator's determination

34 On 25 November 2024, 25 days after Tackelly's response, the adjudicator provided a determination over 437 paragraphs and 106 pages, concluding that:

- (1) Tackelly was required to pay an adjudicated amount of \$2,607,168.96, interest and the adjudicator's costs; and
- (2) the guarantees were to be released to Reward.

35 As explained above, Tackelly did not challenge the quantum of the adjudicated amount but contended that the adjudicator fell into jurisdictional error in directing the release of the guarantees.

36 In determining the issue, the adjudicator accepted Reward's submissions that Tackelly repudiated the contract, entitling Reward to terminate. He further stated that:

I am satisfied that this brought the Contract to an end. I therefore agree with [Reward's] submission that [Tackelly's] entitlement to security under the

Contract ceased and [Tackelly] was obliged by clause 5.4 to release and return to [Reward] the performance security consisting of two Bank Guarantees referred to in [Reward's] submissions.

For these reasons, I am satisfied the criteria in section 58(4) of the [SOP Act] is satisfied, and therefore I have determined that the performance security must be released by [Tackelly].

37 Therefore, it appears that the adjudicator undertook the following process. He:

- (1) considered the contract and the legislation;
- (2) considered the payment claim and payment schedule;
- (3) considered the parties' submissions and evidence about the termination of the contract; and
- (4) determined that Tackelly's "entitlement to security under the Contract ceased" because Reward had no further work to do and Tackelly "was obliged by clause 5.4 to release and return" the bank guarantees.

Jurisdictional challenge

38 Tackelly submitted that the adjudicator made a jurisdictional error, because s 58(1)-(3) of the *SOP Act* had not been satisfied and, therefore, he lacked jurisdiction to release the performance securities.

39 Tackelly submitted that the adjudicator was required to ascertain:

- (1) whether construction work was carried out, or related goods and services were supplied, as identified in the payment claim: s 24(1)(c). This occurred.
- (2) whether there was an entitlement to a progress payment in respect of that work and, if so, its quantum: s 24(1)(b). This occurred.
- (3) whether, because that work was completed, the obligations secured by the performance security had been discharged, such that there was an entitlement to release of the security. The adjudicator's inquiry into whether security should be released was related to (or, as put by counsel for Tackelly, "not divorced from") the adjudicator's inquiry into what work had been carried out and what progress payment should be awarded. This was disputed.

40 Tackelly's submissions continued:

Critically, what this means is that a payment claim cannot claim for the release of performance security which is unrelated to the claimed progress payment or the work which founded the claimed progress payment. Rather, as s 58(1) makes clear the performance security must be "performance security to which the progress payment relates". If the performance security does not relate to the claimed progress payment, it cannot be claimed for release. ... In other words, an adjudication application cannot seek the release of performance security if the payment claim, purportedly but invalidly, sought the release of that security.

- 41 Tackelly submitted that the parties' contract provided that the only way the guarantees could be released was if there was completion of the contract work and a final certificate had been issued, because then the work in the payment claim would "relate" to the securities.
- 42 As a result, Tackelly submitted that if a payment claim wrongly claimed the release of security, that was not "performance security to which the progress payment relates". This would mean that the adjudicator had no jurisdiction to direct its release.

Consideration

- 43 The real issue is the proper construction of s 58 of the *SOP Act*. The principles relevant to jurisdictional facts are not in dispute:

- (1) A jurisdictional fact is "a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question": *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [43] (Gummow, Kirby, Hayne and Heydon JJ).
- (2) The fact that a statute contains a condition of a conferral of decision-making authority does not necessarily mean that legal force and effect is denied to every decision that might be made in breach of that condition: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 98 ALJR 610 at [2]-[7] (the Court).
- (3) It is necessary to determine whether the legislature intended that failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act should be preserved notwithstanding non-compliance with that requirement. The true guide to the statutory intention is to be found in the language of the provision and the scope and object of the whole Act: *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-4 (Hope, Glass and Samuels JJA).
- (4) The construction of legislation ought to promote the purpose or object of that legislation: see s 18 of the *Interpretation Act 1984* (WA).
- (5) It is necessary to examine "the total context of the legislative scheme in which the power is conferred, including the scope and nature of the jurisdiction and of the fact said to be jurisdictional": *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [6] (Spigelman CJ, Mason P, Handley and Sheller JJA and Cripps AJA agreeing).
- (6) Statutory powers are regularly conferred by objectively worded preconditions. The relevant question is whether the precondition must be satisfied by the existence of the fact itself, as objectively assessed, or if it can be satisfied by the donee of the power holding the subjective belief of that fact existing: *AAI Ltd v Chan* [2021] NSWCA 19 at [21]

(Leeming JA, Gleeson JA agreeing). Leeming JA further observed that “[o]ne matter favouring a construction that the [precondition] turns on the proper officer’s opinion ... is that the preconditions involved matters of evaluative judgment”: at [23].

- (7) In relation to legislation expressed in apparently objective terms, “there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker’s opinion in that regard”: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 at [44] (Basten JA); see also *Rodger v De Gelder* (2011) 80 NSWLR 594.
- (8) It is within the jurisdiction of an adjudicator to act on their understanding of the contractual obligations and the content of a payment claim and payment schedule: *Martinus* at [61].
- 44 No real assistance is derived from the extrinsic materials to the *Building and Construction Industry (Security of Payment) Bill 2021* (WA), including the Explanatory Memorandum and the Second Reading Speech in relation to s 58.
- 45 For the reasons that follow, I consider the proper construction of s 58 is that, for the adjudicator to have jurisdiction to release performance security, it is the adjudicator who must be subjectively satisfied of the requirements under that section.
- 46 Here, the issue of whether s 58(1) and (3) were satisfied involved factual and legal complexity. Reasonable minds might differ about the conclusion reached on that question, because it is evaluative. This supports the construction that the adjudicator only needs to be subjectively satisfied of those elements for the power to release performance security to be enlivened, irrespective of whether that determination is correct: *Martinus* at [60]-[61], [99], [131], [175].
- 47 I consider this construction most appropriate in circumstances where the legislature enacted within the *SOP Act* a novel review adjudication process, whereby a party disgruntled about an adjudication determination has an opportunity for that determination to be quickly reviewed by way of another adjudication.
- 48 The review regime is inconsistent with the legislature intending that a disgruntled party would seek judicial review of the first adjudicator’s determination about the release of performance security on the basis that it was affected by jurisdictional error, because of an erroneous decision about

the scope of a payment claim, the work to which it related, and the connection, if any, with performance security in the context of a specific contract.

- 49 To trigger the adjudicator's power to release performance security, it need not actually be the case that:
- (1) the performance security in question "relates" to the progress payment: s 58(1);
 - (2) the "release of performance security ... was sought in a payment claim but ... has not been released": s 58(2); and
 - (3) the performance security "is no longer required because the obligations secured by the performance security have been performed": s 58(3).
- 50 Were it the case that the elements of s 58 were required to be objectively satisfied, rather than being merely satisfied in the subjective opinion of the adjudicator, it could be anticipated that many determinations would lead to public law litigation concerning a possible jurisdictional error, rather than the legislature achieving the speedy interim resolution of payment claims through the adjudication process and review process as intended.
- 51 It was not suggested here that the adjudicator's determination was "irrational, illogical and not based on findings or inferences of fact supported by logical grounds": *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at [38] (Gummow and Hayne JJ). Nor was it suggested that the determination was not arrived at in accordance with the legislation: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 432 (Latham CJ). Instead, Tackelly's argument was that it was incorrect.
- 52 I do not consider that the adjudicator made a jurisdictional error in respect of the release of the performance securities.
- 53 It is unnecessary to determine whether, as a matter of fact and the proper construction of the contract, the performance bonds ought to have been released pursuant to s 58(4). That matter has been separated for a future hearing.

Jurisdiction - service of the adjudication review application

- 54 Tackelly contended that the review adjudicator made a jurisdictional error by finding that he lacked jurisdiction to determine Tackelly's adjudication review

application, because it was served later than the one day specified in s 42(3) of the *SOP Act*. In *Craig v South Australia* (1995) 184 CLR 163 (*Craig*) at 177, Brennan, Deane, Toohey, Gaudron and McHugh JJ observed that “[a]n inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction”. The same may be said of a statutory decision-maker.

55 Pursuant to s 36 of the *SOP Act*, an original adjudicator must consider whether she has jurisdiction to determine the adjudication application. If the adjudicator decides she does not have jurisdiction, then the determination must state that and provide that no amount is payable under the determination and provide reasons: s 36(2), (4). There is no equivalent provision for a review adjudicator.

56 Section 46(1) provides that a review adjudicator “may consider only the following matters”: the Act and regulations, the contract, the adjudication review application and response and submissions “duly made”, the payment claim, payment schedule, adjudication application and response and submissions duly made.

57 Section 46(2) provides that the review adjudicator “must not consider” listed matters, including an adjudication response given after the time allowed by Part 3, Division 3. The time for an adjudication review response is “within 10 business days after receiving a copy of the adjudication review application”: s 45.

58 Section 42 relevantly provides (emphasis added):

(1) An adjudication review application —

(a) must be made in writing and be in the approved form (if any); and

(b) must be accompanied by a copy of the following —

(i) the construction contract or the relevant provisions of the construction contract;

(ii) the payment claim;

(iii) the payment schedule (if any);

(iv) the adjudication application;

(v) the adjudication response (if any);

(vi) any submissions made to the adjudicator by the claimant or respondent (including accompanying documents);

(vii) the adjudicator’s determination...

(3) The **claimant** or respondent making the adjudication review application **must give a copy of the application (and of any accompanying documents) to the other party within 1 business day after the application is made.**

59 There are two issues involved here:

- (1) Was Reward “given” a copy of the adjudication review application within the meaning of s 42(3)?
- (2) Was compliance with the requirement to “give” a copy within one day of lodgement as specified in s 42(3) a jurisdictional fact that needed to be satisfied to enliven the adjudicator’s power?

When was Reward “given” a copy of the adjudication review application?

60 Reward submitted that it never was “given” a copy of the adjudication review application in accordance with s 42(3), despite accepting that Mr Donoghue opened the MimeCast link and accessed the contents therein on 4 December 2024. Reward also substantively responded to the adjudication review application within the time limits prescribed by the *SOP Act* and therefore does not appear to have experienced any issue in that regard.

61 However, it is necessary to determine whether (and when) Reward was “given” the adjudication review application in accordance with ss 42(3) and 113 of the *SOP Act*, the *ETA*, and the parties’ contract, before considering whether any delay meant that the review adjudicator lacked jurisdiction to determine the adjudication review application.

62 I consider that, at the latest, on 4 December 2024, Reward had been “served” for practical and natural justice purposes, for the following reasons.

63 In various cases concerning security of payment legislation, it has been determined that a party cannot deny having been served in circumstances where they have received and accessed the document in question, by reason of a technicality concerning the manner in which the document was given: see eg *Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd* [2006] NSWCA 259 at [58] (Hodgson JA, Handley JA and Hunt AJA agreeing); *In the matter of Nicolas Criniti Pty Ltd (in liq)* [2022] NSWSC 1149 at [53]-[55] (Hammerschlag CJ in Eq).

64 I agree that it would be “remarkable to the point of seeming absurdity” if a defendant could “admit that he received the writ” but nevertheless be “held not

to have been served”: *Pino v Prosser* [1967] VR 835 at 837 (McInerney J).

That principle has been accepted in other jurisdictions, including Western Australia: see eg *Clack v Murray* [2017] WASCA 88 at [10]-[11] (Mitchell JA); *National Australia Bank v Joyce* [2012] WASC 224 at [9] (Edelman J); *Prout v La Rosa* [2007] WASC 63 at [13]-[14] (Blaxell J).

- 65 Therefore, the remaining issue is whether Reward was “given” the adjudication review application within the one day timeframe of s 42(3) with the sending of the original email and embedded MimeCast link.

“Give” pursuant to s 113

- 66 Section 113 of the *SOP Act* specifies the legislated means of service of an adjudication review application. It provides:

- (1) ... “give” includes “serve, send or otherwise provide”
- (2) Any document that by or under this Act is authorised or required to be given by a party to a construction contract to another party to the contract in relation to matters arising under the contract –
 - (a) must be given in the manner (if any) provided in the contract if it is reasonably practicable; or
 - (b) in any other case – must be given in a manner provided by subsection (3).

- 67 Sub-section (3) provides the other “manners” as referenced in s 113(2)(b):

- (3) Any document that by or under this Act is authorised or required to be given to a person may, subject to subsection (2), be given to the person —
 - (a) by delivering the document to the person personally; or
 - (b) by leaving the document for the person at the person’s ordinary place of business; or
 - (c) by sending the document by post to the person’s ordinary place of business; or
 - (d) by email to an email address specified by the person for giving documents of that kind to the person; or
 - (e) by any other method (including the use of an electronic database, document system or any other means by which a document can be accessed electronically) authorised by the regulation for giving documents of that kind to the person.

- 68 Reward submitted that s 113(3)(a) applied and therefore, Tackelly had to “give” the documents in accordance with the parties’ contract. Tackelly submitted that instead s 113(3)(d) of the *SOP Act* or s 14 of the *ETA* applied.

Did the parties' contract govern – s 113(3)(a)?

- 69 Reward submitted that the parties' contract specified "the manner" in which a notice had to be given, and therefore s 113(2)(a) operated. The contract provided in clauses 7.1 and 7.2:

7.1 Services of Notices

A notice (and other communications given under the Contract documents) shall be deemed to have been given and received in writing and signed by or on behalf of the sender and:

- (a) if posted or delivered; or
- (b) sent by email in the form of a letter attachment to the address stated in Annexure Part A or such other address as is last notified by the intended recipient to the sender.

7.2 Receipt of notices

A notice sent under clause 7.1 will be conclusively taken to be duly given or made on the earliest date of:

- (a) actual receipt;
- (b) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification ...or
- (c) 2 business days after posting the notice.

- 70 Clause 7.1 uses the language of *deeming* service rather than identifying expressly the exclusive manner of service. I consider the better construction is that clause 7.1 provided express protection to a party sending a notice as specified, that service would be effective. The required timing of such service was provided in clause 7.2. However, I do not accept that clause 7.1 was mandatory or provided the exclusive methods of service for the purposes of the *SOP Act*.
- 71 Further, I consider that clause 7 concerned contractual notices "under the Contract" and was not prescriptive for the purposes of the *SOP Act*. The parties were sophisticated and were aware of the operation of the *SOP Act*, as it is referenced in the contract.
- 72 As the contract is silent on exactly how notices under the *SOP Act* were to be given, I consider the parties did not intend that the only way any notices were to be given was by way of those methods deemed effective in clause 7.1. Instead, I consider that they intended that s 113(2)(b) would govern.

73 However, if that conclusion is erroneous and the contract did “provide” the “manner” in which the adjudication review application had to be given or served, and s 113(2)(a) applied, then I do not accept that Tackelly properly complied with clause 7. I do not accept that based on their natural and ordinary meaning, the words, “email in the form of a letter attachment”, were satisfied by the way Tackelly sent an email with instructions in the body to access a Mimecast repository. That was not a “letter attachment”.

Was Reward served within one day by email - s 113(3)(d)?

74 Tackelly submitted that, to the extent that it was required to “give” a full copy of the adjudication review application within one day of it being lodged, it did so with the provision of the email with the MimeCast link and instructions.

75 In contrast, Reward submitted that Tackelly’s actions were equivalent to a post worker leaving a slip at premises with instructions of how to collect a parcel at a post office. In support of that submission, Reward relied upon a report of Dr Peter Chapman, a digital forensics expert. That report demonstrated that in order for Reward to access the adjudication review application, it was necessary for it to access the URL link provided by Tackelly in order to access its cloud storage service (here, MimeCast). This was different to receiving an email attachment that could be accessed on Reward’s own device.

76 If s 113(2)(b) is operative here, then Tackelly must still demonstrate that sending an email with another email that included a MimeCast link fell within s 133(3). The parties agreed that the only possibly relevant subsection would be s 113(3)(d), which provided for service:

... by email to an email address specified by the person for giving documents of that kind to that person.

77 The question then is whether sending the email with the attached email providing a MimeCast link amounted to “giving” the documents, noting that “give” includes “otherwise provide”.

78 I do not accept that the legislature intended the method of service used to fall within that subsection for the following reasons.

79 First, s 113(3)(e) demonstrates that the legislature contemplated that electronic or document database systems might be a suitable way of a person giving a

document. However, the section required such systems to be authorised by regulation. Regulation 22 of the *Building and Construction Industry (Security of Payments) Regulations 2022* (WA) (*SOP Regulations*) concerns the “electronic lock-box service of documents **on authorised nominating authorities**” (emphasis added). There is no reference in that regulation to service by “lock-box” on others, such as other contracting parties, and therefore s 113(3)(e) does not apply here.

80 Secondly, there is authority in respect of security of payment legislation in other jurisdictions, which suggests that the “giving” of an adjudication review application is not occasioned by sending an email containing a link which, when “clicked” and accessed, reveals the application.

81 *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 (*Basetec*) was decided in relation to the *Building and Construction Industry Payments Act 2004* (Qld) (*BCIPA*), the precursor to the current *Qld SOP Act*. Section 21(5) of the *BCIPA* required that an adjudication application be “served” on the respondent. That Act did not internally stipulate the means by which service had to occur but expressly referred to s 39 of the *Acts Interpretation Act 1954* (Qld), which allows the service of documents “by post, telex, facsimile **or similar facility...**” (emphasis added). Unlike the *SOP Act* here, the *BCIPA* did not expressly stipulate a timeframe, within which service had to occur. However, the time of service was significant, given it affected the time by which the respondent would be required to file an adjudication response.

82 In *Basetec*, an email within an email included a Dropbox link containing an adjudication application (very similar to the current situation). The question was whether this satisfied the legislative service requirements. Relevantly, s 11(2) of the *Electronic Transactions (Queensland) Act 2001* (Qld) (*Qld ETA*) deemed the giving of information by an “electronic communication” where the information “would be readily accessible so as to be useable” by the recipient, who had consented to the information being given by way of an electronic communication. Schedule 2 of that Act defined “electronic communication” to

mean “a communication in the form of data, text or images by guided or unguided electromagnetic energy”.

- 83 In that case, the parties did not agree to service of documents by electronic communications. However, in any event, McMurdo J found that sending the email could not have occasioned service, because the relevant material within the Dropbox file was not part of an “electronic communication”. His Honour held that the email was an electronic communication, by which relevant information in electronic form could be found, read and downloaded: at [28]-[30]. Further, if the whole of the adjudication application had been in the email, then s 24 of the *Qld ETA* would deem service to have occurred when the email was capable of retrieval. However, the use of a Dropbox link meant the whole of the application was not an “electronic communication”, precluding the operation of s 24: at [29].
- 84 *Basetec* is consistent with later authority that has applied the current *Qld SOP Act*. Martin J held that emailing a Dropbox link and instructions that the link contained “correspondence and [an] attached adjudication claim” did not satisfy the requirement to serve the application: *McCarthy v TKM Builders Pty Ltd* [2020] QSC 301 (*McCarthy*) (Martin J) at [7] and [23].
- 85 Counsel for Tackelly further submitted that *Basetec* turned on a finding that the contents of a link could amount to an electronic communication. I do not agree. Rather, McMurdo J held that providing a Dropbox link did not satisfy the requirements of an electronic communication *for the purpose of service*, because the relevant electronic communication necessarily required the adjudication review application to be viewable by the recipient without them undertaking some additional step: *Basetec* at [29]-[30].
- 86 The decision in *Basetec* is consistent, while not the same, with authority in this jurisdiction, where it has been determined, in relation to the *NSW SOP Act*, that service of a USB stick does not amount to service of its contents. It was held that in order to access the content stored on a USB stick, the recipient must take the additional step of accessing, opening and viewing the files within it: *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194 at [75]-[81] (Hammerschlag J, as his Honour then was). His

Honour concluded that the delivery alone of the USB stick was not service of a copy in writing for the purposes of s 17(5) of the *NSW SOP Act*.

- 87 I adopt the distinction drawn in the above authorities between situations where an adjudication review application is included in the text of an email, or the body of a document attached to it, and where an email contains a link that the recipient can then use to access the electronic application and associated documents. In the latter situation, there has not been service in writing.
- 88 For the reasons above, I do not accept that Tackelly “gave” the documents “by email” as contemplated by s 113(3)(d), because the adjudication review application was not immediately accessible without Reward’s additional action. Accordingly, Tackelly failed to give a copy of its adjudication review application to Reward by 3 December 2024, as required under s 42(3).

Electronic Transactions Act

- 89 Tackelly also submitted that the *SOP Act* also permitted service pursuant to s 14 of the *ETA*. Tackelly relied on Regulation 23(d) of the *SOP Regulations*, which provides:

The time when a document that is authorised or required by or under the Act to be given to a person is taken to have been given is as follows...

(d) in the case of a document sent to a person by email or any other form of electronic communication – when the electronic communication is taken to be received by the person in accordance with the *Electronic Transactions Act 2011* section 14.

- 90 I do not accept that submission.
- 91 Counsel for Tackelly submitted that the outcome in *Basetec* ought not be reached in the present case because s 14 of the *ETA* deems receipt at the point when an electronic document is *capable* of being retrieved, irrespective of whether or not that document *actually* has been viewed or received. However, s 14 concerns the receipt of documents, rather than whether or not documents were “given”. Section 14(1)(a)-(b) refers to “the time of receipt”.
- 92 Regulation 23(d) and s 14 of the *ETA* have the effect of deeming the time “of receipt of the electronic communication”. However, neither specifies the possible means of “giving” the communications. However, s 9 of the *ETA* provides:

9 Writing

(1) If, under a law of this jurisdiction, a person is required to give information in writing [including making an application – s 9(5)], that requirement is taken to have been met if the person gives the information by means of an electronic communication, where –

(a) at the time the information was given, it was reasonable to expect that the information would readily accessible so as to be useable for subsequent reference; and

(b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication.

93 Reward submitted, and I accept, that here, for the purposes of s 9, Reward did not consent to an adjudication review application being given to it by an electronic communication (other than so far as clause 7.1 might allow it).

94 Further, s 9(3) provides:

This section does not affect the operation of any other law of this jurisdiction that makes provision for or in relation to requiring or permitting information to be given, in accordance with particular information technology requirements –

(a) on a particular kind of data storage device; or

(b) by means of a particular kind of electronic communication.

95 Therefore, because s 113 of the *SOP Act* “permits” adjudication review applications to be given in accordance with s 113(3)(d) and (e), the *ETA* does not override s 113, by reason of s 9(3) of the *ETA*.

96 Based on the above, I do not accept that Tackelly “gave” Reward the adjudication review application by reason of the operation of s 14 of the *ETA*.

Is compliance with s 42(3) a precondition to jurisdiction?

97 Because I have determined that Reward can only be taken to have been served on 4 December 2024, it is necessary to determine whether strict compliance with the one-day timeframe in s 42(3) is a precondition to jurisdiction of a review adjudicator.

98 Different approaches to the issue of statutory preconditions have been taken in different jurisdictions concerning similar provisions about the time for service of an adjudication application.

Victoria - Building and Construction Industry Security of Payment Act 2002 (Vic)

99 The Victorian legislation does not specify a time for service of the adjudication application. It has been held that service ought to be made “within a reasonable time of the making of the adjudication application”, but this does not require that service occur “as soon as practicable”: *1155 Nepean Hwy v Promax Buildings* [2020] VSC 398 at [112] (Digby J). However, “the timing of ... service ... is not critical” to allow the adjudication application to be determined. This is because other protections existed for a late-served respondent, including that under the legislation, an adjudicator who accepts an adjudication application must serve it on the respondent, who thereafter has five days to lodge a response to the application: at [108] and [112]-[118].

NSW - Building and Construction Industry Security of Payment Act 1999 (NSW)

100 The NSW legislation does not include any time requirement for the service of adjudication applications in s 17(5) (unlike other sections, such as s 17(6)). Cases have suggested, but not clearly decided, that service is not a precondition to a valid adjudication, but in some situations, delay or failure to serve may amount to a denial of procedural fairness to the respondent: see eg *Douglas Aerospace v Industri Engineering Albury* [2014] NSWSC 1445 at [73]-[75] (McDougall J did not need to decide the “interesting debate” whether s 17(5) was jurisdictional, but doubted it was); *Equa Building Services Pty Ltd v KLG Trading Pty Ltd* [2021] NSWSC 1674 at [53]-[56] (Stevenson J considered the weight of authority was that s 17(5) was not jurisdictional but did not need to decide) and *QC Communications NSW Pty Ltd v CivComm Pty Ltd* [2016] NSWSC 1095 at [27]-[29] (Ball J, as his Honour then was, doubted that service was a precondition to jurisdiction).

Queensland - Building Industry Fairness (Security of Payment) Act 2017 (Qld)

101 Until recently, the security of payment legislation in Queensland similarly did not specify a time for service. However, it had been decided under the previous legislation, that by reason of s 38(4) of the *Acts Interpretation Act 1954* (Qld), service must take place “as soon as possible after [an] application [is] made”: *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd* [2019] QSC 91 (*Niclin*) at [18] (Ryan J). Further, service within time was a pre-condition to jurisdiction (at [16] and [18]):

I did not find it an easy task at all to discern the intention of the legislation, but it seems to me that in the context of a scheme designed to achieve the speedy and expeditious resolution of disputes, time limits are critical. ...The service requirement was not an onerous one, and it was totally within the claimant's control.

- 102 *Niclin* was determined in relation to the *BCIPA*, the precursor to the *Building Industry Fairness (Security of Payment) Act 2017* (Qld). Decisions concerning the 2017 Act have reached the same conclusion: see eg *McCarthy* at [24]-[25]; *National Management Group Pty Ltd v Biriell Industries Pty Ltd* [2019] QSC 219 at [70]-[83] (Wilson J); *Equinox Construction Pty Ltd v Henning* [2021] QSC 223 at [127]-[131] (Ryan J). However, these decisions were all prior to the Act being amended in June 2024 to stipulate, for the first time, that a claimant making an adjudication application must give a copy of that application to the respondent within four business days of the application having been made: s 79(4). I was not referred to any post-amendment authority concerning the question of whether service within that timeframe is a pre-condition to jurisdiction.

Consideration

- 103 The issue here is whether the Western Australian legislature intended that compliance with s 42(3) was necessary to enliven the review adjudicator's power. As noted, there is no authority on this issue.
- 104 I do not accept that was the legislative intention for the following reasons.
- 105 While the legislature did impose a time frame of one day for service, I nevertheless do not accept that it was intended that any departure from that time frame would render the adjudication review application invalid. It is true that the legislation is designed for the speedy resolution of payment claim disputes. However, it would seem unlikely that it was intended that service one minute late would deprive an adjudicator of jurisdiction.
- 106 Section 42 is different to other sections that prohibit an action if there is no compliance, such as s 40(1) that prohibits the making of an adjudication review application "unless" there has been payment of any disputed adjudicated amount into a trust account.

- 107 In contrast, s 42 is entitled “requirements relating to adjudication review application” and prescribes the format, the attachments, the application fee and submissions, in addition to service. While those matters are important, it does not appear likely that matters more of form are preconditions to jurisdiction.
- 108 Counsel for Reward submitted that the time limit for the giving of an adjudication review application is central to the process by which the review process then proceeds. For instance, s 45(1) requires that any review response be made within 10 business days of receiving a copy of the adjudication review application. It was submitted that this fact supports a strict interpretation of s 42(3), whereby compliance is a jurisdictional prerequisite. However, I consider that s 45(1) goes the other way. Its operation means that any delay in service does not affect an adjudication review respondent’s ability to respond, given that they are guaranteed 10 business days from the *time of receipt* of the adjudication review application to submit a response to it.
- 109 If service occurred after one day, I consider it would be for the adjudicator to ensure that there was procedural fairness given to the recipient party in the exercise of his or her broad discretion. Such an approach is consistent with various decisions in New South Wales: see above at [100 [Ref193970418](#)].
- 110 Authorities have held that the “clear policy” of security of payment legislation is the establishment of a “pay now, fight later” regime, wherein disputes can be resolved in a “speedy and effective” manner: see eg *Martinus* at [8] and [292]. I consider that framing strict compliance with s 42(3) of the *SOP Act* as a jurisdictional precondition would be antithetical to this purpose, preventing an effective means of resolving the dispute of the parties by way of adjudication review. This is particularly so in circumstances where Reward was in fact served, for practical purposes: see above at [60 [Ref194497041](#)]-[64 [Ref194497059](#)].
- 111 Accordingly, I find that satisfaction of Tackelly’s requirement to “give a copy of [its adjudication review] application” under s 42(3) of the *SOP Act* was not a jurisdictional pre-condition to the review adjudicator’s power to consider Tackelly’s application.

Conclusion

- 112 For the reasons above, the review adjudicator erroneously found that he lacked jurisdiction and this was jurisdictional error: see eg *Craig* at 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (*Kirk*) at [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd* [2021] QCA 10 at [95] (Jackson J).
- 113 It is therefore necessary to determine the appropriate relief in the circumstances.

Relief

- 114 Tackelly sought a “mandatory order, in the nature of mandamus or mandatory injunctive relief, ordering [the adjudicator] to determine the [adjudication review application] in accordance with law”.
- 115 Reward did not dispute that this could be an appropriate course, in the event Tackelly succeeded on its argument concerning service. However, Reward submitted that, in that event, the parties ought to be granted liberty to apply concerning the appropriate wording of the order.
- 116 There is no doubt that this Court, exercising its constitutionally entrenched supervisory role, can grant mandamus as relief for jurisdictional error. This jurisdiction cannot be ousted, as the “supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus ... was, and is, a defining characteristic of those courts”: *Kirk* at [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). It must follow that this Court has power to grant mandamus against an *SOP Act* adjudicator where his purported determination or part thereof was affected by jurisdictional error. For those affected parts, the adjudicator has not discharged his duty under the *SOP Act* to determine the corresponding aspects of the adjudication review application. Consequently, an adjudicator may be compelled to perform that undischarged duty.
- 117 However, there remains a question as to whether this Court, exercising its constitutionally entrenched supervisory role, should make orders in the nature of mandamus compelling the adjudicator to determine according to law those

aspects of his adjudication determination which were affected by jurisdictional error: see *Kirk* at [98]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399 at [89] (McDougall J); *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716 at [11] (Basten JA).

- 118 Mandamus is a discretionary remedy: see eg *Randall v Northcote Town Council* (1910) 11 CLR 100 at 113 (O'Connor J). Even where jurisdictional error has been established, the Court may refuse to make an order in the nature of mandamus "if a more convenient and satisfactory remedy exists" or "no useful result could ensue": *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).
- 119 As observed above, the policy underpinning security of payment legislation is the swift and practical determination of disputes between parties in the building and construction industry. Ordinarily, this is best served by the determination of a payment dispute by an adjudicator, who can determine a matter "informally, summarily and quickly": *Martinus* at [292].
- 120 In this case, proceedings are on foot between the parties concerning the separate question of whether Reward was entitled to have the bank guarantees released, because Reward validly terminated the contract. That question remains to be determined, following this judgment.
- 121 However, there is no doubt that the contract is at an end and the parties are entitled to litigate about any past payment claims or their accrued contractual rights. In those circumstances, I consider it is not the preferable course to require the review adjudicator to determine the adjudication review application. The alternative course would not advance the informal, summary and quick determination of the parties' dispute as envisaged in *Martinus*, given that litigation concerning the same subject matter of any adjudication determination would remain.
- 122 Instead, here, a grant of mandamus would lead to the "prolongation of the adjudication process, when that process has been set up to ensure a swift, although rough and ready, system for the interim determination of rights to

payment under a construction contract”: *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)* [2016] NSWSC 1229 at [96]-[100] (McDougall J). The determination of the parties’ rights under the construction contract by a Court on a final basis and the relief obtainable from those proceedings is a more satisfactory remedy, particularly in circumstances where the underlying contract is at an end: *Probuild* at [44] and [53].

123 For these reasons, I will not make an order of mandamus.

124 The effect of this conclusion is that it is neither necessary nor appropriate for me to consider how a grant of mandamus would interact with the time limits for the determination of an adjudication review application fixed by section 47(2)(a) of the *SOP Act*: see *Probuild* at [53] in the context of certiorari; see also *Procon Developments (Australia) Pty Ltd v Hi-Cal Bricklaying* [2025] QSC 67 at [49] (Bowskill CJ).

Recovery of trust moneys

125 Following the first instance adjudication determination, Tackelly was required to pay Reward the adjudicated sum, unless it paid that sum into a trust account pursuant to s 40(1)(b) of the *SOP Act* to progress an adjudication review application. That section provides:

(1) The respondent cannot make an adjudication review application unless —
... (b) the respondent has paid the adjudicated amount (or part) that is disputed by the respondent into a trust account with a recognised financial institution —

126 On 2 December 2024, consistent with this section, Tackelly paid a sum of \$2,702,084.27 into an authorised trust account with the Resolution Institute. That sum comprised the adjudicated amount including GST, interest on the adjudicated amount, the adjudicator’s fees, and the administrative fees of the Resolution Institute. The effect of that payment was to hold Reward out of the money that had already been determined through an adjudication process to be payable to it.

127 Section 40(2) states (emphasis added):

Money held in a trust account under this section (including any accrued interest) is taken to be held by the respondent or the authorised nominating authority (as the case requires) on trust for the benefit of the claimant **until the**

adjudication review application is determined or withdrawn and all money required to be paid to the claimant as a result of that determination or withdrawal has been paid.

128 Tackelly seeks a final injunction restraining the Resolution Institute from “dealing in or otherwise disbursing” the money held.

Has adjudication review application been “determined”?

129 Above, I have held that the review adjudicator’s purported determination was affected by jurisdictional error, because he erroneously denied that he had jurisdiction to determine the adjudication review application. However, I also declined on discretionary grounds to make an order in the nature of mandamus compelling him to determine the adjudication review application according to law.

130 The moneys which Tackelly paid into trust will remain there until either the adjudication review application is determined or withdrawn. Tackelly has not withdrawn the application. The question then arises whether Tackelly’s review adjudication was “determined” for the purpose of s 40(2).

131 On one view, it might be said that an adjudication review application is only “determined” when the review adjudicator either confirms the determination of the first instance adjudicator or quashes that determination and makes a new determination: see *SOP Act* s 48(1). If that is correct, then Tackelly’s adjudication review application has not been “determined”, and it will likely never be “determined”, as I have not granted mandamus.

132 The practical consequence would be that the \$2,702,084.27 would remain held on trust, unless and until, Tackelly decided to withdraw its adjudication review application.

133 It may be that the better construction of s 40(2) is that an adjudication review application is “determined” not only when a review adjudicator makes a valid review determination, but also when it is otherwise “brought to an end”, for example, where there is no reasonable prospect of the review adjudicator determining the adjudication review application. It is unnecessary to decide the correct construction for the purposes of determining whether Tackelly is entitled to the injunction it seeks.

Conclusion

- 134 I refuse to make an order in the form of an injunction preventing the Resolution Institute from dissipating the trust money as sought by Tackelly. There is no evidence that the Resolution Institute intends or has threatened to dissipate that money.
- 135 If the current situation means that the adjudication review application has been “determined” within the meaning of s 40(2) of the *SOP Act*, or if Tackelly withdraws the adjudication review application, s 52(1)-(2) requires Tackelly to pay the adjudicated amount which it owes (as determined by the first instance adjudicator) to Reward. Tackelly may do that by directing that the trust moneys be disbursed to Reward (who is the beneficiary under the s 40(2) trust) or by otherwise paying the amount owed to Reward.
- 136 The trust moneys will remain trust funds until “all money required to be paid to the claimant as a result of [the] determination [ie the adjudication review application coming to an end] has been paid”: *SOP Act* s 40(2). Section 40(3) deals with what happens to any money that remains in the trust account after this has occurred.
- 137 The parties are otherwise left to their rights under the *SOP Act* or at common law.

Orders

- 138 I order that:
- (1) On or before 4pm on 16 April 2025, the plaintiff serve on the defendants short minutes of order intended to give effect to these reasons for judgment together with the orders it proposes in relation to costs and any necessary explanation;
 - (2) On or before 4pm on 22 April 2025, the defendants:
 - (a) if they agree with the plaintiff's short minutes of order, notify the plaintiff and my Associate of their agreement, in which case the orders will be considered in chambers if appropriate;
 - (b) if they do not agree with the plaintiff's short minutes of order, serve on the plaintiff a document (which may include alternative short minutes of order) setting out the matters on which they disagree and provide copies of the plaintiff's short minutes of order and their document to my Associate, in which case the matter will be listed, initially for directions, at 9:30 am on 24 April

2025, or such other date as is agreed with my Associate, to deal with all outstanding issues.

Amendments

19 May 2025 - Amended cover sheet to include second to fifth defendants

28 May 2025 - Corrected "s 43(2)" in [12], [97] and its heading, and [103] to "s 42(3)"