Issues in judicial review proceedings arising out of Security of Payment Matters

An Overview of Recent decisions

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INTRODUCTION

1. The Security of Payment (SOP) regime, which exists in some form in all Australian states and territories, is designed to ensure a simple and expeditious means of payment to those involved in the provision of construction work and related goods and services.

2. Those practising regularly in the Security of Payment area know well that despite the objectives of the legislation, SOP processes are often not simple or expeditious, particularly when adjudication proceedings are subject to judicial review.

3. The last two years have been notable for the courts around Australia dealing with a range of interesting issues in judicial review proceedings arising out of SOP determinations.

4. This paper will deal with a number of these issues, including:
    - the ability to claim retention monies in a payment claim
    - the distinction between jurisdictional and non-jurisdictional issues
    - reference dates and stage payments
    - submissions "duly made"
    - the operation of issue and Anshun estoppel, and abuse of process
    - stays of judgment based on adjudication determination.

THE ABILITY TO CLAIM RETENTION MONIES IN A PAYMENT CLAIM

J.G. King Project Management Pty Ltd v Hunters Green Retirement Living Pty Ltd & Or [2024] VSCA 310

5. *JG King v Hunters Retirement Green* concerned the ability to make a final payment claim for retention money only, where the contractual requirements for making a final claim had not been met.

6. J.G. King Project Management and Hunters Green Retirement Living entered into two contracts for the construction of stages 12 and 13 of a retirement village in August 2018. Practical completion was certified on 28 June 2019. On 3 July 2019, J.G. King invoiced for 'retention billed' in the amount of 50 per cent of the retention moneys withheld under the contract; which was paid. On 19 August 2022, the builder issued final payment claims for stage 12 and stage 13, which were equivalent to the amounts of the remaining 50 per cent of the retention moneys under the contracts. At that stage, no "final certificate" had been issued by the superintendent. Hunters Green issued nil payment schedules in respect of each payment claim.

7. J.G. King sought adjudication. The adjudicator held that Hunters Green was liable to pay the retention moneys to J.G. King (less some adjustments). On review, Attiwill J upheld Hunters Green's challenge to the determination, on the basis that (per cl 37.4 of the contracts) the final progress claims were not due and payable until 14 days after the final certificates were issued, which they had not been. No money was payable as a result, as the contractual mechanism triggering the release of the security was not satisfied.

8. Among the grounds of appeal advanced by J.G. King were whether cl 37.4 (read with cl 5.4) of the contracts permitted Hunters Green to withhold the balance of retention monies under the contracts until issuance of a final certificate by the superintendent and, if so, whether cl 5.4 and cl 37.4 were invalid and inoperative under s 48 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the Victorian Act**), in that they purported to exclude, modify or restrict that Act. For its part, Hunters Green raised by notice of contention whether the retention monies held by Hunters Green were held as security and, as such, were outside the scope of a valid progress claim under the Act because they were not "for construction work".

<u>On payment claims for retention monies</u>

9. Niall and Kennedy JJA took similar approaches to the question of payment claims in respect of retention monies. Both held that the amounts held by way of retention were 'for' construction work, in that they were for construction work that had been undertaken, regardless of whether the claims were also capable of being characterised

as claims for security.[3] In any case, and consistently with *Enermech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd & Ors*,[4] their Honours reasoned that the Act provides for progress payments 'in respect of' (ss 10 and 14), and 'under' (ss 9 and 14), a construction contract, and are not confined to amounts 'for construction work'.[5] Macaulay JA agreed on this latter point.

10. Macaulay JA (in dissent) took a different view on the question of whether the secured money was 'for' construction work. His Honour considered that once deducted from money payable for construction work, the retention money "formed a discrete and separate fund that was of a different character from the money due for construction work which was its financial source".[6]

Release of security not conditional on issuance of final certificate

11. Another issue was whether the retention moneys were due and payable immediately under the final payment claims or only after a final certificate had been issued, in accordance with the contractual terms.

12. Niall JA found that cl 37.4 encompassed both payment claims and claims going beyond a final progress claim under the SOP Act. Accordingly, the principal may be obliged to satisfy the statutory payment claim independently of the contracts. The contractual obligation to maintain security would not stand in the way of a final payment claim under the Act.[7]

13. Kennedy JA found that the absence of the final certificate did not preclude the builder from making a payment claim for the release of security. The claim was made within the time specified in the contracts, and featured a reference date, therefore it did not matter that the final certificate had not been issued.[8]

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[3] *JG King* [41], [166], [175].

[4] [2024] NSWCA 162.

[5] *JG King* [45], [172].

[6] *JG King* [321].

[7] *JG King* [59]-[60].

[8] *JG King* [230], [231].

14. In obiter, Niall and Kennedy JJA considered that if cl 37.4 did require that the amount owing by way of statutory entitlement be withheld until all of the contractual payments had been assessed and certified by the superintendent, it would be inconsistent with the Act and would be unenforceable to that extent under s 48 of the Act.[9]

15. Macaulay JA dissented, finding that retention money was due and payable only under the contractual provisions which provided for release only after the issue of a final certificate.[10]

Takeaway: *JG King confirms that a payment claim can be made for retention moneys, which are payments "for construction work" (although it is not necessary for a claim to be valid that it be such a claim). If the contract makes the issuing of a final payment claim subject to matters such as approval by a superintendent or an occupancy permit, such provisions may be interpreted as not precluding the issuing of a statutory payment claim or alternatively are likely to be void pursuant to s 48.*

THE DISTINCTION BETWEEN JURISDICTIONAL AND NON-JURISDICTIONAL ERROR

16. The distinction between jurisdictional error and non-jurisdictional error of law on the face of the record can be an important one. Ordinarily, judicial review is available for both jurisdictional error and error of law on the face of the record. However, in some jurisdictions, including the ACT[11] and Queensland,[12] review for error of law on the face

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[9] *JG King* [65], [240]-[254].

[10] *JG King* [321]-[324].

[11] *Building and Construction Industry (Security of Payment) Act 2009* (ACT) s 43. Review for error of law is only available if the determination of the question of law could substantially affect the rights of one or more parties to the decision and there is a manifest error of law on the face of the decision or strong evidence that the adjudicator made an error of law and that the determination of the question may add, or be likely to add, substantially to the certainty of the law.

[12] *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 101(4)(a) (expressly references jurisdictional error).

of the record is excluded or limited by statute.[13] It is not possible to oust the jurisdiction of the court to review for jurisdictional error.[14]

17. In New South Wales, review for error of law on the face of the record is not available as a result of the High Court's decision in *Probuild v Shade Systems.*[15] Kiefel CJ, Keane, Nettle and Gordon JJ found that the NSW SOP Act evinces a clear legislative intent to oust the court's jurisdiction to quash an adjudication for error of law on the face of the record.[16] In drawing that conclusion, their Honours considered a range of features of the SOP regime that are common to the Victorian regime including the purpose of the SOP Act, that it is not conclusive of the parties' entitlements, that "cashflow is the lifeblood of the construction industry", that the SOPA permits informal procedures, and the limit on bringing a cross-claim or raising a defect once an adjudication certificate is filed as judgment for a debt.[17]

18. In *Maxcon v Vadasz,*[18] which was determined at the same time as *Probuild,* the High Court found that the SA SOP Act also ousts the Supreme Court's jurisdiction to make an order quashing a determination for non-jurisdictional error of law on the face of the record.

19. In Victoria in 2024,[19] Niall JA (as his Honour then was) noted the exclusion of review for error of law on the face of the record in NSW, and stated, "I am unable to discern a basis to distinguish the High Court's decision in relation to adjudication decisions under the Act." His Honour found that while the existence of a construction contract is a jurisdictional requirement, whether construction work was carried out under that particular construction contract is not.[20]

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[13] Victorian Act s 51 (review for error of law ousted after judgment has been entered).

[14] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99]-[100].

[15] (2018) 264 CLR 1.

[16] *Probuild* (2018) 264 CLR 1 [35], [45] (Gageler and Edelman JJ agreeing with separate reasons).

[17] *Probuild* (2018) 264 CLR 1 [35]-[43].

[18] *Maxcon Constructions v Vadasz* (2018) 264 CLR 46 [5], [41].

[19] *Roberts Construction Group v Drummond Carpentry* (2024) 74 VR 346 [78].

[20] Ibid [75].

20. However, there is a legislative provision in Victoria that potentially distinguishes it from the position in NSW. Section 85(5) of the *Constitution Act 1975* (Vic) prevents implied ouster of the Supreme Court's jurisdiction unless that provision is satisfied (which requires a statement of legislative intent in the Act and the Second Reading Speech).

21. Section 51 of the Victorian SOPA states that it is the intention of both s 46 and s 28R to alter or vary s 85 of the *Constitution Act 1975*. Section 46 excludes the personal liability of an adjudicator. Section 28R applies where a judgment has been entered on an adjudication certificate, and provides that on an application to set aside the judgment, the person bringing the application is not entitled to bring any cross-claim, raise any defence or challenge an adjudication determination, other than on the basis that the adjudicator took into account a variation that was not a claimable variation.

22. It has been held that there is no implied ouster of the Court's jurisdiction to order certiorari for error on the face of the record.[21] Subsequently, Vickery J found that s 28R of the Victorian SOP Act met the requirements of s 85 where a judgment had been entered, in respect of a proceeding to have the judgment set aside.[22]

23. In 2023, Attiwill J drew a different conclusion to the one subsequently indicated by Niall JA, in a decision that was subsequently overturned on appeal (though the point on jurisdictional error was not addressed on appeal).[23] His Honour agreed with a joint submission made by the parties in that case that the presence of s 85 of the Constitution Act is a distinguishing feature of the Victorian SOPA landscape and, where judgment has not been entered pursuant to s 28R of the Act, the Supreme Court has jurisdiction to review a security of payment adjudication determination for error of law on the face of the record.

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[21] *Hickory Developments Pty Ltd v Schiavello* (2009) 26 VR 112.

[22] *Amasya Enterprises v Asta Developments* [2015] VSC 233.

[23] *Hunters Green Retirement Living v JG King Project Management* [2023] VSC 536 [174]-[176].

24. Justice Digby had previously "left for another day" the question of whether the decisions in *Probuild* and *Maxcon* ousted the court's jurisdiction for non-jurisdictional error of law.[24]

25. Where review for error of law on the face of the record is available, it is also necessary to demonstrate that the error is material; if it is not, that is a ground for refusing the exercise of discretionary relief.[25]

26. In jurisdictions where review for error of law is precluded, it will therefore be necessary for a party that wishes to challenge an adjudicator's decision to identify a jurisdictional error.

27. The distinction between the two types of error is not always clear-cut. The following decisions offer some guidance as to what types of error will constitute jurisdictional error.

Ingeteam Australia Pty Ltd v Susan River Solar Pty Limited & Ors [2024] QSC 30

28. In *Ingeteam v Susan River,* the Court had to determine whether an error was jurisdictional in terms of whether it would preclude a subsequent adjudicator from making a different decision on the matter.

29. Described as a "big case about … a small bit of wood", *Ingeteam Australia Pty Ltd v Susan River Solar Pty Limited & Ors* concerned a piece of Bunnings plywood.[26] Susan River owned a solar farm, and entered into a contract with Ingeteam in 2020, a licensed electrical contractor who employed qualified and licensed electricians.[27]

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[24] *Shape Australia v The Nuance Group* [2018] VSC 808, fn 117.

[25] (2018) 264 CLR 1 [101].

[26] *Ingeteam Australia Pty Ltd v Susan River Solar Pty Limited & Ors* [2024] QSC 30 [1].

[27] [8]–[9].

30. The contract entitled Ingeteam to an annual fee of $978,820 in equal monthly instalments to be invoiced quarterly, in return for its operating and maintaining the solar farm. Ingeteam was also entitled to charge for additional services that fell outside of the scope of services to be provided.

31. During the contract, Ingeteam undertook electrical work and engaged third-party contractors for other work. Under the contract, work requiring a licence had to be undertaken by licensed contractors. There was a 'head contractor exemption', which allowed an unlicensed person to enter a contract for commercial building work if they used licensed subcontractors working within their relevant licence class.[28]

32. The contract ended in 2023, and Ingeteam sent Susan River a payment claim under the SOP Act for $2,385,867 for unpaid monthly instalments and additional services. Susan River replied with a payment schedule disputing the claim, contending they were entitled to offset any amounts payable for alleged defects and liquidated damages.

33. Ingeteam lodged an adjudication application. Susan River filed submissions which included several jurisdictional points not raised in the payment schedule. One was an argument that Ingeteam had undertaken work that was required under legislation to be carried out by a licensed contractor. On this basis, Susan River argued that there was no construction contract for the work, which was a jurisdictional requirement.[29]

34. Ingeteam's submissions acknowledged their lack of licence for the work, but maintained they had not contravened the legislation because of the 'head contractor exemption'.[30] One matter, a minor floor repair worth $294, was found by the adjudicator to have been carried out by an unlicensed contractor.[31]

35. The adjudicator concluded that the claimant required a licence to do that work, and therefore he did not have jurisdiction to determine the claim, because there was no

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[28] [12].

[29] [20].

[30] [23]–[24].

[31] [28].

enforceable contract underlying the payment claim.[32] The adjudicator acknowledged Ingeteam had not had the opportunity to respond to the new factual allegations raised by Susan River, which had not been included in the payment schedule.

36. Ingeteam sought judicial review of the adjudication determination.

37. The substantial issues before the court were:[33]

    a. Did the adjudicator err in deciding that the claimant was required to hold a licence to perform the floor repair works, and therefore he did not have jurisdiction? If the adjudicator erred in making the licensing decision, was that a jurisdictional error?
    b. Whether the adjudicator failed to afford the claimant procedural fairness, resulting in a jurisdictional error material to both the licensing determination and his overall jurisdiction?
    c. Is the licensing decision material to the decision because it engages the *Dualcorp* form of issue estoppel?
    d. Should the Court grant the relief sought by declaring the licensing findings void, and leave other issues decided by the adjudicator to stand?

38. Applegarth J found the adjudicator's decision was affected by three errors: a denial of procedural fairness; an error in finding that unlicensed building work had been performed; and making a finding a breach of s 42 that no reasonable decision maker would have arrived at.[34]

Licensing Issue

39. His Honour held that the adjudicator had erred in concluding that Ingeteam had carried out building work for which it needed a licence. His Honour concluded that the plywood was floating floor and therefore exempt from the definition of building work (the work that required a licence).[35]

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[32] [3].

[33] [7].

[34] [73].

[35] [48]–[66].

40. As a result, his Honour was satisfied the adjudicator had ultimately erred in his conclusion that he did not have jurisdiction to decide the payment claim due to the claimant carrying out unlicensed building work.[36] His Honour found this amounted to jurisdictional error.[37] His Honour noted the same principle applies to tribunals and other decision makers.[38]

Procedural Fairness

41. His Honour determined there was a denial of procedural fairness in two aspects, also resulting in jurisdictional error.[39] The first aspect was the adjudicator's acknowledged failure to provide Ingeteam with an opportunity to refute Susan River's allegations.[40] The second aspect was the finding that Ingeteam entered the contract with the 'intention' not to adhere to the requirements of s 42 of the QBCC. His Honour found that finding 'completely unreasonable, illogical and unexplained'.[41]

Materiality

42. His Honour referred to *Hossain*, where Kiefel CJ, Gageler and Keane JJ held that the threshold for materiality would not ordinarily be met if a failure to afford procedural fairness did not deprive the person of an opportunity to be heard of 'the possibility of a successful outcome', or where a decision maker failed to take into account a mandatory consideration which was 'so insignificant that the failure to take it into account could not have materially affected' the decision that was made.[42]

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[36] [64].

[37] [84]–[87]; *Kirk v Industrial Court of New South Wales* [2010] 239 CLR 531 [72]; *Craig v South Australia* [1995] 184 CLR 163 [177].

[38] [87].

[39] [76], [84]–[85].

[40] [74–[75].

[41] [67]–[69].

[42] Ibid [77]; *Hossain v Minister for Immigration and Border Protection* [2018] 264 CLR 123 [30].

43. His Honour recognised that had procedural fairness been afforded, there was at least a realistic possibility that the adjudicator may have reached a different conclusion regarding the licensing issues, and the existence of a 'construction contract' under the SOP Act. The breaches of procedural fairness were therefore material.[43]

Issue Estoppel

44. His Honour referred to what is sometimes referred to as "Dualcorp issue estoppel" (discussed further below).[44] Ingeteam argued that the doctrine would preclude them, in any subsequent adjudication application, from contesting the adjudicator's determination that there was no 'construction contract' because of breach of licensing requirements.[45]

45. His Honour determined that the finding as to whether a construction contract existed, was the kind that engages a Dualcorp issue estoppel because:[46]

    a. the determination of the licensing issue led to the adjudicator declining jurisdiction; and
    b. it affected Ingeteam's statutory right to make a payment claim, and to apply for a new decision sought from a new adjudicator.

46. Ordinarily, where Ingeteam sought to raise a 'construction contract'/licensing argument that had been determined against them in an earlier adjudication, a new adjudicator following the authorities confirming *Dualcorp* would not allow Ingeteam to do so – 'unless and until' that determination is declared invalid by the court.[47] In line with this principle, his Honour found Ingeteam was at 'substantial risk' of the new adjudicator considering the previous jurisdictional decision as binding, and that Ingeteam would be precluded from rearguing the jurisdictional issue that was found against them.[48]

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[43] [82]–[83].

[44] ***Dualcorp*** *Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190 ('Dualcorp')

[45] *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] 74 NSWLR 190.

[46] [105].

[47] Ibid.

[48] [107], [141].

47. His Honour determined that if the jurisdictional error was left uncorrected, the subsequent adjudicator would have no choice but to follow a decision 'on a fundamental issue going to jurisdiction'.[49]

48. Interestingly, Applegarth J did not refer to the 2022 ACT Court of Appeal decision in *Harlech Enterprises* (discussed below) where the NSW Court of Appeal preferred the term "preclusion" to the concept of "issue estoppel" in a SOP context.

Decision

49. Applegarth J held that the court had jurisdiction under s 101(4)[50] to declare void those parts of the adjudicator's decision affected by jurisdictional error. His Honour ordered the adjudication decision should be declared void, in part for jurisdictional error – namely the parts of the decision containing licensing findings.[51] His Honour also made a declaration that Ingeteam and Susan River were not bound by the licensing findings.[52]

Takeaway: *the decision reinforces the need for a party to be afforded procedural fairness and the availability of judicial review if it is not provided to a party to an adjudication. Lack of procedural fairness and a finding as to the existence (or absence) of a construction contract are both jurisdictional matters, and errors will invoke the court's jurisdiction to review for jurisdictional error.*

On the particular finding of the adjudicator, that he lacked jurisdiction due to the absence of a 'construction contract', the Court found that a subsequent adjudicator would be "estopped" from deciding the issue afresh based on the 'Dualcorp principle'. However, the Court made no reference to the subsequent consideration of Dualcorp in the ACT Court of Appeal decision in Harlech Enterprises, referred to below.

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[49] [141].

[50] *Civil Proceedings Act 2011* (Qld).

[51] [143].

[52] Ibid.

Forme Two Pty Ltd v McNab Developments (Qld) Pty Ltd [2025] QSC 96 (12 May 2025)

50. In the matter of *Forme Two Pty Ltd v McNab*, the applicant (**Forme Two**) engaged McNab to undertake consultant design drawing work for a development project,[53] pursuant to an unsigned contract. On 17 January 2024, McNab submitted a purported payment claim, which referenced works allegedly completed up to 25 December 2023. Under the contractual arrangement, 25 December 2023 was identified as the relevant reference date, meaning that no work after this date could form part of the claim. Forme Two provided a nil payment schedule. McNab subsequently made a successful adjudication application on the basis of the payment claim.

51. Forme Two sought a declaration that the adjudication decision made in McNab's favour for $162,505 was void due to jurisdictional error. The core of Forme Two's argument was that the payment claim was not a valid claim under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Qld Act**), specifically s 75(2)(b), as it failed to include any claim for work undertaken within the six months prior to the date of the claim being given. As such, the decision based on that invalid claim should be declared void.[54]

52. Two issues arose for determination:
    a. What does s 75(2)(b) require? Is it sufficient for *any* work under the contract to have been completed in the preceding six months, or must the claim itself include work performed within that period?
    b. How is the requirement under s 75(2)(b) to be characterised? Specifically, is it a jurisdictional fact or a non-jurisdictional matter, discussed in *Icon Co v Australia Avenue Developments*.[55]

53. Justice Hindman held that the adjudication decision was void due to jurisdictional error, as the payment claim was based entirely on work completed outside the statutory six-month period, and therefore was not a valid claim under the Qld Act.

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[53] *Forme Two Pty Ltd v McNab Developments (Qld) Pty Ltd* [2025] QSC 96 [3] ('*Forme Two*').

[54] *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* s 75(2)(b) ('*SoP Act*').

[55] *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 [13]-[15].

54. On the first issue, her Honour interpreted s 75(2)(b) as requiring that the claim must actually include *some* work completed within the preceding six months – not merely that some work under the contract was done during that time. Her Honour concluded that this was a necessary precondition for a valid payment claim. As long as some work completed within the period six months prior is claimed for, historical work can be part of the claim as well.[56]

55. In determining whether this requirement was jurisdictional, Hindman J adopted the reasoning from *Icon*, which used the terminology of 'category 1' and 'category 2' matters. A category 1 matter refers to jurisdictional facts: objective facts that must exist for a tribunal to have power to decide the matter. A category 2 matter, by contrast, depends on whether the adjudicator has formed the relevant opinion. In the second category, the adjudicator has the jurisdiction to make the decision, and thus the decision will be valid even if the adjudicator errs in forming an opinion, or the opinion is wrong.

56. Justice Hindman concluded that s 75(2)(b) imposes a category 1 requirement. Her Honour emphasised the importance of the statutory time limits in the Qld SOP Act and the mandatory language of the provision.[57] Her Honour relied on the fact that while s 75(8) expressly provides that non-compliance with a different mandatory requirement in s 75 *does not affect* the validity of the payment claim; no such provision applies to s 75(2)(b) – suggesting that the *absence* of a similar provision in s 75(2) means non-compliance *does affect* the validity of the payment claim.[58]

57. Even if she were incorrect in this characterisation, her Honour concluded that the adjudicator had failed to form any opinion about whether the payment claim complied with s 75(2)(b). As a result, even if the requirement were treated as a category 2

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[56] *Forme Two* [30].

[57] *Forme Two* [42].

[58] *Forme Two* [46].

matter, the judge was not satisfied that a requisite opinion by the adjudicator was formed. Consequently, jurisdictional error still arose.[59]

58. Her Honour observed that compliance with the time-based requirement in s 75(2)(b) of the Qld Act is a jurisdictional fact. On these facts, a payment claim that does not include any work done within the six months prior to the giving of the payment claim is invalid, and an adjudication decision based on such a claim is void.

Takeaway: *it is important to ensure that payment claims comply with all relevant legislative requirements within the jurisdiction, including (in Queensland) that the claim must include construction work carried out within the past 6 months. The inclusion of work completed within the previous six months is a jurisdictional matter. The Court adopted "Category 1" and "Category 2" characterisation of jurisdictional matters with "Category 1" matters depending on a finding of a Court as to a required state of affairs (jurisdictional) and "Category 2" matters depending only on whether the relevant opinion has been formed by the adjudicator (only the formation of the opinion is jurisdictional).*

Woonona-Bulli RSL Memorial Club Ltd v Warrane-Design Construct Fit-Out Pty Ltd **[2025] NSWSC 271**

59. On 7 December 2023, Woonona-Bulli RSL Memorial Club Ltd ('RSL') entered into a 'costs plus' contract with Warrane-Design Construct Fit-Out Pty Ltd ('Builder') for the upgrade of its car park and construction of an Anzac memorial, with an estimated contract sum of $4.17 million.

60. Keen to complete the works by ANZAC Day 2024, the RSL urged the Builder to commence work before the Builder's requested site investigations were completed. In response, the Builder insisted on a 'costs plus' contract, so the club would bear the risk of any increased cost for unanticipated underground conditions.[60]

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[59] *Forme Two* [60]-[61].

[60] [5].

61. In January 2024, the Builder engaged All Civil ('the Subcontractor') to carry out subcontracted works. On the same day the subcontract works commenced, asbestos was discovered in the landscaping.

Subcontractor Determination

62. In May 2024, the Subcontractor served a progress claim on the Builder for $932,856.17. The next day, the Builder issued its own progress claim on the RSL for $1,183,407.76. Both the Builder and the RSL responded with payment schedules proposing nil payment.

63. The Builder's Managing Director later informed the adjudicator that the RSL had instructed them to "go hard" on the Subcontractor's payment claims. He warned the RSL that any resulting adjudication costs on the basis of those instructions would be borne by them.[61]

64. On 29 July 2024, the adjudicator determined that the subcontractor was entitled to $961,365.96. The Subcontractor issued the RSL with a certificate under the *Contractors Debts Act* ('*Debts Act*') for the adjudication amount, plus costs and interest. Payment was made only after the Builder suspended works due to non-payment.[62]

65. The second adjudication was initiated after the Subcontractor's claim was again met with a nil payment schedule. On 20 November 2024, the adjudicator determined that the Subcontractor was entitled to claim Variation 31 under the subcontract – allowing for 118 days and $936,619.81 in delay costs.[63]

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[61] [12].

[62] *Contractors Debts Act 1997* (NSW).

[63] [16]–[17].

Builder Determination

66. On 29 November 2024, the Builder issued a progress claim to the RSL for $2,203,564.59, which included the adjudicated amount of $936,619.81 (Variation 40).[64] The claim included the Subcontractor's invoice for the adjudicated amount.

67. The RSL responded with a nil payment schedule, arguing that the Builder had failed to comply with cl 10 of the contract, which required notice to be given in respect of delays and extensions of time. The RSL also contended that Variation 40 was not payable under cl 10(a), as the delay was caused by the "default or negligence of the Builder".[65]

68. Relying on s 22(2)(a)–(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**), the RSL submitted that the payment for "delay" as a "cost of the works" must be assessed solely by reference to the Act and the terms of the contract between the Builder and the RSL.[66] The RSL submitted that the Subcontractor determination *only* determined the position arising out of the subcontract – not the Builder's entitlement to be paid under the head contract with the RSL.[67]

69. On 20 January 2025, the adjudicator determined that Variation 40 was payable in full.[68] The parties agreed that the Subcontractor would be paid its entitlement out of the adjudicated amount, and the Builder would retain the balance. Judgment was subsequently entered in the Supreme Court on 3 February 2025 for the full adjudicated amount.[69] The following week, the Subcontractor served a further claim on the RSL under the *Contractors Debts Act*, seeking $464,008.78.

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[64] [18].

[65] [19]–[21].

[66] [29]–[31]; *Building and Construction Industry Security of Payment Act 1999* (NSW).

[67] [30].

[68] [32].

[69] [33].

70. The Builder brought an application against the RSL seeking a garnishee order to enforce the judgement entered in respect of the adjudication determination. Stevenson J heard the application and observed that the effect of the payments was that the judgement overstated the amount owed by the RSL under the head contract by $1,200,670.24.[70]

Appeal

71. The RSL sought to quash part of the adjudication determination under the NSW Act, on the basis that the adjudicator fell into jurisdictional error by accepting an adjudication determination of the delay costs between the Builder and its Subcontractor as determining the value of the works under the head contract, by failing to value the delay costs in accordance with the contract and s 10 of the Act, failing to take into account a relevant consideration, and taking into account an irrelevant consideration.

72. Rees J cited *Probuild*, which confirmed that the Court lacks jurisdiction to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.[71] Her Honour also referred to the decision in *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd & Anor*, which illustrated the difference between jurisdictional and non-jurisdictional error.[72] In that case, the Court observed that the adjudicator did not cease to comply with s 22(2) of the NSW Act simply because their conclusion proceeded from an error in construction or wrong understanding of the particular law.[73]

73. Her Honour noted that the adjudicator had repeatedly referred to s 22(2) of the NSW Act as setting out the only matters to be considered in determining the application.[74] The adjudicator had considered, at length, the RSL's submission that the

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[70] [35].

[71] [47]; *Probuild Constructions (Aust) Pty Ltd v Shade Systems* (2017) 264 CLR 1 per Gageler J at [83].

[72] [47]; *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd & Anor* (2018) 97 NSWLR 773

[73] Ibid [41] per Meagher JA (Barrett AJA agreeing).

[74] [51].

Subcontractor determination did not bind the RSL. However, he ultimately determined that while he was not bound by the Subcontractor determination, he was entitled to take it into account.[75]

74. Rees J held that it was apparent that the adjudicator had considered only the provisions under s 22(2) of the NSW Act. Her Honour held that for this reason, the adjudicator's decision was the product of a valid exercise of his jurisdiction.[76] Even if the adjudicator had misconstrued or misapplied s 22(4) of the NSW Act,[77] Her Honour considered this was a non-jurisdictional error of law – which the Court lacked the jurisdiction to quash.

Takeaway: *an adjudicator is bound to consider the matters set out as mandatory considerations in the legislation (in Victoria, the relevant provision is s 23(2) of the Victorian Act). However, if the adjudicator misconstrues or misapplies the law that is a non-jurisdictional error.*

Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd [2025] NSWCA 103 (16 May 2025)

75. The Applicants ('the Rewaises') engaged BPB Earthmoving Pty Ltd ('BPB') to carry out earthworks on their property. The work was completed, although no written contract was executed between the parties. When requesting a quote, the Rewaises provided BPB with an email address, which was later used for project correspondence, including the issuing of invoices marked as claims under the Security of Payment Act.[78]

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[75] [60], [68].

[76] [69].

[77] Which provides that if an adjudicator has determined the value of any construction work carried out under a construction contract, the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as previously determined.

[78] *Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd* [2025] NSWCA 103 [46], [49] (Mitchelmore JA).

76. BPB issued a number of invoices to that email address In October 2023, the Rewaises paid $80,000 via four bank transfers to the account included on the emailed account.[79] The parties subsequently fell into dispute in relation to further payments for additional works carried out on the property, and the parties communicated their respective positions over email.

77. On 24 April 2024, BPB emailed the Rewaises withdrawing all previously unpaid invoices and reissued them as a single invoice – expressly stating that the invoice was a payment claim for the purposes of the SOPA.[80]

78. On 22 May 2024, BPB's solicitors issued a notice of their intention to adjudicate under s 17(2) of the NSW Act, both by post and to the same email address.[81] On 11 June 2024, BPB's solicitors emailed the Rewaises' solicitors copies of all earlier correspondence. The Rewaises were unaware of the emails containing the payment claim and s 17(2) Notice until notified by their solicitors. Accordingly, they did not serve any payment schedule in response to the April payment claim.

79. On 13 June 2024, BPB lodged an adjudication application. The adjudicator determined that both the payment claim and s 17(2) Notice had been validly served on the Rewaises via their nominated email address. He concluded that the Rewaises were required to make a progress payment sought by BPB in the payment claim.[82]

80. The Rewaises commenced proceedings in the Supreme Court seeking to have the adjudication determination declared void for jurisdictional error, and an order preventing enforcement of the determination on the basis that BPB had not satisfied some of the requirements under the *Home Building Act 1989* (NSW) ('*HBA*').[83] The Rewaises submitted that they were not aware of the email until their solicitors had

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[79] [55].

[80] [77].

[81] [82].

[82] [88]–[89].

[83] *Home Building Act 1989* (NSW) ss 4, 92 (s4: unlicenced contracting; s 92: effect of failure to insure building work) ('*HBA*').

received it, relying on s 17(2)(a) which requires a claimant to serve notice within 20 business days after the due date for payment before making an adjudication application. They argued the adjudication application was premature because the adjudication application had been lodged prematurely, and therefore the adjudicator's decision was invalid for having been made before the proper time for adjudication had arisen.[84]

81. The primary judge, McGrath J, determined that the adjudication determination *was* premature, as the payment claim and 17(2) notice were only served when the Renwaises became aware of them in June. His Honour concluded that although the Rewaises had not expressly nominated the email address for service, this did not deprive the adjudicator of jurisdiction.[85]

82. The Rewaises raised two issues on appeal:
    a. whether the adjudicator had the jurisdiction to hear and determine BPB's adjudication application despite the prematurity of the application; and
    b. whether ss 10 and/or 94 of the *HBA* rendered the determination unenforceable.[86]

83. BPB issued a Notice of Contention, arguing that the primary judge erred in finding that the application had been made prematurely as the payment claim and s 17(2) notice had not been served by email. BPB also argued that the Security of Payment Act impliedly repealed ss 10 and 94 of the *Home Building Act* to the extent that s 94 precluded enforcement of adjudication determinations.

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[84] [91]–[92], [97]–[99].

[85] [100].

[86] *HBA* s 10: Enforceability of contracts and other rights; s 94: Effect of failure to insure residential building work).

Effect of Premature Application on Jurisdiction

84. Leeming JA observed that the current proceeding concerned only the validity of the adjudicator's decision in favour of BPB. His Honour emphasised that review is limited to jurisdictional error and that a mere error on the face of the record is insufficient.[87]

85. Citing *Probuild Constructions*, his Honour noted that an adjudicator is authorised to determine and apply their own view of contractual interpretation – and that such errors, on their own, do not amount to jurisdictional error.[88]

86. However, service of a valid payment claim under s 13(1) of the NSW Act is an essential precondition to the statutory adjudication process.[89] Without that, there can be no adjudication application.

87. The primary judge determined that the payment claim and s 17(2) notice had not been served within time but that did not affect the adjudicator's decision. The primary judge's finding as to service, if properly made, should have necessitated a finding that the adjudicator lacked jurisdiction and the determination was void.[90]

88. The Court then considered BPB's notice of contention, and the argument that the primary judge had erred in finding that the payment claim and s 17(2) notice had been served prematurely. This turned on the primary judge's finding that the payment claim and s 17(2) notice had not been served until 11 June 2024, when they were brought to the Rewaises' attention by their solicitors. BPB relied on the service of both documents by email, given that Dr Rewais had provided that email address to them and numerous documents were exchanged by email using that address.

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[87] [1], [3] (Leeming JA).

[88] [4] (Leeming JA) and [103] (Mitchelmore JA) citing Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1 [79]–[80}.

[89] [5] (Leeming JA citing *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 [44).

[90] [37], [101], [123] (Mitchelmore JA), [9] (Leeming JA), [166] (McHugh JA).

89. In determining whether service had occurred prior to receipt by the Rewaises' solicitors, Leeming JA and McHugh JA determined that service of documents under s 31(d): 'a person may be served…by email to an email address specified by the person for the service of documents of that kind', refers to a class of documents that have been "specified'' – which may be only a subset of the broader class of documents to which the provision refers.[91]

90. Leeming JA noted that the term "documents of that kind" in s 31(1)(d) is to be read as a whole, and as s 31(a)–(c) (delivery, lodgement and post) are unqualified, they apply to *any* document that the Act authorises or requires to be served on a person.[92] In contrast, ss 31(d)–(d1) (email and other method authorised by the regulations) are qualified by referring to 'documents of that kind'. Citing *Project Blue Sky*, Leeming JA interpreted that 'documents of that kind' does not refer to the whole class of documents that may be served under the Act, but it instead refers to a class of documents 'specified' by the person.[93]

91. A person who specifies an email address for service of a class of documents by words or conduct (express or implied) can indicate their consent to the use of that email address for service of that class of document.[94]

92. Leeming JA found that the Rewaises had received and paid previously emailed invoices expressed to be claims under the NSW Act, without objection to the mode of service. This was sufficient to impliedly specify the email address for documents including the payment claim and the s 17(2) notice.[95]

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[91] [3], [15]–[16] (Leeming JA), [167]-–168] (McHugh JA).

[92] [15].

[93] [15] (Leeming JA), [167]-[168] (McHugh JA). *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 [71].

[94] [170] (McHugh JA, Leeming JA agreeing).

[95] [24]-[25] (Leeming JA) and [172] (McHugh JA).

93. Michelmore JA determined that s 31(1)(d) of the NSW Act permits a person to specify an email address for service of all documents, or for service of particular documents that are authorised or required to be served.

94. Her Honour observed that the question was whether the payment claim and notice was served by email to an email address specified for service of a document of that kind. Specification can take place impliedly or by conduct; to limit the provision to *only* express specification would be inconsistent with the broader purpose of the NSW Act.[96]

95. Her Honour held (Leeming JA and McHugh JA agreeing) that the Rewaises' use of the email address in communications with BPB involving invoices expressed as payment claims under the NSW Act, had impliedly specified the email address for service of a 'document of that kind'.[97] Additionally, her Honour stated (Leeming and McHugh JJA agreeing) that s 13A of the *Electronic Transactions Act* provides that an email does not need to be opened or read by the addressee to have been served.[98]

96. The Court held that the primary judge had erred in his finding that the email address was not available to BPB under s 31(1)(d) – in his reasoning that the email address had only been provided for the purpose of receiving a quote.[99]

Home Building Act

97. Mitchelmore JA and Leeming JA (McHugh JA agreeing) found that the adjudication process, and the enforcement of an adjudication determination, are not barred by ss 10 or 94 of the *Home Building Act .*[100]

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[96] [137]–[138] (Mitchelmore JA).

[97] [139] (Mitchelmore JA), [10] (Leeming JA); [172] (McHugh JA).

[98] [142] (Mitchelmore JA), Leeming and McHugh JJA agreeing); *Electronic Transactions Act 2000* (NSW) s 13A.

[99] [140].

[100][163] (Mitchelmore JA), [26] (Leeming JA), [166] (McHugh JA).

98. Section 10 precludes a person who contracts to do residential building work from being entitled to damages or to enforce another remedy if they are not licensed. Section 92 precludes entitlement to damages or enforcement of another remedy unless a contract of insurance is in force. BPB was not licensed and did not have a contract of insurance in place. A subsequent amendment to the Security of Payment Act (which was not in force at the time) precludes entitlement to a progress payment if the builder is not licensed or if there is no insurance policy in place.

99. The court found that taking steps under the Security of Payment Act is not the pursuit of an entitlement to damages, so the provisions are not contravened.[101] The rights created by the Security of Payment Act do not give rise to any entitlement other than an interim entitlement which does not determine the parties' contractual rights.[102]

Decision

100. The Court of Appeal held that BPB had validly served the payment claim and s 17(2) notice. As a result, the adjudicator had jurisdiction to determine the application. The Court set aside the primary judge's orders and declared the adjudicator's determination valid and enforceable.

Takeaway: *Rewais reiterates that the service of a payment claim and a s 17(2) notice are jurisdictional requirements for a valid adjudication determination. The Court's decision clarifies the circumstances in which documents may be served by email under the NSW Act, which will include where a party has "impliedly" specified the use of email for documents of that kind, for example through past conduct. For example, the prior receipt and payment of payment claims using a particular address can be used to show that the party has "specified" that email address for receiving payment claims in the future.*

[101] [26] (Leeming JA).

[102] [26] (Leeming JA).

Little Hardiman Street Pty Ltd v Henny Pty Ltd [2025] VSC 436

101. *Little Hardiman* concerned a claim for "Value Management Adjustment" and a dispute over whether such a charge was one for claimable variations or an excluded amount under the Victorian Act.

102. The plaintiff (Little Hardiman Street) engaged the first defendant (Henny) as the contractor to undertake construction of the 'Little Hardiman Lofts' for the sum of $25 million.[103]

103. On 26 September, Henny served a progress claim on Little Hardiman Street, seeking payment of $380,149.32.[104]

104. On 30 September, the Superintendent issued a Superintendent Certificate to both parties stating that Henny owed Little Hardiman Street $752,624.57 for "value management and alternative materials cost savings" ('Value Management Adjustment').[105] The Certificate attached a report by Mitchell Brandtman, who was engaged by Little Hardiman Street, estimating the total savings associated with value management items in that amount.[106]

105. On 3 October 2024, the Superintendent issued a Payment Schedule in response to the Payment claim. The Superintendent deducted the Value Management Adjustment and assessed that Henny owed Little Hardiman Street $479,594.86.[107]

Adjudication Determination

106. Henny applied for an adjudication of the Payment Claim under the Vic Act, contesting the deduction of the Value Management Adjustment in the Payment Schedule.

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[103] *Little Hardiman Street Pty Ltd v Henny Pty Ltd* [2025] VSC *436* [1].

[104] [17].

[105] [4].

[106] [19].

[107] [5].

107. The Adjudicator found there was no contractual provision detailing how such savings were to be evaluated, nor any mechanism authorising the Superintendent to assess or apply the Adjustment. He further determined that the Value Management Adjustment is not a variation, or indeed a claimable variation under s 10A of the Victorian Act.[108]

108. The Adjudicator determined that Little Hardiman Street was liable to pay Henny $386,231.26 plus interest and adjudication fees.[109] He rejected Little Hardiman Street's submission that the Value Management Adjustment could be deducted from the amount claimed.

Judicial Review

109. Little Hardiman Street applied for judicial review of the determination, and sought relief in the nature of certiorari that the determination be quashed, or alternatively declared void.[110] It was submitted that the Adjudicator had erred in failing to recognise that the Superintendent's certificate was capable of being set off against the payment claim under the contract.

110. The issues for determination were:
    a. whether the adjudicator erred by misconstruing the contract; or
    b. whether the adjudicator failed to identify the Value Management Adjustment as a second-class claimable variation under s 10A(3) of the Vic Act.[111]

111. The first issue was framed as an error of law on the face of the record – specifically, whether the Adjudicator had erred in construing the Contract by finding there was no mechanism for valuing or deducting the Value Management Adjustment.

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[108] [26]

[109] [7], [26].

[110] [8], [30].

[111] [9].

112. Stynes J determined that the Value Management Adjustment formed part of the agreed scope of work. On proper construction of the contract, there were no provisions that governed the value or adjustment to the contract sum to account for such works. The Value Management Adjustment work was clarifications and exclusions that had already been agreed between the parties.[112]

113. On the second issue, her Honour considered s 10A of the Vic Act, which sets out classes of variations which may be taken into account when calculating a progress payment. The common requirement is that they constitute the s 4 definition of "a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract". Because the work was within scope, it did not constitute such a change.[113]

114. Stynes J stated that no other provisions were identified by the parties to account for Value Management Adjustment, which was "unsurprising in relation to work that is part of an agreed scope".

115. Her Honour determined that there was no error in the adjudicator's construction of the contract, or in the determination of the adjudicated amount without the deduction of the Value Management Adjustment.

Takeaway: *an error in the construction of a contract is an error of law on the face of the record, not a jurisdictional error. A charge for "Value Management Adjustment", not otherwise provided for in the contract, and where the work was identified as being clarifications and exclusions previously agreed between the parties, was found not to constitute a claimable variation.*

A note on the distinction between jurisdictional and non-jurisdictional error

116. The distinction between a jurisdictional error and a non-jurisdictional error is an important one, and one not always easily capable of being made. For example, in

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[112] *Little Hardiman* [37], [40], [52].

[113] *Little Hardiman* [59].

Ingeteam v Susan Solar, an error of fact as to a particular type of construction work led to an adjudicator incorrectly determining that there was no enforceable contract, and that he therefore lacked jurisdiction.

117. On the other hand, in *Woonona-Bulli,* the Court found that an error in construction or interpretation of a law does not necessarily amount to a jurisdictional error. In *Little Hardiman Street,* an error in the construction of a contract was said to be a non-jurisdictional error.

118. In *Forme Two,* the Queensland Supreme Court referred to a NSWCA decision in *Icon*[114] distinguishing those matters where the existence of a state of affairs is a jurisdictional fact and those matters where the adjudicator's opinion as to the existence of the state of affairs is the jurisdictional fact. *Icon* was not referred to in the other decisions considered here. There remains a degree of uncertainty as to whether and how jurisdictional and non-jurisdictional facts are to be determined.

REFERENCE DATES AND STAGE PAYMENTS

Babicka v ASD Corporation Aust Pty Ltd & Anor [2024] VSC 587

119. The decision of the Victorian Supreme Court in *Babicka v ASD Corporation Aust Pty Ltd & Anor*[115] considered the issue of whether the 'stages' of the works had been completed and therefore, whether any valid reference dates had arisen.

120. The defendant, ASD Corporation Australia Pty Ltd, ('ASD') was a builder. Alois Babicka, Nadia Babicka and Mazs Investment Group Pty Ltd (the plaintiffs) each owned lots at 105 Newlands Road, Coburg North. Each of the plaintiffs engaged the defendant to construct warehouses, under separate contracts relating to each of their lots, in the same development at 105 Newlands Road, Coburg North. The contracts were on substantially the same terms, and each included special conditions which

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[114] *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339.

[115] [2024] VSC 587

provided for payment on completion of specified stages. Special Condition 4 of each contact provided that the builder was entitled to claim milestone payments in specified percentages of the contract price for the completion of stages.[116] The stages were deposit; undergrounds; base; structure; lock-up; fixing; and final stage.

121. ASD served a payment claim under Victorian Act against MAZS, claiming $629,615.27 for the structure stage payment claim and two further payment claims under the Victoria Act against the Babickas in the amount of $235,068.37 and $115,633.05 for the lock up stage payment claims.

122. The three payment claims were disputed. The Babickas disputed the payment claim on the basis that the works the subject of the payment claim were incomplete and ASD had not reached lock-up stage, meaning that the reference date had not passed.[117] MAZS also disputed the payment claim on the basis, amongst others, that the structure stage was not complete and therefore there was no valid and available reference date.[118]

Adjudication determination

123. ASD applied for an adjudication under the Victorian Act. The plaintiffs were unsuccessful in the adjudication (with the adjudicator determining, inter alia, that ASD had reached lock-up and structure stage and therefore there was a valid and available reference date for each of the payment claims) and determined that the amounts claimed by ASD were payable by each of the plaintiffs and awarded interest.[119]

Judicial review

124. Each of MAZS, Alois Babicka and Nadia Babicka applied for judicial review of the determination and sought relief in the nature of certiorari that the determination be

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[116] [5].

[117] [20]

[118] [25].

[119] [24], [27].

quashed or alternatively declared void.[120] The ground relied on by each of the plaintiffs was that the payment claim relevant to each determination was not made on and from a 'reference date' for the purposes of s 9(1) of the Victorian Act,[121] and therefore the adjudicator did not have the power to make the awards that he did. Specifically, the Babickas contended that neither the structure stage nor the lock-up stage had been completed when the lock-up payment claims were made[122] and MASZ contended that structure stage had not been completed when the structure stage payment claim was made.[123]

125. The Court set aside the adjudication determinations, finding that ASD had not made the relevant payment claims on and from a 'reference date' as required by the Victorian Act because the works had not reached the relevant stages at the time the payment claims for those stages were made. As such, the adjudicator did not have jurisdiction to make the awards that he did.

126. In coming to this conclusion, the Court considered the following questions:
    a. What works formed part of the structure stage and lock-up stage?
    b. Were the works, which formed part of the structure stage, required to be approved by a building surveyor as a prerequisite to achieving completion of the stage?
    c. In relation to the application by Alois and Nadia Babicka, was the completion of the structure stage a prerequisite to the completion of the lock-up stage?

What works formed part of the structure and lock-up stage?

127. The analysis of the works, which were found to form part of the structure and lock-up stage, turned on construction of the specific contract terms and expert evidence. This analysis will not be considered here but can be found at paragraphs [44] to [57] and [90] to [96].

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[120] [1].

[121] [28].

[122] [37].

[123] Ibid.

Were the works, which were found to form part of the structure stage, required to be approved by a building surveyor?

128. The contract between both MASZ and ASD and the Babickas and ASD required that completed works under the structure stage and the base stage be approved by a qualified building surveyor prior to completion of the relevant stage. ASD submitted that, in relation to the structure stage, the works had been inspected by a building inspector, pursuant to its obligations under the building permit (this was agreed by the parties) and that this inspection constituted approval by a building surveyor.

129. His Honour summarised the case law with respect to interpreting a construction contract at paragraphs [32] to [36] and held that a reasonable businessperson would understand that that the terms of the contract required the works to be inspected and approved by a building surveyor and that they (being the reasonable businessperson) would not have any doubt or ambiguity about what was required.[124]

130. Accordingly, His Honour did not accept the submission made by ASD and held that when ASD served the three payment claims, the works which formed part of the structure stage had not been inspected or approved by a building surveyor[125] because:
    a. that the building inspector was not authorised to give the structure stage approval under the contracts as he was not a qualified building surveyor;[126] and
    b. the building inspector did not appreciate that he was being requested to inspect and approve the works to establish that the structure stage had been reached, rather he was of the opinion that that he was undertaking a structural steel inspection as required by the building permit.[127]

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[124] [63]

[125] [75].

[126] [74].

[127] Ibid.

131. It therefore follows that His Honour found that the payment claim made in relation to the structure stage (against MASZ) was prematurely made.[128] In relation to the two payment claims made against the Babickas (being for lock-up stage), His Honour held that they too would be prematurely made, if it was found that the structure stage had to be completed as a precondition to attaining lock-up stage.[129]

Was the completion of the structure stage a necessary pre-requisite to the completion of the lock-up stage?

132. The third question considered by His Honour was whether the terms of the contract should be construed so as to require the consecutive and incremental completion of each stage of construction[130] (meaning that structure stage had to be completed prior the ASD being able to claim lock-up stage was complete).

133. In the analysis, his Honour considered the Court of Appeal decision of *Cardona v Brown*[131] and noted that the decision of whether completion of an earlier stage is a prerequisite of reaching a subsequent stage is essentially a matter of statutory interpretation for domestic building contracts (the Court of Appeal in *Cardona* held that the scheme for progress payments under the DBC Act and the contract was sequential)[132] or construction of the terms of the contract for commercial building contracts.[133] His Honour held, when considering the terms of the commercial building contracts, the contracts required the completion of an earlier stage as a prerequisite to reaching a subsequent stage.[134] In coming to this conclusion, His Honour found that the stages in these contracts are sequential and incremental; that the stages and allocated percentages add up to the totality of the works; that completion of the stages entitles ASD to a milestone payment and the concept of milestones inherently refer to

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[128] [76].

[129] Ibid.

[130] [39].

[131] (2012) 35 VR 538

[132] Ibid, 554, [67].

[133] [79].

[134] [84].

significant events or achievements that mark specific points in the completion of works; and the stage schedule provides a regular and systemic methodology to achieve completion of the works.[135]

134. The effect of this finding was that the payment claims served by ASD on the Babickas were premature as the reference date had not yet arisen for the lock-up stage milestone. This was because lock-up stage had not been completed as ASD had not yet achieved structure stage completion, due to the works not being approved by a qualified building surveyor.

Did the failure to get the works approved by a building surveyor fall within the Cardona exception?

135. In *Cardona*, the Court of Appeal held that trivial failures or failures born of impracticalities do not preclude effective and satisfactory completion of a stage.[136]

136. ASD submitted that a failure to get approval of the structure stage from a building surveyor was a trivial failure or a failure borne of impracticality and therefore, should not preclude the completion of the structure stage.

137. His Honour disagreed and held that the failure of ASD to obtain building surveyor approval did not fall within the exception identified in *Cardona*.[137] His Honour noted that such a requirement provides assurance to the owners and financiers alike that the works were completed to a quality and standard approved by a building surveyor.[138] Similarly, His Honour noted it was not impractical for ASD to arrange for a building surveyor to inspect and approve the works.[139]

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[135] [83].

[136] *Cardona*, 554-555, [76]-[69].

[137] [87].

[138] Ibid.

[139] [88].

Other issues considered

138. ASD submitted that the Court should exercise its discretion and grant relief despite its finding that the payment claims were not made 'on and from' a valid reference date primarily because the issue of the failure of the building surveyor to inspect the works was not put to the adjudicator.[140] This was rejected by His Honour, who found that it would be unfair to require the plaintiffs to pay for the structure stage (and lock-up stage) when the works had not been approved by a building surveyor, despite the parties expressly agreeing in the contact that this was a prerequisite of the stage progress payment.[141] His Honour also noted that that this issue was not identified or articulated before the adjudicator (without apportioning blame) and stated, had the adjudicator been aware of this critical issue, the outcome of the determinations would likely have been different.[142]

Helpful obiter

139. In assessing whether the reference date was valid and available, his Honour helpfully summarised the legal principles that relate to 'reference dates' and the resulting jurisdiction of adjudicators:

a. the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under the Victorian Act;
b. the making of a valid payment claim under the Victorian Act is a precondition to an adjudication application and to the jurisdiction of the adjudicator;
c. the existence of a reference date is a jurisdictional fact as it is a criterion the existence of which enlivens the power of an adjudicator;
d. the existence of an available reference date to found a payment claim is a condition precedent to the adjudicator exercising his or her power to make a determination under the Act;
e. on an application for judicial review, the Court must determine for itself whether the reference date exists;

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[140] [99].

[141] [111].

[142] [108].

f. determination of whether a stage is completed is a mixed question of fact and law determined on the evidence before the Court;
g. if an adjudicator purports to exercise power under the Victorian Act despite the non-existence of a jurisdictional fact, whether the non-existence of that part of the adjudicator's jurisdiction and base is ignored or wrongly determined by the adjudicator, the adjudicator will have committed a jurisdictional error; and
h. the Court has power to make orders in the nature of certiorari in respect of an adjudicator's erroneous determination of a jurisdictional fact.

Takeaway: *When submitting an adjudication application, a claimant must ensure that all necessary preconditions for the payment claim are met. Failing to fulfil the contractual requirements for a specific milestone—especially when that milestone determines the reference date—could prevent the claimant from successfully adjudicating the payment claim. Additionally, in contracts with a sequential structure, where earlier milestones are prerequisites for later ones, failing to meet one milestone can prevent a reference date from being established for subsequent payment claims.*

SUBMISSIONS "DULY MADE"

Castle Constructions Pty Ltd v Napoli Excavations and Civil Pty Ltd [2023] NSWSC 348

140. The plaintiff (Castle Constructions) sought a declaration from the NSW Supreme Court that an adjudicator's determination made under the NSW Act was void and of no effect, following an adjudication application in which the adjudicator determined that Napoli Excavations was entitled to be paid a progress payment in the sum of $48,362.05 plus interest.

141. The facts are as follows: The adjudication concerned a payment claim made by Napoli Excavations on 30 September 2022. That was the fourth payment claim made by Napoli Excavation since work under the contract had ceased in May 2022. The third payment claim, made on 31 August 2022, was in exactly the same amount.

142. In the adjudication application, Napoli Excavation submitted that the works had merely been suspended and accordingly the contract was not terminated, thereby entitling Napoli Excavations to submit the fourth payment claim. In the adjudication response, Castle Constructions submitted that the contract had in fact been terminated on 6 May 2022 and pursuant to s 13(1C) of the NSW Act, Napoli Excavation was only entitled to make one payment claim after the date of termination and therefore the fourth payment claim was invalid.

143. In the adjudicator's determination, the adjudicator proceeded on the basis that it was common ground between the parties that work under the contract was suspended. The adjudicator did not reference Castle Construction's submission that the contract had in fact been terminated. Castle Construction, in its submissions to the Court, stated that the failure of the adjudicator to consider its submission that the contract had in fact been terminated was a failure by the adjudicator to comply with section 22(2)(d) of the NSW Act, which requires an adjudicator to consider the payment schedule to which the adjudication application relates, together with all submissions duly made in support of the payment schedule.

144. Drake J agreed with the submission made by Castle Construction that the adjudicator failed to consider its submission that the contract had been terminated and therefore had failed to consider all submissions duly made in support of the payment schedule.[143] His Honour further held that such a failure was material as had the adjudicator considered the submission, he may have come to a different conclusion.[144] His Honour concluded that adjudicator's material failure to discharge his obligation to comply with section 22(2)(d) of the NSW Act amounted to a jurisdictional error and accordingly made the requested declaration.[145]

Takeaway *– If an adjudicator fails to consider duly made submissions where they are statutorily bound to consider such submissions, and that failure is material is to the decision, it will amount to jurisdictional error and invalidate the adjudicator's determination.*

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[143] [22].

[144] [23].

[145] [23]-[24].

Builtcom Constructions Pty Ltd v VSD Investments Pty Ltd as trustee for the VSD Investments Trust (No 2) [2025] NSWCA 134

145. The NSW Court of Appeal in *Builtcom Constructions Pty Ltd* considered whether the adjudicator's determination was affected by jurisdictional error on the basis that he found certain submissions made by the claimant (Builtcom) had not been 'duly made'.

146. Builtcom (the builder) and VSD (the developer) were parties to a construction contract for a 30-storey mixed residential-commercial development in Burwood, NSW. The contract was terminated for convenience by VSD and subsequently Builtcom submitted a final payment claim of $30,625,050.75 under the NSW Act. An adjudication application followed.

147. The payment claim served by Builtcom was a two-page letter attaching 9 pages of tables, whereas Builtcom's application for adjudication was accompanied by 802 paragraphs occupying 171 pages of submissions. Suffice to say, the adjudication application contained significantly more detail than what had been included in the payment claim.

Relevant legislation

148. Section 22(2) of the NSW Act requires the adjudicator to only consider certain matters in determining an adjudication application. Paragraph (c) of that section states that the adjudicator is to consider the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim.[146]

The decision of the adjudicator

149. The determination made by the adjudicator was in the amount of $8,467,232.13. The adjudicator rejected many of Builtcom's claims on the basis of what he called the "*Cardno* test", which is based on the decision of *John Holland Pty Ltd v Cardno MBK*

[146] An equivalent section is found at section 23(2)(c) of the Victorian Act.

(NSW) Pty Ltd.[147] The adjudicator articulated this test as being that if there were a new document which was supplied for the first time with the adjudication application, then he had to ask whether the presence of that document in the original payment claim would have changed the valuation or reasoning in the payment schedule, and if so the new document was to be ignored.[148]

150. Adopting this test, the adjudicator refused to consider many of the documents submitted in the adjudication application as they had not been provided in support of the payment claim and therefore could not be considered to be submissions 'duly made' and accordingly valued many of the claims as 'nil'.[149]

The decision at first instance

151. The primary judge acknowledged that the adjudicator's failure to consider the totality of the claims made by Builtcom was an error of law however found that it did not amount to jurisdictional error.[150] Her Honour further held that an adjudicator's determination as to whether a submission was "duly made" was not subject to judicial review.

The decision of the Court of Appeal

152. The Court of Appeal dismissed the appeal (with Adamson JA dissenting) holding that whilst the adjudicator's decision was an error of law, the error was not jurisdictional. Therefore, the adjudicator's determination was upheld.

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

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[147] [2004] NSWSC 258.

[148] [32].

[149] Ibid.

[150] [127] to [128]. (Should put in primary Judgement here)

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

154. The Court found that an adjudicator's opinion that a submission was or was not duly made is not immune from judicial review.[151] However, whether such an opinion is amenable to judicial review requires an analysis of how that opinion was arrived at and whether it was the result of jurisdictional error.[152]

Was the opinion of the adjudicator affected by an error of law?

155. The Court agreed that the adjudicator, in rigidly applying *Cardno* test, had fallen into an error of law.

156. Leeming JA (with Free JA agreeing) held that whilst the issue of whether a submission is "duly made" is an issue for the adjudicator to determine, there is no rule which prohibits an adjudicator having regard to material not supplied with a payment claim merely on the basis that the material would have altered the payment schedule,[153] and further, that no such test was discernible from the reasons of *Cardno* itself.[154] His Honour also held that there is no place for such a strict test within the statutory framework provided by the NSW Act, as such a test is inconsistent with both section 21(4) and section 17(3)(h).[155]

157. Adamson JA took a slightly different approach, however reached the same conclusion. His Honour held that NSW Act does not impose a limitation on what may be included in an adjudication application. In particular the NSW Act does not contain the gloss for which *Cardno* stands (that the adjudicator is not entitled to consider any part of the payment claim where the submissions contain material which was not served with the

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[151] [86] (Leeming JA); [150] (Adamson JA); [183] (Free JA).

[152] [87]-[88] (Leeming JA); [151] (Adamson JA); [183] (Free JA).

[153] [43].

[154] [38] – [39].

[155] [41]-[42]

payment claim) and therefore the adjudicator, in applying that limitation, made an error of law.[156]

Whether the error was jurisdictional?

158. Leeming JA (with Free JA agreeing) held that the adjudicator's error of law in applying the *Cardno* test was not jurisdictional.[157] His Honour held that "it is for an adjudicator to determine whether a submission is duly made. That obligation is imposed upon the adjudicator by s 22…. Generally speaking, if the adjudicator is wrong in determining whether a submission is duly made, that will not without more invalidate the determination for jurisdiction error."[158]

159. His Honour rejected the arguments advanced by Builtcom that the text and purpose of the NSW Act meant that, when they were departed from, the error was jurisdictional[159] and, secondly, that it was the adjudicator's opinion that a submission was duly made (and not whether a submission was duly made) which was reviewable.[160] This second submission sidestepped the significant amount of authority which held that whether or not a submission was duly made was not jurisdictional.

160. However, his Honour did note that there may be some occasions when an adjudicator finding that a submission was not duly made would disclose jurisdictional error.[161] The examples his Honour provided included where the adjudicator had ignored submissions which were made on the wrong coloured paper or where an adjudicator's personal assistant had altered the date of a party's submissions and delayed their

[156] [160].

[157] [44].

[158] [96].

[159] [57] – [66].

[160] [68].

[161] [86].

receipt, thus leading to bona fide determination by the adjudicator that they were not duly made.[162]

161. Dissenting, Adamson JA held that by refusing to adjudicate on the claims in the *Cardno* category on the basis that they were not "duly made", the adjudicator misapprehended his statutory mandate in s 22, being to consider the adjudication application, including all materials which substantiated the claims for payment in the payment claim.[163] Accordingly, because the adjudicator misconstrued the NSW Act and therefore misconstrued his task, His Honour found that the error was jurisdictional.

Takeaway *- This decision underscores the importance of accuracy in payment claims, emphasising that all supporting documentation must be included. Whether a submission is considered duly made is a matter for an adjudicator, and courts in NSW will not overturn an adjudication determination for an error of law only.*

ISSUE ESTOPPEL IN A SOPA CONTEXT

Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd [2022] ACTCA 42

162. In *Harlech Enterprises,* the ACT Court of Appeal considered and refined principle of "Dualcorp estoppel" (discussed above).

163. The appellant, Harlech Enterprises Pty Ltd ('Harlech') was the vehicle through which Beno Excavations Pty Ltd ('Beno') engaged its general manager, Mr Moseley.

164. Harlech served a payment claim under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) ('the ACT Act') against Beno, claiming an amount for work in 2020 of approximately $60,000 (first payment claim). Beno responded with a payment schedule proposing nil payment, proposing that:[164]

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[162] [87].

[163] [172].

[164] *Building and Construction Industry (Security of Payment) Act 2009* (ACT) ('ACT Act'); [40]–[41].

a. there was no construction contract in place with the claimant;
b. there was no agreement implied or otherwise to pay instalments;
c. the Act has no application to the agreement between the parties;
d. the claimant paid for management and consulting services provided by the general manager who was personally responsible for Beno Excavations;
e. if the Act does apply (although denied), the figures provided by Harlech were incorrect, and there was no agreement at the relevant time to profit share

(collectively, the **Beno contentions**).

165. The adjudicator in the first determination determined the full amount claimed by Harlech was payable.[165]

166. Harlech served a further two payment claims of approximately $150,000 for work in 2017 (second payment claim) and approximately $450,000 for work in 2017-2018 (third payment claim). Beno again responded with payment schedules proposing nil payment, repeating the same contentions above, but supplementing them with two further arguments:[166]
    a. the claims had come after Mr Moseley had left his employment with no notice in March 2020; and
    b. Mr Moseley commenced employment with no experience in the Trenchless Industry, requiring him to walk into an ongoing project and learn on the job. There was no agreement that Mr Moseley would receive any profit for the projects with ICON water.

167. The adjudicator determined that the majority of the total amount claimed by Harlech was payable by Beno. The adjudicator concluded reasons 1-6 of the payment schedule were the same issues decided in the first adjudication, and that the principle of 'issue estoppel' arose and he was bound by the original adjudicator's decision in respect of them.[167]

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[165] [41(c)].

[166] [40(d)].

[167] [41(f)].

168. In his determination, the adjudicator reasoned that:

a. although a decision made under the ACT Act represents an interim decision about a progress payment, the case authorities of *Hutchison* and *Dualcorp* consider the issues decided in an adjudication to be *finally decided* on an interim basis.[168] The adjudicator noted that authorities from different jurisdictions discuss the impacts of *res judicata* and issue estoppel when an issue resolved in a previous decision is presented to a new adjudicator.

b. Section 24(4) of the ACT Act is reasonably interpreted to say that new claims/approaches taken in a subsequent adjudication that closely resemble claims/approaches in a previous decision, become unreasonable. Therefore, once the valuation of the work has been decided in accordance with s 12, then section 24 of the Act bars the respondent from raising issues that were part of the considerations in valuing the claim in a subsequent matter.[169]

169. The adjudication certificate was filed and became a judgment of the Court. Beno subsequently brought an application for prerogative relief, which was granted by Mossop J on the grounds that Beno's challenge was limited to the adjudicator's interpretation of s 24(4) of the ACT Act and issue estoppel.[170]

170. His Honour found that the determinative issue was whether the adjudicator had been correct in his application of the principles of issue estoppel. His Honour granted prerogative relief in favour of Beno, finding that the adjudicator had wrongly applied the principle of issue estoppel. Harlech subsequently appealed the decision of the primary judge.

Appeal Judgment – Kennett J

171. The central question for the Court was whether the adjudicator was correct to find that the Beno contentions could not be raised before him due to principles of issue estoppel. Both Kennett and Lee JJ found that the primary judge did not err in finding

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[168] [41(7)]; *Hutchison Pty Ltd v Galform Pty Ltd and Ors* [2008] QSC 205; *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 (*Dualcorp*).

[169] [41(g)] (adjudicator's decision at [68]–[69].

[170] [42].

that the adjudicator had erred in finding that he was estopped from reconsidering the Beno contentions.

172. Kennett J referred to the majority observation in *Tomlinson*, where the High Court observed that issue estoppel is not confined to judicial determination, but also extends to final judgments rendered in other adversarial contexts.[171]

173. Kennett J noted that, like any other common law doctrine, estoppel may be excluded or modified by statute. His Honour declined to adopt the formulation in *Dualcorp* (per Macfarlan JA), which asks whether the Act "manifests an intention to confer a sufficient degree of finality on [a determination] to attract" *res judicata* and issue estoppel. Instead, his Honour framed the necessary inquiry as:[172]

a. what degree of finality the ACT Act confers on an adjudicator's determination;
b. whether that is sufficient to attract the principles of issue estoppel; and
c. if so, whether anything in the ACT Act abrogates or limits their application.[173]

174. His Honour accepted that the possibility of repetitious claims under the ACT Act, or re-agitation of previously rejected claims, could be properly characterised as an abuse of process. However, this did not provide the answer to the parameters of issue estoppel that were relied upon by the adjudicator.[174]

175. Citing the High Court in *Kuligowski*, his Honour observed that an adjudication under the ACT Act is "final", with the result binding except to the extent the Act permits it to be revisited. Unless displaced by the Act, the common law operates to establish an estoppel between the parties, preventing the re-agitation of the fundamental issues that formed the basis of the adjudicator's decision.[175]

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[171] [10]; *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HC256 CLR 507 ('*Tomlinson*').

[172] [14]; *Dualcorp* [50] (per Macfarlan JA).

[173] [14].

[174] [19].

[175] [28]-[31]. *Kuligowski v MetroBus* [2004] HCA 34 (03 August 2004) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); 220 CLR 363.

176. In line with this reasoning, his Honour held that the critical question is whether anything in the ACT Act excludes the application of issue estoppel. His Honour noted that s 38(1)(b) provides that an adjudication decision does not affect a party's right to claim a progress payment. In other words, a right to a progress payment arising out of a contract is not affected by a prior adjudication. Accordingly, s 38(1)(b) leaves no scope for issue estoppel to arise at common law in relation to issues determined in an earlier adjudication.[176]

177. His Honour disagreed with the majority in *Dualcorp*, to the extent that the majority saw the result in that case as flowing from principles of issue estoppel. In Kennett J's view, those principles are excluded from operation in relation to an adjudication decision.[177]

Appeal Judgment – Lee J

178. Lee J arrived at the same decision as Kennett J via a different route. Lee J noted that the ACT Act expressly prohibits judicial review on the ground of an error of fact of law on the face on the decision, however the court still has the power to grant prerogative relief in the nature of certiorari.[178]

179. While the parties had focused in submissions on the 'principles of issue estoppel', his Honour preferred the term 'preclusion'.[179] His Honour referred to the fundamental principle of finality referred to in *D'Orta-Ekenaike v VLA*, which dictates that once controversies have been judicially resolved, they are only to be reopened in limited circumstances.[180]

180. His Honour referred to the discussion of the interrelationship between legal estoppel and related principles in *Tomlinson v Ramsey Food*, where the High Court referred to

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[176] [35].

[177] [37]–[38].

[178] [58]–[59] s 43(1) ACT Act.

[179] [61].

[180] [62]–[63]; *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 (at 17 [34] per Gleeson CJ, Gummow, Hayne and Heydon JJ).

the three forms of estoppel recognised by the common law – cause of action estoppel, issue estoppel and Anshun estoppel.

181. Referencing the statutory SOP scheme, Lee J highlighted the danger of decontextualising the 'principles of estoppel' beyond their principled application. His Honour observed that it was clear to see from the development of the principle in relation to 'final and conclusive judgements on the merits', that common law 'issue estoppel' is an unsuitable label to apply to the preclusion identified in *Dualcorp*.[181] However, Lee J noted that the majority in *Dualcorp* found that 'abuse of process' is within the broad scope that falls within the mischief prohibited by the Act.[182]

182. His Honour was of the view that 'preclusion' in the current matter would "in any event, be a form of abuse of the process before a judgment on a second or subsequent adjudication was obtained". A party would abuse the processes of the Act by purporting to re-agitate a claim which had already been decided.[183]

183. Referring to *Dualcorp*, Lee J held that avoiding the use of the term 'issue estoppel' is also consistent with recognising that the starting point is the Act itself.[184] His Honour reasoned that in a statutory context, common law principles operate to 'complement acts of Parliament, not to overwhelm them'. This provides that any form of preclusion must be from ACT Act itself.[185]

184. Lee J did not accept the proposition that parties are precluded from re-agitating facts fundamental to an earlier adjudicator's decision. His Honour referred to the following provisions which lead to this conclusion:

    a. Section 24(4) provides that an adjudicator's valuation of work may only be disturbed by a subsequent adjudicator in limited circumstances. Cognisant of the majority view in Dualcorp, s 24(4) should not be regarded as an exhaustive

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[181] [90].

[182] [90].

[183] [92].

[184] [96]; *Dualcorp* (at 200–201 [42] per Macfarlan JA, Handley JA agreeing at 207 [76].

[185] [96].

statement of matters determined in an earlier adjudication which are binding on a subsequent adjudicator. Lee J understood that there would be matters "antecedent and incidental" to a valuation determination which Parliament cannot have intended to be open to abuse. However, the purpose of the ACT Act is to protect payment claims from interference once adjudicated on – not to protect the broader findings of adjudicators.[186]

b. The ACT Act provides that an adjudication certificate may be enforced by a court as a judgment for debt.[187] That certificate states nothing more than party names, the adjudicated amount, the day payment was required, and the amount of any adjudicated amount that has been paid.

c. Section 15(6) allows a claimant to claim an amount subject to a previous claim, by reference to another reference date. This express permission for cumulative claims indicates that the *only* matter that cannot be revisited in a subsequent adjudication is the valuation of work for a particular reference date.

d. Finally, s 24(2) sets out mandatory considerations for adjudicators, including: the Act, the adjudication application and contract, payment claims and the payment schedule in question. The decision in *Brodyn Pty Ltd* also sets out a list of jurisdictional matters that must be determined by an adjudicator to provide a valid decision.[188] Noting these essential preconditions, Lee J held that if, as Harlech contended, an adjudicator were bound by a previous decision, the adjudicator would then be unable to turn their mind to these mandatory considerations.[189]

185. This last factor indicates that the matters which an adjudicator is not "precluded" from reconsidering will be those essential preconditions that an adjudicator is bound to determine, e.g. the existence of a construction contract. However, an adjudicator may be precluded from considering other matters "incidental or antecedent" to a previous

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[186] [109].

[187] [110] ss 26–27 ACT Act.

[188] [112]; *Brodyn v Davenport* [2004] NSWCA 394; 61 NSWLR 421 (at 441 [53] per Hodgson JA, Mason P and Giles JA agreeing)

[189] [112].

determination e.g. whether a variation was directed, or a particular construction of a contract that is incidental to determining the amount of a progress claim.

Decision – Elkaim J

186. Elkaim J held the appeal should be dismissed, preferring the path taken by Lee J but without rejecting the reasoning of Kennett J.[190]

Takeaway: *unlike Applegarth J in Ingeteam, who endorsed the principles of so-called "Dualcorp issue estoppel", the ACT Court of Appeal in Harlech took a different approach, with Kennett J eschewing the doctrine altogether and Lee J (Elkhaim J agreeing) preferring the doctrine of "preclusion" based on applying the principle of finality within the context of the SOP Act and the broader doctrine of abuse of process. Based on this approach, the only issues which a subsequent adjudicator would be precluded from considering would be a determination of the value of construction work previously determined for a particular reference date, and some matters "antecedent and incidental" to that.*

RE Oakey Pty Ltd v Canadian Solar Construction (Australia) Pty Ltd; Canadian Solar Construction (Australia) Pty Ltd v RE Oakey Pty Ltd [2024] QCA 202

187. In *Re Oakey,* the Queensland Court of Appeal considered an estoppel argument in the context of a dispute over whether a payment claim had been properly served.

188. The respondent (Canadian Solar) contracted with the appellant (Oakey) for the design and construction of a solar farm project.

189. On 26 June 2023, Canadian Solar's representative sent a payment claim by email addressed to "Stanley Wang" who had been issuing valuation certificates under the contract for the previous three years. The email was also copied to six other named executives who included representatives of the project manager and representatives of the manager, both of whom were designated under the contract. The email to Mr

[190] [2].

Wang bounced back, which was notified to the sender, and Mr Wang did not become aware of the email until 14 July 2023. The sender did not see the bounce-back email.

190. Oakey accused Canadian Solar of acting in bad faith by sending the email to an address known not to be in use; Canadian Solar denied knowing that, and also pointed to the email having been delivered to six other representatives of Oakey.

191. Mr Wang sent a response to the payment claim on 14 July 2023, which was 15 business days after 26 June 2023 and outside the contractual time specified for issuing a payment schedule.

192. The primary judge ordered that Oakey pay Canadian Solar the sum of $4,030,714 (exc GST), pursuant to s 78(2)(a) of the Qld Act.[191] The primary judge found that Canadian Solar had "given" the payment claim to Oakey as it was delivered to the project manager who was designated as Oakey's agent under the contract. His Honour found that Canadian Solar was not estopped from asserting the payment claim was valid.

193. The contract provided for notice to be given in the manner expressly provided for in the relevant clause, or, where no manner was specified, by hand, prepaid post or (except where the notice was being given under the Qld Act) by email to the relevant address in Annexure A or last notified in writing to the party giving notice.

194. The appellant appealed on grounds that:

    a. the primary judge erred in interpreting the contract and finding the relevant payment claim was given to Oakey;
    b. the primary judge erred in finding that Oakey did not respond to the payment claim within time;
    c. the primary judge erred in finding that Canadian Solar was not estopped from asserting the payment claim was validly given, and in finding that Canadian Solar's conduct was not misleading or deceptive, or constituted unconscionable conduct.

[191] S 78(2)(a) is the equivalent of s 16(2) of the Victorian SOPA.

195. Boddice JA, with whom Bond JA and Wilson J agreed, found that the trial judge correctly concluded no manner of service for payment claims was expressly provided in the contract. The clause of the contract that provided for notice to be given referred to "may be given" and therefore did not prescribe the method of service that must be used.[192]

196. At least one of the other recipients of the email had been nominated as a project manager representative, and that nomination had not been revoked.

197. Clause 39.3 of the contract provided for a "valuation certificate" to be issued within 10 business days after the service of a valid payment claim. Although the reference was to a "valuation certificate", this clause was found to constitute a prescription of the time for serving a payment schedule, which was less than the default 15 day period, and was therefore the applicable time for serving a payment schedule. As Oakey had not responded within 10 business days of the (valid) service of the payment claim, the payment schedule was out of time.[193]

198. Oakey relied on an estoppel argument that the parties had adopted a common assumption that a payment claim had to be delivered by email to Mr Wang, and that Canadian Solar should be estopped from departing from that common assumption. The Court of Appeal found that there was no error in the trial judge's acceptance of the sender's evidence that he assumed all recipients of the email would consider and discuss the payment claim. Previous payment claims had been sent to multiple recipients who were all people on the project who had a responsibility in considering aspects of the payment claims.[194]

199. Nor was there any error in the trial judge's finding that Canadian Solar had not engaged in misleading or deceptive conduct, or unconscionable conduct. No representation was made by Canadian Solar to the effect that the email had in fact been delivered to each

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[192] *Re Oakey* [48].

[193] *Re Oakey* [58].

[194] *Re Oakey* [66]-[68].

of the listed recipients, simply by the appearance of those names within "to" and "cc" fields of the email.[195]

Takeaway: *the Qld Court of Appeal's judgment exhibits an approach to construing the contract that is facilitative of a practical approach to service of a payment claim. In this case, the finding on estoppel came down to the court's acceptance of the evidence of the parties as to whether or not they had operated on a "common assumption". In circumstances where a payment claim is received by multiple parties, and there is a question as to whether or not it has been validly received, careful consideration needs to be given as to whether a payment schedule should be served, rather than seeking to rely on a technical argument as to service of the payment claim.*

Goyder Wind Farm 1 Pty Ltd v GE Renewable Energy Australia Pty Ltd & Ors [2025] SASCA 39

200. The applicant (**Goyder**) entered into contracts for the construction of a wind farm with the first two respondents, who were acting in a joint venture (collectively, **GE-Elecnor**). GE-Elecnor issued three claims for progress payments, claiming entitlement to extensions of time and delay costs. The claims were made pursuant to the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SA Act**). Prior to issuing the First Payment Claim, GE-Elecnor issued a notice of arbitration referring a dispute to arbitration claiming a total of $61,451,756 in delay costs.

201. Applications for adjudication were made in relation to the first two payment claims, and resulted in two determinations, both arising out of two extension of time (**EOT**) claims. While both payment claims were delay-related, they related to different aspects of delay costs. The first payment claim sought prolongation costs and the second payment claim was for procurement premiums.

202. The first adjudication determination included a finding that GE-Elecnor was entitled to an EOT of 118 days and to extra costs directly and necessarily incurred by reason of delay events. The adjudicator determined that GE-Elecnor was not entitled to

[195] *Re Oakey* [78]-[79].

'thickening costs' (indirect costs of additional personnel and resources required due to delays). The second determination required Goyder to pay $21,029,854.77 to GE-Elecnor. The adjudicator found that there was no overlap between the delay costs the subject of the first and second determinations.

203. Goyder sought judicial review in respect of the second determination. Alternatively, Goyder sought a declaration that the second determination was of no effect, or of no effect insofar as it related to delay costs. It also sought to restrain GE-Elecnor from progressing the third payment claim.

204. The primary judge dismissed the application with respect to the second determination but allowed the application in part in relation to the third claim. The part that was allowed related to thickening costs, on the basis that the claim sought to reagitate a claim the adjudicator had already decided.

205. Goyder appealed the decision in respect of the second claim. Goyder argued that the principle of *Anshun* estoppel,[196] alternatively principles of abuse of process, applied to the making of the second payment claim. The basis for Goyder's claim was that in a notice of arbitration, which preceded the two payment claims, GE-Elecnor had claimed the sum claimed in both payment claims. Goyder argued that as GE-Elecnor's claim for the entirety of the delay costs had been formulated prior to the making of the first payment claim, it should have been included in the first payment claim. Goyder's primary argument was that delay costs arising from the EOT granted to GE-Elecnor constituted a single claim for delay costs which could not be split across two payment claims.

206. The primary judge found that neither the contract nor the SA SOPA required all delay costs arising from an EOT to be claimed in a single payment claim.[197] Her Honour considered that, subject to the terms of the contract, it would be inconsistent with the

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[196] *Port of Melbourne Authority v Ansun Pty Ltd* (1981) 147 CLR 589.

[197] *Goyder* [46].

purpose of the SA Act to require a claim for all components of delay costs incurred by a delay event to be claimed in a single progress claim.[198]

Applicability of *Anshun* estoppel and abuse of process

207. The Court of Appeal considered a number of previous decisions in other jurisdictions concerning the applicability of principles of estoppel to security of payment matters.

208. In *Dualcorp* (referred to above), the New South Wales Court of Appeal found that while a payment claim could include amounts previously claimed, that did not authorise inclusion of a claim that had been the subject of an earlier adjudication. Macfarlan JA, with whom Handley JA agreed, found that the principles of issue estoppel were applicable. While unnecessary to reach a final view, his Honour also considered that the general principle of abuse of process is "probably also applicable".[199]

209. *University of Sydney v Cadence Australia Pty Ltd*[200] concerned a payment claim for delay costs in circumstances where a previous claim for some of those delay costs had been adjudicated. Hammerschlag J found that although no issue estoppel was created, the second payment claim was an abuse of process because it sought to have a "second go" at the process provided by the Act.[201]

210. *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd*[202] concerned a payment claim for variations where those variations had been the subject of an earlier adjudication determination and it had been found that the contractor had not proved its contractual entitlement. Although not necessary to decide in that case, McDougall J found Watpac was able to rely on the extended principle of issue estoppel. It was unreasonable, taking into account all the circumstances and the scheme of the Act, for the contractor to put its variation claims on different bases before different

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[198] *Goyder* [54].

[199] *Goyder* [69]-[70].

[200] [2009] NSWSC 635.

[201] *Goyder* [77]-[78].

[202] [2010] NSWSC 168.

adjudicators, to twice engage the processes of the Act and to put the respondent to the trouble and expense of replying to the subsequent claim. His Honour particularly focused on whether it was unreasonable to reagitate a claim, rather than whether it was an abuse of process.[203]

211. The Court in *Goyder* also referred to s 32 of the SA SOP Act, which provides that nothing done under the Act affects civil proceedings arising under a construction contract, and decisions considering the applicability of an issue estoppel in the context of that provision (and its equivalents in other jurisdictions). In *Caltex Refineries (Qld) Pty Ltd v Allstate Access (Australia) Pty Ltd*,[204] Philip McMurdo J found that in the context of s 32, an estoppel would be "problematical in many ways".[205] Similar views were expressed by Kourakis CJ in *Civil & Allied Technical Construction Pty Ltd v Resolution Institute*.[206]

212. The Court also referred to *Harlech Enterprises* (discussed above).

213. The Court in *Goyder* considered that the "appropriate framework within which to consider complaints of the kind agitated here" was that of abuse of process. Their Honours considered the reasoning of Philip McMurdo J in *Caltex,* Kourakis CJ in *Civil & Allied,* and Lee J's analysis of the Act in *Harlech* to be persuasive.[207]

214. The common law concept of issue estoppel was not applicable, particularly when regard was had to s 32 of the Act, and nor was the extended doctrine of *Anshun* estoppel. This left scope for the operation of the "doctrine of preclusion". Applying this doctrine, a subsequent claim made for the same entitlements as previously claimed unsuccessfully would likely be characterised as an abuse of the processes of the Act.[208]

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[203] *Goyder* [90]-[91].

[204] [2014] QSC 223

[205] *Goyder* [95].

[206] [2019] SASC 193. *Goyder* [99].

[207] *Goyder* [119].

[208] *Goyder* [120], [122].

215. Applying these principles, the Court found that the second payment claim did not constitute an abuse of the SA SOPA's processes. It was a non-overlapping claim made in respect of a later reference date where the claim could have been made (but was not) as part of the first payment claim. The matters that Goyder relied upon in support of its argument, which were principally the additional work involved in responding to two different payment claims, were "contestable matters of commercial practice". Goyder failed to identify any fact that demonstrated that the second payment claim undermined the principle of finality of adjudications that underlies Part 3 of the SOP Act.[209]

***Takeaway**: while ordinary principles of Anshun and issue estoppel are not applicable to adjudications, there is a so-called "doctrine of preclusion" that prevents a party seeking to reagitate an issue that has already been determined by an adjudicator on a previous adjudication. The doctrine will not prevent a party including in an application a claim for payment that could have been made previously but was not.*

A final note on estoppel

216. In Victoria, the doctrine of issue estoppel has previously been applied in a SOP Act context. In *Shape Australia v The Nuance Group (Australia),*[210] Digby J applied the principle of issue estoppel outlined in *Dualcorp*. The doctrine was said to prevent a claimant from resubmitting an already adjudicated claim if dissatisfied with the adjudication.[211] In that particular case, Shape Australia was not permitted to remit a payment claim for redetermination unless an adjudication determination which determined the claimant's entitlement on that payment claim were to be quashed.[212]

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[209] *Goyder* [141]-[146].

[210] [2018] VSC 808.

[211] *Shape Australia* [14].

[212] *Shape Australia* [17].

217. In *Westbourne Grammar School v Gemcan Constructions,*[213] the doctrines of issue estoppel and Anshun estoppel were applied, noting that findings by a judge on a judicial review proceeding did not create an estoppel against an arbitrator from determining whether Gemcan was in substantial breach of the Contract.

218. In *Vanguard Development Group v Promax Building Developments,*[214] Kennedy J referred to *Dualcorp* in noting that it was "doubtful" whether issue estoppel would apply in a security of payment context but that in any case, it was subject to qualification by statute. Section 23(4) provided for the value of work to be reargued in certain circumstances so that issue estoppel could not determine the matter.[215]

219. The Victorian courts have not yet, therefore, had the opportunity to consider the ACT Court of Appeal's refinement of issue estoppel in *Harlech Enterprises*.[216] It remains to be seen how such an argument will be treated in Victoria moving forward.

Stays of judgment based on adjudication determination

Black Label Developments Pty Ltd v McMenemy [2025] NSWCA 114

220. The relevant facts to this matter are as follows.[217] The respondent (Mr McMenemy) contracted with the appellant (Black Label) to renovate his family home. On 7 September 2023, McMenemy informed Black Label that his family needed to move back into their home on 22 September 2023 and that "there is no slack to push that back". Mr McMenemy alleged that, on 22 September 2023, with all of their belongings in removal vehicles waiting outside the family home, Black Label informed him that he must sign a "deed of variation" (**Deed**) or he would not be moving in. The Deed

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[213] [2022] VSC 6.

[214] [2018] VSC 386.

[215] *Vanguard* [143].

[216] As at the time of writing *Harlech Enterprises* had been referred to in three Victorian Supreme Court decisions, but not substantively.

[217] The basis for this summary of facts has been adopted from the headnote to *Black Label Developments Pty Ltd v McMenemy [2025] NSWCA 114*.

substantially increased the contract price and introduced a charge over the property in favour of Black Label to secure its entitlements under the amended contract.

221. Black Label subsequently served a payment claim on Mr McMenemy pursuant to the NSW Act, claiming amounts which Black Label asserted were owed under the contract as amended by the Deed. Mr McMenemy submitted a payment schedule which included allegations of duress and unconscionability.

222. The claim was subject to adjudication, and the adjudicator made a determined that $264,575.99 was payable to Black Label. Relevantly, the adjudicator said, "in respect of the reasons provided by the Respondent (being Mr McMenemy), for example duress and unconscionability, these are not the type of matters that I can make a determination on."

223. Black Label obtained an adjudication certificate which it filed in the District Court pursuant to s 25(1) of the NSW Act,[218] resulting in a judgment in favour of Black Label.

224. Mr McMenemy commenced proceedings against Black Label in the District Court (**Substantive Proceeding**) alleging, among other things, that he executed the Deed under duress and undue influence and by reason of Black Label's misleading and deceptive and unconscionable conduct. The relief sought included declarations that the Deed was void or unenforceable.

225. Mr McMenemy also filed a motion in the District Court seeking orders staying execution of the s 25 judgment obtained by Black Label, pending resolution of the parties' rights in the Substantive Proceeding. The notice of motion which sought these orders did not identify the power it invoked,[219] however it was not in dispute that the power in s 135 of the *Civil Procedure Act 2005* (NSW)[220] extends to staying the execution of a

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[218] See s 28R Vic Act, for the equivalent section in the Victorian SOP Act.

[219] [41]

[220] There isn't a section in the Victorian *Civil Procedure Act* which is equivalent to s 135 of the NSW *Civil Procedure Act*, however the Supreme Court has inherent jurisdiction to grant a stay of enforcement it is in the interest of justice or to prevent an abuse of process.

judgement in the District Court.[221] The primary judge granted the stay on the condition that Mr McMenemy pay the judgment sum into court.

226. Black Label sought leave to appeal the decision of the primary judge, relying heavily on the statement in *A-Civil Aust Pty Ltd v Ceerose Pty Ltd*[222] at [21]: "the power [to stay] must be exercised in accordance with the policy of the [NSW Act]."

227. The Court (McHugh JA, Bell CJ and Griffiths AJA agreeing) granted leave to appeal in respect of some of the Builder's proposed grounds on the basis that they raised questions of importance beyond the instant case but ultimately dismissed the appeal.[223]

228. In considering Black Label's arguments, the Court gave a summary of the principles governing the exercise of the Court's discretionary power to grant a stay under s 135 of the Civil Procedure Act in the context of a s 25 judgment and held that:
    a. The overriding principle a court is to apply when determining whether to exercise its power to stay execution pursuant s 135 is to consider what the interests of justice require.[224] Therefore the matters bearing on consideration of what justice demands, and therefore on the discretion as to whether to grant a stay of execution, will vary depending on the nature and circumstances of the case.[225]
    b. Where a stay is sought of a s 25 judgment, the statutory context of the NSW Act, being that articulated in *A-Civil Aust Pty Ltd v Ceerose Pty Ltd,*[226] as (i) to maintain the flow of money to the subcontractor; and (ii) to place (as an interim measure) the risk of insolvency on the principal, will be highly material in assessing the dictates of justice.[227] However whilst the policies of the NSW Act

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[221] [46].

[222] [2023] NSWCA 144.

[223] [172].

[224] [49].

[225] [52] – [53].

[226] [2023] NSWCA 144

[227] [57] – [58].

will generally be matters of great weight in the exercise of the court's discretion to grant a stay, that discretion is not extinguished or confined by the policies of the NSW Act.[228]

c. The Court held that, when determining what weight was to be given to the statutory policies of the NSW Act, as articulated in *A-Civil*, the Court was to have regard to the assumptions on which those policies were predicated; namely (i) the assumption that the work was done pursuant to a contract or arrangement;[229] (ii) the assumption that there has been an interim assessment of the principal's answer to the claim, however rough and ready;[230] and (iii) the assumption that the principal is a commercial party.[231] Notably in this case, each of these assumptions were not applicable in that: (i) the payment claim was made pursuant to the Deed which Mr McMenemy argues is void and unenforceable which, if this argument is successful, will mean that the premise from which the policy of the Act proceeds does not apply;[232] (ii) the adjudicator did not assess Mr McMenemy's allegations of duress and unconscionability because they were outside of scope;[233] and (iii) Mr McMenemy is not a commercial party and therefore the dictates of justice are more complex in cases such as the present involving consumers of residential building services.[234]

Takeaway - *The Court upheld the well-established principle that the statutory policies underpinning the Act generally weigh against granting a stay of judgment under section 25 of the Act. However, it clarified that the primary consideration should be what justice requires, which may influence the weight given to these policies when deciding whether to grant a stay in a given case.*

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[228] [63].

[229] [77] – [79].

[230] [81] – [84]

[231] [86].

[232] [80].

[233] [85].

[234] [103].