

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL & EQUITY DIVISION
TECHNOLOGY, ENGINEERING & CONSTRUCTION LIST

No. 2388 of 2011

DIRECTOR OF HOUSING OF STATE OF VICTORIA

Plaintiff

v

STRUCTX PTY LTD T/ AS BIZIBUILDERS
(ABN 38 132 017 700)

First Defendant

and

PAUL ROBERTS

Second Defendant

JUDGE: VICKERY J
WHERE HELD: MELBOURNE
DATE OF HEARING: 8 AUGUST 2011
DATE OF JUDGMENT: 29 AUGUST 2011
CASE MAY BE CITED AS: DIRECTOR OF HOUSING v STRUCTX PTY LTD T/ AS
BIZIBUILDERS AND ANOR
MEDIUM NEUTRAL CITATION: [2011] VSC 410

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Circumstances in which decisions of an adjudicator and review adjudicator are subject to judicial review - Section 7(2)(b) meaning of "in the business of building residences" - Whether valid payment schedule - Breach of the rule as to procedural fairness - Adjudication determination quashed.

ADMINISTRATIVE LAW - Certiorari - Excess of Jurisdiction - Jurisdictional Error - Natural Justice - *Kirk v Industrial Court (NSW)* considered and applied - Adjudication determination quashed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr R. Andrew	Holding Redlich
For the Defendant	Mr L. Connolly	Aldgate Lawyers
For the Second Defendant	No Appearance	

HIS HONOUR:

Background

1 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the “Act”).

2 The construction contract in the present case provides for the construction of homes by the First Defendant (“Structx”), which is the builder, for the Plaintiff, Director of Housing of the State of Victoria (the “Director”).

3 The Director seeks judicial review of an adjudication determination purportedly made under the Act by the Second Defendant (the “Adjudicator”) dated 29 March 2011 (the “Adjudication Determination”).

4 By originating motion dated 17 May 2011, the Director seeks to have the Adjudication Determination quashed on the grounds that:

- (a) Pursuant to section 7(2)(c) of the *Building and Construction Industry Security of Payment Act 2002* (the Act) the Adjudicator did not have jurisdiction to make the said adjudication determination because the relevant contract was a domestic building contract and the Director was/is not in the business of building residence (Ground One);
- (b) In finding that the Plaintiff did not issue a payment schedule the Second Defendant made an error of law on the face of the record, in that:
- (c) There was no basis upon which the Second Defendant could find (at paragraph 22 of the adjudication determination) that the Superintendent’s Representative lacked authority to issue payment schedules (Ground Two);
 - i. The Second Defendant held that section 15(2)(d) requires a payment schedule to be in the form prescribed by the contract, whereas upon a proper construction section 15(2)(d) refers to any form prescribed by regulation (Ground Three). [Emphasis added].

5 Further or in the alternative, the Director seeks a declaration that the relevant contract is a domestic building contract and that the Director is not in the business of building residences.

Background to the Application

6 Structx is a building contractor that specialises in carrying out small to medium size residential projects, as well as smaller commercial developments.

7 The Director is a body corporate whose statutory powers include the power to develop land and construct buildings. Its objectives principally relate to the provision of public housing in Victoria.

8 On or about 15 November 2009, the Director and Structx entered into an agreement pursuant to which the Director engaged Structx to construct residential units at 20 Kenna Avenue and 105 Bree Road, Hamilton, Victoria (the "Construction Contract"). The Construction Contract is comprised of:

- (a) amended Standards Australia General Conditions of Contract AS2124-1992;
- (b) formal instrument of agreement, signed and sealed by the Director of Housing Victoria, dated 15 November 2010;
- (c) accepted tender form dated 1 June 2010 and stamped received by Property Services Management on 3 June 2010;
- (d) "Form 2 Tender Cost Breakdown", dated 2 June 2011; and
- (e) Department of Human Services letter dated 23 September 2010 regarding Superintendent's Representatives.

Adjudication Determination

9 The Adjudicator found that the following key steps occurred under the Act:

- (a) Structx served a payment claim on the Director on 4 February 2011 claiming \$360,311.95 (including GST) (the "Payment Claim").
- (b) The Director did not serve a payment schedule in the time required by the Act.
- (c) Structx served a notice of intention to apply for adjudication on 7 March 2011.
- (d) The Director did not serve a payment schedule in the time required by the Act.
- (e) Structx made its Adjudication Application on 15 March 2011 (the "Adjudication Application");

- (f) The Adjudication was accepted by the Adjudicator on 17 March 2011;
- (g) The Director made its Adjudication Response on 22 March 2011 (the "Adjudication Response").

10 The Adjudicator determined the amount of the progress payment to be paid by the Director to Structx was \$293,424.13 (including GST) (the "Adjudicated Amount").

Ground 1 - Does the Act apply to the Construction Contract?

11 In essence, the Director contended that pursuant to s 7(2)(c) of Act, the Adjudicator did not have jurisdiction to make the Adjudication Determination because the Construction Contract in issue was a domestic building contract and the Director was/is not in the business of building residences.

12 Other than by the possible application of the exception provided by s 7(2)(b) of the Act, it was accepted by both parties that the Construction Contract in this case was a construction contract to which the Act applies. By operation of s 7 of the Act, in combination with the definitions provided by s 4, this is clearly the case.

13 The Director submitted that the Act nevertheless does not apply for the following reasons:

- (a) Section 7 of the Act contains the self-explanatory title "Application of Act". Subsection (2) relevantly provides:

This Act does not apply to ...

...

- (b) a construction contract which is a domestic building contract within the meaning of the *Domestic Building Contracts Act 1995* between a builder and a building owner (within the meaning of that Act) for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.

The following definitions in the *Domestic Building Contracts Act 1995* were submitted by the Director to be relevant:

"domestic building contract" means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor

“builder” means a person who, or a partnership which –

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

“building owner” means the person for whom domestic building work is being, or is about to be, carried out

“domestic building work” means any work referred to in section 5 that is not excluded from the operation of this Act by section 6 [s 6 has no application to the present case]

Pursuant to section 5(1) Building work to which the Act applies includes:

- (a) the erection or construction of a “home”

“home” means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include – [items that are not relevant to the present case].

- (c) The Director is specifically exempt from the requirements of domestic building insurance.
- (d) There are no general exemptions under either section 6 of the *Domestic Building Contracts Act* or the regulations made under that Act.
- (e) It was submitted by the Director, that the Construction Contract is a domestic building contract and therefore the Act does not apply to the contract. The exception in section 7(2)(b) of the Act does not apply because the Director is not in the business of building residences, nor was the contract entered into in the course of or in connection with any such business.
- (f) For these reasons the Director submitted that the Adjudicator committed jurisdictional error and the Adjudication Determination is a nullity.

14 Against this contention, it was submitted on behalf of Structx that there has been no jurisdictional error for the following reasons:

- (a) the finding made by the Adjudicator that the Act applies to the Director is a finding of a jurisdictional fact and one that it was open for him to make, such that even if the Adjudicator erred in

deciding the jurisdictional fact (which is expressly denied), the Adjudicator still stays within his jurisdiction;¹

- (b) the functions and powers of the Director make it clear that the Director is in the business of building residences for the purposes of the Act;
- (c) construing the words used in s 7(2)(b) the Act, establishes that the Act is intended to apply to the Director;
- (d) it is consistent with the overall objective of the Act for it to apply to the Director.

Finding of a Jurisdictional Fact

15 In apparent reliance upon *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)*², Structx contended that the finding made by the Adjudicator that the Act applies to the Director, is a finding of a jurisdictional fact which was open for him to make, with the result that even if the Adjudicator erred in deciding the jurisdictional fact, the Adjudicator remains within jurisdiction.

16 However, as the Court observed in *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)*:³

In short, it seems to me that, though critical in some cases (as was recognised by the High Court in *Craig* at 179), the distinction between a court of law and a true administrative tribunal is essentially of importance only if and in so far as the nature of the one or the other sheds any light on deciding the intention of the Parliament in committing the task at stake to the body in question - and in particular whether that task includes not only the power to decide but also the power to decide wrongly (and whether on questions of fact or law) without attracting prerogative relief: compare *Newcastle Wallsend Coal Co Pty Ltd v Court of Coal Mines Regulation* (1997) 42 NSWLR 351 at 386-7, contrast 390-1.

And further:

It is just that on questions of fact it is perhaps even less likely that the body in question will have strayed outside its jurisdiction. Administrative tribunals are commonly charged with determination of the facts (as of course are courts) and error in making a decision in that regard is less likely to attract certiorari for jurisdictional error. That is not to say that error of fact may not in certain circumstances amount to jurisdictional error; it may. For example error on a question of fact will go to jurisdiction if the jurisdiction of the tribunal is conditioned upon some event's having occurred, as distinct from the tribunal's deciding, rightly or wrongly, that it has occurred. In the former case, the

¹ See *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* 2009 at [107] (Vickery J).

² [2009] VSC 426 at [107].

³ *Supra* at [104-107].

tribunal will have exceeded its jurisdiction if it proceeds otherwise than after the event has actually occurred: for example, *Potter v Melbourne and Metropolitan Tramways Board* [1957] HCA 43; (1957) 98 CLR 337. It is otherwise if the tribunal has had conferred upon it the jurisdiction to proceed after deciding that the event has occurred and thus irrespective of whether its decision on the fact was right or wrong. Such error may be open to correction on appeal (if an appeal lies) but it is not jurisdictional error. *Parisiennne Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; (1938) 59 CLR 369 at 388-9 per Dixon J, *R v Blakeney, ex parte Association of Architects etc. of Australia* [1950] HCA 40; (1950) 82 CLR 54 at 57-8.

Whether the question decided below has been one of fact or law, where the body in question, be it administrative tribunal or court of law, is authorised to decide the question without being guilty of jurisdictional error if it decides wrongly, the body will sometimes be described as having the power (or the jurisdiction) to decide "conclusively" or "authoritatively" (not meaning to exclude any right of appeal that may exist but meaning that the tribunal, even if it errs in deciding, still stays within its jurisdiction). Sometimes it will be described more vividly as having the power, or the jurisdiction, not only to go right but also to go wrong: *R v Governor of Brixton Prison, Ex parte Armah* [1968] AC 192 at 234 per Lord Reid (revisited by his Lordship in *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 at 171), *Parisiennne* at 374, 375, per Latham CJ. But whatever description is given it, the duty of the supervising court will be to determine whether the power of the decision-making body is as I have just described (in which case prerogative relief will not go) or is not so extensive as to exclude such relief.

Accordingly, in the present case each of the grounds raised in the originating motion will have to be considered to determine whether all or any of them raise jurisdictional error. In the course of this analysis it will be necessary to determine whether, in each case, an adjudicator was conferred with the power under the Act to determine the facts which establish his or her jurisdiction, such that, if an adjudicator errs in deciding the jurisdictional fact, the adjudicator still stays within his or her jurisdiction.

- 17 For the purposes of considering whether the Adjudicator is within jurisdiction, the Adjudicator is an administrative tribunal. As observed in *Grocon*:

They [adjudicators appointed under the Act] are clothed with legal authority to make a binding determination for the purposes of the Act which affect the statutory rights or obligations of persons or individuals who are claimants for progress payments under the Act or who are respondents to such claims.⁴

As such they are amendable to certiorari. However, an adjudicator appointed under the Act does not constitute an inferior court within the court hierarchy.

- 18 As observed in *Craig*, an adjudicator is therefore exposed to fall into jurisdictional error in a broader range of circumstances than a court.

⁴ Ibid at [49].

19 In the present case, I do not consider that the exception provided by s 7(2)(b) of the Act was intended to confer on an adjudicator the power to decide jurisdiction founded on questions of law or mixed questions of law and fact, which includes the power to decide the question wrongly, without attracting prerogative relief.

20 The fundamental jurisdictional question in this case was whether the Director was “in the business of building residences”. A “business” is not defined in the Act. The determination is a mixed question of law and fact. The question of law must be determined on the usual rules which apply to the construction of legislation. An adjudicator is not required by the Act to be legally qualified. The Act does not demonstrate an intention that the determination of such a question be assigned to an adjudicator immune from judicial review by a court with the capacity to grant prerogative relief.

21 For these reasons, the decision made by the adjudicator under s 7(2)(b) of the Act, that the Director was “in the business of building residences”, is open to judicial review by way of certiorari.

Whether Director in the Business of Building Residences

22 The Adjudicator made the following determination as to his jurisdiction:

having carefully considered the provisions referred to me, I am not persuaded that the Director of Housing is a building owner within the meaning of the *Domestic Building Contracts Act 1996* rather than a building owner which is in the business of building residences in the sense referred to in the proviso contained in section 7(2)(b) of the Act.

It was on this principal basis that the Adjudicator found that the Act applied to the Construction Contract in question.

23 In my opinion, the Director was not “in the business of building residences” within the meaning of s 7(2)(b) of the Act, and for this reason the proviso did not operate to exempt the Construction Contract from the operation of the Act.

24 I accept that the Construction Contract in this case is a domestic building contract between a builder (Stuctx) and a building owner (the Director) within the meaning of

the *Domestic Building Contracts Act 1995*. The contract was for the carrying out of domestic building work within the meaning of that act, the work being for the construction of a home or homes as defined in s 5(1). As noted above, a “builder” for this purpose means a person who, or a partnership which:

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work; and a “building owner” means the person for whom domestic building work is being, or is about to be, carried out.

25 Therefore, at least *prima facie*, the Act applies to the Construction Contract.

26 The question then becomes, did the exception provided by s 7(2)(b) apply because the building owner (the Director) is or was at the relevant time *in the business of building residences and the contract is or was entered into in the course of, or in connection with, that business?*

Whether s 7(2)(b) the Act is Intended to Apply to the Director

27 As aforementioned, “business” is not defined in the Act. A glance at the Oxford Dictionary⁵ shows that the word has a number of meanings. It is necessary to engage in a process of construction in order to arrive at the meaning of the word as it is used in s 7(2)(b) of the Act. The ordinary and natural meaning in the context of the section must be adopted, having regard to the statutory purpose to be served.

28 The expression “in the business of building residences ...” connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.

29 Reference is made to *Hope v Bathurst City Council*.⁶ The appellant before the High Court, was the owner and occupier of certain land known as “Hassall Park”, situated at Kelso near Bathurst. He appealed under s 118 (7) of the *Local Government Act 1919* (NSW), as amended, against the decision of the respondent Bathurst City Council that

⁵ 2004 4th edition.

⁶ (1980) 144 CLR 1.

his land, the subject of a rate notice for the year 1978, was not rural land, with the consequence that he was not entitled to the benefit of the lower general rate made in respect of rural land. The expression "rural land" was relevantly defined in s 118 (1) of the *Local Government Act* as:

a parcel of ratable land which is valued as one assessment and exceeds 8,000 square metres in area, and which is wholly or mainly used for the time being by the occupier for carrying on one or more of the *businesses or industries* of grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping horticulture, vegetable growing, the growing of crops of any kind or forestry.

As identified by Mason J,⁷ this definition threw up as an issue for determination by the primary judge, the question whether the appellant's land was wholly or mainly used by him for carrying on the business or industry of grazing.

30 Mason J, with whom the other members of the Court agreed⁸ said:

I accept, then, that "business" in the sub-section has the ordinary or popular meaning which it would be given in the expression "carrying on the business of grazing". It denotes grazing activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis.⁹

31 I accept that the expression "in the business of building residences ...", as it is used in s 7(2)(b) of the Act has a similar meaning.

32 This conclusion is echoed in *National Management Services v Cth*.¹⁰ In that case the Supreme Court of New South Wales (McLelland J) considered whether the Commonwealth was engaged in business in the context of a claim under the *Trade Practices Act 1974*. It should be noted that s 4 of the *Trade Practices Act* expressly defined "business" to include a business not carried on for profit. In *National Management Services* the Commonwealth had contracted with the plaintiff to carry out building works at an office development for its use. The Court found in the following passage that the Commonwealth was not engaged in business:

⁷ Supra at 5.

⁸ Gibbs, Stephen, Murphy and Aickin JJ.

⁹ Ibid at 8-9.

¹⁰ (1993) 9 BCL 190.

... There is nothing to suggest that in relation to the development of the site the Commonwealth was engaged in a trading or commercial activity which could appropriately be characterised as carrying on a business.¹¹

33 The critical issue before the Court is whether the material before it warrants a finding that the Director was in fact engaged “in the business of building residences” within the meaning of the phrase as I have construed it.

34 I accept that the Director is vested, inter alia, with the following powers under the *Housing Act 1983* (Vic) (“*Housing Act*”):

- (a) Acquire and dispose of land;¹²
- (b) Create or extinguish easements or restrictive covenants over land;¹³
- (c) Borrow or lend money;¹⁴ and
- (d) Enter into agreements.¹⁵

35 Further, pursuant to s 15 *Housing Act*, the Director is vested with the power to develop and manage land. This includes the power to:

- (a) develop any land which is vested in the Director or in respect of which the Director has a leasehold estate;
- (b) generally control, manage or use any land which is vested in or leased to or subject to any mortgage or security in favour of the Director; and
- (c) maintain and repair and generally control, manage or use any houses and building situated on any such land as is referred to in paragraph (b).

36 The objects of the *Housing Act* are defined in s 6 as follows:

6. Objects

- (1) The objects of this Act are-
 - (a) to ensure that every person in Victoria has adequate and appropriate housing at a price within his or her means by encouraging-
 - (i) the provision of well maintained public housing of suitable quality and location;

¹¹ Supra at [198].

¹² *Housing Act 1983* (Vic) (“*Housing Act*”) s 14.

¹³ Ibid s 16.

¹⁴ Ibid, s 20, s 21.

¹⁵ Ibid, s 33.

- (ia) the participation of non-profit bodies in the provision of well maintained, affordable rental housing of suitable quality and location;
- (ii) the distribution, according to need, of Government housing financial assistance;
- (iii) the promotion of the orderly planning, assembly and development of land;
- (b) to expand and develop the role of the public sector in the provision of housing;
- (c) to promote cost effectiveness in the provision of housing;
- (d) to promote the integration of public and private housing;
- (e) to provide in the public sector a variety of housing types in various locations;
- (ea) to provide a regulatory framework to encourage the development of rental housing agencies serving the housing needs of low-income tenants by providing for the registration of those rental housing agencies and the regulation and monitoring of registered agencies;
- (f) to promote security and variety of tenure;
- (g) to seek the participation of tenants and other community groups in the management of public housing and non-trading co-operatives engaged in the provision of rental housing to their members;
- (h) to promote consultation on major housing policy issues with all persons and groups of persons involved in housing;
- (i) to monitor the house building and housing finance industries in both the public and private sectors and to assist those industries to achieve growth and stability;
- (j) to co-ordinate the provision of all necessary community services and amenities ancillary to public housing;

37 However, the fact that the powers described are conferred on the Director does not mean that the Director is in the business of building residences. Section 7(2)(b) speaks in terms of the actual business which the building owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity.

38 Further, even if it was possible for the Director acting within power to undertake the construction of dwelling houses as a commercial enterprise, for profit, on the basis of

a going concern on a continuous and repetitive basis (a matter on which I make no finding), this would not lead to the exception in s 7(2)(b) being enlivened, unless there was sufficient evidence to found a finding of fact that the Director was indeed engaged in such an undertaking.

39 There was no evidence that the Director is or was at any time in the business of building residences within the meaning of s 7(2)(b) of the Act. The statutory provisions contained in the *Housing Act* go no further than establishing that the Director is a government body providing and promoting affordable housing to Victorians. Insofar as the Director arranges, as an owner of land or as lessee for the construction of residences, it does so principally in pursuit of the objectives set out in s 6 *Housing Act*.

40 I am not satisfied that there is any probative evidence upon which the Court can act to determine that the Director is or was at any material time in the business of building residences.

41 Accordingly, to the extent that the Adjudicator concluded that the Director was in the business of building residences, he erred as to a jurisdictional question, and certiorari may be issued.¹⁶

Whether Consistent with the Objectives of the Act

42 It was submitted on behalf of Structx that the Act, being beneficial legislation, should be construed with a broad reach in order to give effect to its object. As observed in *Hickory Developments v Schiavello*:

The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot

¹⁶ *Asian Pacific Building Corporation v Aircon Duct Fabrication* [2010] VSC 300 at [79].

stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.¹⁷

43 However, in my opinion, the text of s 7(2)(b) of the Act, considered in its context, does not warrant any extension of the concept “in the business of building residences” as the phrase is properly construed, to embrace a building owner which is not accustomed to undertake work of that description. Such an exercise would involve re-writing the legislation as it is currently drawn.

Whether a Valid Payment Schedule

44 The Adjudicator found that there was no payment schedule on two bases:

- (a) the architect lacked authority to issue payment schedules; and
- (b) the payment schedule did not comply with section 15(2)(d) of the Act in that it was not in a form prescribed by the contract.

45 These findings had a significant influence on the Adjudicator’s approach to the matter before him. He determined:

Accordingly, pursuant to section 21(2A) of the Act, the respondent is not permitted to provide an adjudication response. The respondent’s submission dated 22nd March 2011 has therefore not been considered [by me] other than for the jurisdictional issue addressed at point 7 to 11.

46 Before dealing with this issue, it is necessary to trace the short history of the payment claim issued by Structx, and the payment schedule relied upon by the Director.

47 By a tax invoice dated 4 February 2011, Structx issued and served on the Director’s agent, the Department of Human Services, a payment claim. It was duly endorsed in accordance with the Act: “This Claim is being made under the *Building and Construction Industry Security of Payment Act 2002*”. The claim was for \$360,311.95. In the attached statutory declaration signed by a director of Structx it was described as “Progress Claim No 6”. I accept that this was a payment claim properly made by Structx under the Act.

¹⁷ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156 at [2].

48 The payment schedule relied upon by the Director was dated 14 February 2011. It was stated to be in respect of "Claim No. 6". It was signed by Neil Holland, who was described as "Superintendent's Representative" on the "Progress Payment Claim Form" and as "Neil Holland, Creative Architects, Warrnambool" on a document headed "Progress Certificate". The sum of \$124,355 was certified as being payable on the payment claim made by Structx. This sum was subsequently paid by the Director.

Authority of the Architect to Issue a Payment Schedule

49 Structx contended that there were two matters which constituted "strong probative evidence" that Neil Holland did not have the authority of the Director to issue a payment schedule under the Act.

50 First, Structx submitted that there was no term of the Construction Contract which authorised the issuing of a statutory payment schedule. However, in my opinion, the absence of such a provision in the contract is not of itself probative evidence capable of supporting a conclusion that the Director's architect did not have authority to issue a payment schedule.

51 Structx also placed reliance on letter dated 23 September 2010 which appointed persons as the "Superintendent's Representatives" pursuant to the General Conditions of the Construction Contract. The relevant condition contained in AS 2124 - 1992, being clause 24, was in the following terms:

24 SUPERINTENDENT'S REPRESENTATIVE

The Superintendent may from time to time appoint individuals to exercise any functions of the Superintendent under the Contract but not more than one Superintendent's Representative shall be delegated the same function at the same time. The appointment of a Superintendent's Representative shall not prevent the Superintendent from exercising any function.

The Superintendent shall forthwith notify the Contractor in writing of-

- (a) the appointment and the name of any Superintendent's Representative and the functions delegated to the Superintendent's Representative;
- (b) the termination of the appointment of a Superintendent's Representative.

If the Contractor makes a reasonable objection to the appointment of a representative, the Superintendent shall terminate the appointment.

52 The relevant part of the letter dated 23 September 2010 was in the following terms:

Pursuant to the General Conditions of Contract, you are advised that the following nominee(s) are hereby appointed as Superintendent's Representatives for the time being, to exercise the particular powers, duties, discretions and authorities that are listed under each respective name:

Project Manager
Paul Filiadis

Approve variation costs, evaluate Extension of Time claims submitted and recommended by the Consultant, issue Progress Certificates; Practical Completion Certificate; authorise the final statement and recommend issue of Final Certificate.

Project Consultant
Mr Neil Holland of Creative Architects
21 Banyan Street
WARRNAMBOOL VIC 3280

Ensure that the contract works are in accordance with the contract documents, direct the Issue of Site Instructions pursuant to the provisions of the contract, authorise Possession of Site, endorse approval of subcontractors and approved suppliers, endorse contractor's claims for Department of Human Services supplied terms, check and recommend claims in respect of Progress Certificates and Variations, examine and recommend Extension of Time claims, convene and chair site meeting and distribute the minutes of same, recommend the issue of Practical Completion Certificates, check, negotiate and recommend issue of the Final Statement, sight and forward the Licensed Surveyor's set-out certificates of new building works to the Project Manager and including overseeing employment related compliance works.

Assess whether the contractor is in compliance with Occupational Health & Safety obligations under the contract and to undertake surveillance of contractor's and sub contractor's Occupational Health & Safety and Environmental Management compliance. (The Department of Human Services reserves the right to appoint an occupational health and safety auditor or direct the Project Consultant to appoint a nominated occupational health and safety auditor.)

The powers, duties, discretions and authorities as above are effective as of 23 September 2010.

53 The letter of 23 September 2010 did not appoint Neil Holland as a Superintendent's Representative, nor did it appoint Mr Holland as a person under the Act who was authorised by the Director to issue payment schedules on its behalf. However, in my opinion, the purpose of the letter was to nominate a Superintendent's Representative for the purposes of the Construction Contract, not the Act. It did not purport to limit

the Director's delegation of authority to the matters set out. Nor is it evidence that the architect did not have authority to issue a payment schedule under the Act.

54 There was no probative evidence to support the finding made by the Adjudicator that the architect was not authorised to issue a payment schedule. In finding that the architect lacked authority, the Adjudicator fell into error on the face of the record.

55 Accordingly certiorari may also be issued on this ground.¹⁸

Form of the Payment Schedule

56 The Adjudicator also found that the payment schedule was invalid, because it was not in any prescribed form.

57 This issue is simply resolved. Section 15(2)(d) of the Act provides that a payment schedule "must be in the relevant prescribed form (if any)". This is a reference to any form prescribed by regulation. However, there are no forms for payment schedules prescribed by regulation.

58 Accordingly, in finding that there was no valid payment schedule because the payment schedule did not comply with s 15(2)(d) of the Act, the Adjudicator fell into further error on the face of the record, and on this ground certiorari should also issue.

Breach of s 23(2)(d) of the Act

59 The Director further submitted that, by not taking into account the payment schedule and the Director's submissions based upon it, the Adjudicator failed to take into account matters which he was bound to take into account, contrary to s 23(2)(d) of the Act.

60 Section 23(2) of the Act provides:

- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only -
 - (a) the provisions of this Act and any regulations made under this Act;

¹⁸ *Asian Pacific Building Corporation v Aircon Duct Fabrication* [2010] VSC 300 at [79].

- (b) subject to this Act, the provisions of the construction contract from which the application arose;
- (c) 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;
- (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

61 In failing to take into account the payment schedule and the Director's submissions founded upon it, as required by s 23(2)(d), the Adjudicator fell into further error on the face of the record, and certiorari should issue on this ground.

Natural Justice

62 Further, in failing to take into account the payment schedule and the Director's submissions founded upon it, the Adjudicator did not afford procedural fairness to the Director.

63 This amounted a substantial denial of the measure of procedural fairness required under the Act.

64 On this ground too, an order in the nature of certiorari should be made.

Jurisdictional Error following *Kirk v Industrial Court*

65 The question of jurisdictional error was discussed by the High Court in *Craig v South Australia*¹⁹ and more recently in *Kirk v Industrial Court (NSW)*.²⁰ The Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) commenced its analysis in *Kirk* from the following observation:²¹

As Professor Sawyer wrote, more than 50 years ago, the English common law courts sought to control inferior courts by "keeping the inferior tribunal within its 'jurisdiction' [which] may be equated with compelling the inferior tribunal to observe 'the law', ie, what the superior tribunal considers the law to be". Yet

¹⁹ (1995) 184 CLR 163.

²⁰ (2010) 239 CLR 531.

²¹ *Supra* at 568 [57].

at the same time "it [was] usually desired, for reasons of expediency, to give the inferior decision some degree of finality, or, as is often said, some jurisdiction to go wrong". Those two purposes pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied. As Sawyer wrote, "it is plain enough that the question is at bottom one of policy, not of logic". [Footnotes omitted]

66 The High Court proceeded to confirm the principles as stated in *Craig* and further explain the law relating to certiorari.

67 First, the High Court confirmed the distinction between inferior courts and administrative tribunals, and that jurisdictional error will more readily be found in an administrative tribunal rather than an inferior court. The basis for the distinction is "the lack of authority of an administrative tribunal (at least in the absence of contrary intent in the statute or other instrument establishing it) either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law". The Court continued, "[b]y contrast, it was said that 'the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine'."²²

68 Second, it was held that even where an inferior court is presumed to have authority to decide questions of law "authoritatively", this is not to conclude that the determination of any particular question is not open to review by a superior court:

Whether a particular decision reached is open to review is a question that remains unanswered. The "authoritative" decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by "jurisdiction" and "jurisdictional". It suggests that the observation that inferior courts have authority to decide questions of law "authoritatively" is at least unhelpful.²³

69 Third, it was held that the reasoning in *Craig* is not to be seen as providing a "rigid taxonomy of jurisdictional error:"

The three examples [in *Craig*²⁴] given in further explanation of the ambit of jurisdictional error by an inferior court are just that - examples. They are not to be

²² Ibid at [68].

²³ Ibid at [70].

²⁴ (1995) 184 CLR 163 at 177-178.

taken as marking the boundaries of the relevant field. So much is apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example.²⁵

70 Fourth, after considering constitutional issues, the Court held that the State Supreme Courts retain power to correct for jurisdictional error:

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.²⁶

71 It follows that the authority of this Court to quash an adjudication determination where jurisdictional error has occurred has been reinforced by *Kirk*.²⁷

Orders

72 The Court will make the following orders:

1. It is declared that the Director of Housing for the State of Victoria is not in the business of building residences within the meaning of s 7(2)(b) *Building and Construction Industry Security of Payment Act 2002* (Vic).
2. The adjudication determination made by the Second Defendant dated 29 March 2011 is quashed.

73 I will hear the parties on the question of costs of the proceeding and on any other consequential orders which should be made.

²⁵ Ibid at [72-73].

²⁶ Ibid at [100].

²⁷ See too: *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 which applied *Kirk* in the context of adjudications under the NSW legislation equivalent to the Victorian Act.