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

Not Restricted

No. 8731 of 2009

PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011) Plaintiff

v

RESOURCES COMBINED NO.2 PTY LTD (ACN 108 925 999) Defendant

No. 8732 of 2009

PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011) Plaintiff

v

JETOGLASS PTY LTD (ACN 006 256 239) Defendant

No. 8833 of 2009

PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011) Plaintiff

v

GANTLEY PTY LTD (ACN 113 690 574) Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	11 SEPTEMBER 2009
DATE OF JUDGMENT:	25 SEPTEMBER 2009
CASE MAY BE CITED AS:	PHOENIX INTERNATIONAL GROUP PTY LTD v RESOURCES COMBINED NO. 2 PTY LTD & ORS
MEDIUM NEUTRAL CITATION:	[2009] VSC 425 1st Revision

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic.) – Entry of judgment under s.27 of the Act as it was prior to the operation of Act No. 42 of 2006 – Recovery from the respondent of adjudicated amount as a debt due to the claimant in any court of competent jurisdiction – Form of the proceeding – Originating motion in Form 5C on notice to respondent appropriate – Order for entry of judgment by Associate Judge – Entry of judgment under s.28R of the Act after commencement of Act No. 42 of 2006 - Originating motion in Form 5D appropriate – Order for entry of judgment by Associate Judge ex parte

PRACTICE AND PROCEDURE - *Building and Construction Industry Security of Payment Act 2002* (Vic.) – Entry of judgment under s.27 of the Act as it was prior to the operation of Act No. 42 of 2006 – Recovery from the respondent of adjudicated amount as a debt due to the claimant in any court of competent jurisdiction – Form of the proceeding – Originating motion in Form 5C on notice to respondent appropriate – Order for entry of judgment by Associate Judge – Entry of judgment under s.28R of the Act after commencement of Act No. 42 of 2006 - Originating motion in Form 5D appropriate – Order for entry of judgment by Associate Judge ex parte

STATUTORY CONSTRUCTION - Whether amending enactment can throw light on the intention of an earlier enactment - .

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D.B. Sharp	Erhardt & Associates
For the Defendants	Mr M.A. Robins	Kliger Partners Lawyers

HIS HONOUR:

Introduction

1 These three related matters,[1] which were heard concurrently, arise from the operation in Victoria of the *Building and Construction Industry Security of Payment Act 2002*.

2 As I observed in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor*, [2] 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.[3] Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments 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 stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act. In *Hickory*,[4] I canvassed the purposes and objects of the Act, and the procedures designed to implement them, in some detail.

3 This legislation came into operation in Victoria on 31 January 2003. It has since been amended by Act No. 42 of 2006. The first of the amendments came into operation on 26 July 2006. These were relatively minor. The second and more substantial group of amendments commenced on 30 March 2007. Accordingly, the legislation in its present amended form (the "New Act") applies to construction contracts entered into on or after 30 March 2007. For construction contracts entered into on or after 31 January 2003, but prior to 30 March 2007, the legislation in its unamended form (the "Old Act") applies, save for the minor amendments which became operative on 26

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1 *Phoenix International Group Pty Ltd v Resources Combined No2 Pty Ltd* (No. 8731/09); *Phoenix International Group Pty Ltd v Jetoglass Pty Ltd* (No. 8732/09) and *Phoenix International Group Pty Ltd v Gantley Pty Ltd* (No. 8833/09).

2 [2009] VSC 156 at [2].

3 *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act* (NT); and *Building and Construction Industry Payments Act 2004* (Qld).

4 (2009) VSC 156 at [36-65].

July 2006.[5] The amendments to the legislation which have effect from 30 March 2007 include a process for enforcing payment of unpaid adjudicated amounts due to a claimant by a method of fast track entry of judgment in courts of competent jurisdiction.

4 In this case, the plaintiff Phoenix International Group Pty Ltd ("Phoenix") entered into a construction contracts with each of the defendants in respect of different construction projects. I shall briefly outline each of the projects by reference to the different defendants in each case and the separate proceedings.

Phoenix v Resources (No. 8731 of 2009)

5 In this matter, Phoenix entered into a construction contract with the defendant, Resources Combined No. 2 Pty Ltd ("Resources"), on 20 January 2006. Pursuant to the contract Phoenix was to construct 8 townhouses at Blackhill in Ballarat, Victoria for Resources, which was the owner of the land. The principal of Resources was Zygmunt Zayler. Accordingly, the Old Act applies to the construction contract.

Phoenix v Jetoglass (No. 8732 of 2009)

6 In this matter, Phoenix entered into a construction contract with the defendant Jetoglass Pty Ltd ("Jetoglass") on 6 December 2005. Pursuant to the contract Phoenix was to construct 2 townhouses in Beaumaris, Victoria for Resources, which was the owner of the land. Again, the Old Act applies to this construction contract.

Phoenix v Gantley (No. 8833 of 2009)

7 In this matter Phoenix entered into a third construction contract with the defendant Gantley Pty Ltd ("Gantley") on 2 October 2006. Pursuant to the contract Phoenix was to construct 20 apartments in Hawthorn, Victoria for Resources, which was the owner of the land. Again, the Old Act applies to this construction contract.

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5 See the transitional provision: s. 53 *Building and Construction Industry Security of Payment Act 2002* (as amended).

The Payment Claims and Adjudications

8 In May and July 2009, Phoenix served payment claims on Resources pursuant to the Old Act in respect of construction work done under the construction contracts in all three matters. In response to the payment claims, each of the defendants served payment schedules under the Old Act disputing the whole of the claims made by Phoenix.

9 Pursuant to the Old Act, Philip Davenport was appointed to act as the adjudicator in respect of the three disputed payment claims. Resources, Jetoglass and Gantley delivered submissions in the adjudications which contended that the payment claims in each case were contrary to the Old Act and invalid, and that each of the sums claimed were not due to Phoenix.

10 By adjudication determinations each dated 24 August 2009, the adjudicator determined that the sums claimed by Phoenix pursuant to its payment claims in each matter were due to it. However, Resources, Jetoglass and Gantley failed to pay the adjudicated amounts, or any part of those sums.

Phoenix Applications for Judgment

11 Phoenix made an application ex parte to this Court at about 5 pm on 4 September 2009 for judgment to be entered in respect of the unpaid adjudicated amounts in the Resources and Jetoglass proceedings. Phoenix also made application for the issue of a debt certificates in the two matters purportedly pursuant to ss.32 and 33 of the legislation. The applications were said to be made on an urgent basis. There was no originating process filed in relation to either of the applications. The applications were supported by affidavits of Tanya Belaj sworn 3 September 2009 filed in each matter.

12 The affidavit filed by Phoenix in the Resources matter deposed as follows:

> 1. I am the Director of the Claimant Company and as such am duly authorised by it to make this affidavit on its behalf. Save and insofar as otherwise indicated, I make this affidavit from facts and matters within my own personal knowledge, and am able to swear positively thereto.

2. On 24 August 2009, an Adjudication in this matter was determined by the Adjudicator, Philip Davenport. The Adjudicator awarded an amount of $586,761.50, including GST to the Claimant. The Adjudication determination was received by the parties to the Adjudication on the 28 August 2009. in addition, the Adjudicator apportioned his fee of $7,733 in the proportion of 50% to the Respondent and 50% to the Claimant. Now produced and shown to me and marked TDB1 is a copy of the Adjudication certificate and the Adjudicator's reasons for his determination. Also a duly receipted tax invoice for the amount of his fee, which fee has been paid fully by the Claimant.

3. As of the date hereof no payment has been received of any part of the Adjudicated amount or of the Respondent's proportion of the Adjudicator's fee.

4. In the premises, the Claimant respectfully requests that Judgment be entered in favour of the Claimant in the amount of $586,761.50 being $582,895, the amount awarded, plus 50% of the fee, being $3,866.50

13 The affidavit filed by Phoenix in the Jetoglass matter was to like effect, save that, based on the applicable adjudication determination, the claimant requested that judgment be entered in its favour in the amount of $62,165.50, comprised of $59,927 being the amount awarded, plus 50% of the adjudication fee, amounting to $2,238.50.

14 On the application made to the Court on 4 September 2009, Phoenix was represented by counsel. There was no appearance on the part of Resources or Jetoglass, and the short hearing was conducted ex parte. The plaintiff's material supporting the application had not been served on Resources or Jetoglass. The Court made the following orders in the Resources matter at the conclusion of the hearing:

> Upon the Claimant's Counsel undertaking to file an originating motion with the Prothonotary on Monday 7 September 2009 by 4 pm the Court orders that:
>
> 1. There be judgment in favour of the Claimant, Phoenix International Group Pty Ltd, against the Respondent in the sum of $586,761.50 together with the costs of the adjudication being $3,866.50.
>
> 2. Pursuant to s.33 of the *Building and Construction Industry Security of Payment Act 2002*, a Debt Certificate be issued under this section to be signed by the Prothonotary.
>
> 3. The Respondent pay the Claimant's costs.

15 Orders to similar effect were made in the Jetoglass matter, save that the judgment entered reflected the different sums claimed by Phoenix in that matter.

16 The orders in both matters were authenticated by the Court on 4 September 2009.

17 On Monday 7 September 2009, following an oral ex parte application made by counsel for Phoenix in the Resources matter pursuant to the "slip rule",[6] paragraph 1 of the orders made 4 September 2009 in that matter was amended to adjust the judgment sum from $586,761.50 to $582,844.50 "together with costs of the adjudication being $3,866.50".

18 A similar order was made in the Jetoglass matter on 7 September 2009, to adjust the judgment sum in that matter from $62,162.50 to $59,924.00 "together with costs of the adjudication being $2,238.50".

19 On Monday 7 September 2009, Phoenix filed originating motions in each of the Resources and Jetoglass matters in Form 5D. On 10 September 2009 it also filed an originating motion in Form 5D seeking the entry of judgment in the Gantley matter and the issue of a debt certificate.

Resources and Jetoglass Applications to Set Aside the Judgments

20 On 11 September 2009 Resources and Jetoglass made application to the Court, on notice to Phoenix, in respect of the orders which had been made. They contended that the Old Act applied to their construction contracts with Phoenix and not the New Act. Consequently the "fast track" procedure provided for in s.28R of the New Act had no application and s.27 of the Old Act should have been applied. As a result, it was contended, the judgments entered on 4 September, as amended on 7 September, were irregular and a nullity because the process contemplated by s.27 of the Old Act had not been complied with.

Gantley Application for Judgment

21 In the third matter, on 11 September 2009, Phoenix also made application to the Court for entry of judgment against Gantley in the proceeding which had been commenced in this particular matter. The application was made pursuant to the originating

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6 Order 36.07 *Supreme Court (General Civil Procedure) Rules 2005*.

motion in Form 5D which had been filed, which was supported by an affidavit in similar form to those filed previously in relation to the other matters, save that the claimant requested that judgment be entered in its favour in the amount of $1,273,572.00, being $1,263,804.00 the amount awarded, plus 50% of the fee, being $9,768.00. Phoenix also made application for the issue of a debt certificate against Gantley pursuant to s.33 of the legislation.

The Debt Certificates and the Statutory Assignment Enforcement Procedure

22 At the hearing on 11 September 2009, Resources, Jetoglass and Gantley submitted that there was no proper basis for the issue of the debt certificates pursuant to s. 33 of either the Old Act or the New Act.

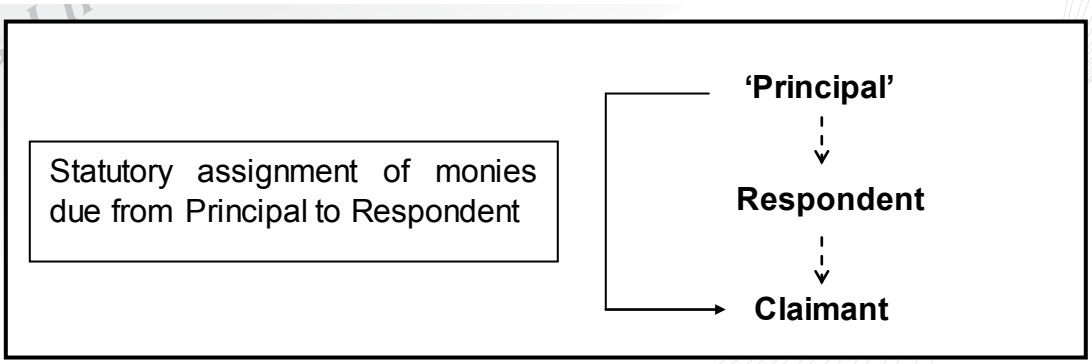
23 On the return of the matter on 11 September 2009, Mr Sharp of counsel, who appeared for Phoenix conceded, in hindsight, that there was in fact no basis for the issue of the debt certificates.

24 The issue of a debt certificate pursuant to s. 33 of the legislation is part of a second tier of enforcement provided by the legislation for a claimant which has not been paid its adjudicated amount by a respondent to a progress claim. Division 4 of Par 3 of both the Old Act and the New Act provides a complementary system of recovery for a claimant who remains unpaid following an adjudication in its favour, and following the entry of judgment against the unsuccessful respondent for the adjudicated amount. In these circumstances, the unpaid claimant may also make a claim against a third party who is described in the legislation as the "Principal". This enables a claimant to, in effect, "garnishee" payments due from that Principal to the non-paying respondent under a construction contract.

25 To facilitate this process, a scheme of statutory assignment is provided for. It works like this: if a claimant has been awarded an adjudicated amount against a respondent by an adjudicator, and following non-payment of the adjudicated amount or part of that amount by the respondent, the claimant has entered judgment against the respondent for the unpaid sum, the claimant may then obtain payment of the

outstanding adjudicated amount out of money that is payable, or becomes payable, to the respondent by some other person (the "Principal") for construction work or goods and services that the Principal engaged the respondent to carry out or supply under a contract, provided that the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the Principal engaged the respondent to carry out or supply: s.31. The process is described diagrammatically below:

STATUTORY ASSIGNMENT PROCESS (Part 3, Division 4)
(Recovery from Principal)



26 In order to obtain the statutory assignment, a claimant is required to follow the procedure provided for in the legislation: ss.32–34. These sections are set out below:

> **32. Procedure for obtaining payment**
>
> (1) The following procedure must be followed to obtain payment of the money owed-
>
> (a) firstly, a debt certificate must have been issued for the money owed (as provided by section 33); and
>
> (b) secondly, the claimant must serve a notice of claim on the principal.
>
> (2) A notice of claim is a notice in the prescribed form together with a copy of the debt certificate.
>
> **33. Certification of debt by court**
>
> (1) When judgment is given or entered in proceedings for the recovery of an adjudicated amount as a debt, the court may, by

order made on the application of the claimant, issue a certificate (a debt certificate) in respect of the debt under this section.

(2) A debt certificate is to be in a prescribed form.

(3) In this section, judgment includes a default judgment.

34. Notice of claim operates as assignment of debt

(1) The service of a notice of claim on the principal operates to assign to the claimant the obligation of the principal to pay the money owed under the contract to the respondent.

(2) The assignment is limited to the claimant's certified debt.

(3) The assignment is subject to any prior assignment under this Division that is binding on the principal and the respondent.

27 A priority of assignments is provided for by s.35. Section 35(1) says in this regard:

35. Payment of respondent's debt by principal

(1) After a notice of claim is served on a principal in accordance with this Division, the principal must pay to the claimant the money that the principal owes to the respondent under the contract with the respondent.

28 In this case, however, the statutory assignment process established under Division 4 of Part 3 of the legislation, as conceded by Mr Sharp of counsel, who appeared for Phoenix, had no application. This was because, in each case, there was no third party "Principal". Phoenix was engaged directly by Resources, Jetoglass and Gantley to undertake separate construction work on different projects. Resources, Jetoglass and Gantley respectively were the owners of the land on which the construction work was to be undertaken. Resources, Jetoglass and Gantley were therefore both the respondent to each of the progress claims and the "Principal" on each project.

29 Accordingly, there being no basis for the issue of any debt certificate in each matter pursuant to s.33 of the legislation, on the return of the matter before me on 11 September 2009, I made the following order by consent in relation to the Resources and Jetoglass matters:

1. Paragraph 2 of the Order dated 7 September 2009 is revoked.

30 Further, Mr Sharp quite properly did not press for the issue of a debt certificate in relation to the Gantley matter.

Procedure for the Entry of Judgment

31 The principal question for consideration in these reasons relates to the appropriate procedure to be adopted for the entry of judgment, pursuant to s.27 of the Old Act. This section has now been repealed by the amending Act No. 42/2006, but still operates in respect of progress claims made under construction contracts entered into between 31 January 2003 and 30 March 2007. Section 27 provides:

> **27. Consequences of not complying with adjudicator's determination**
>
> (1) This section applies if, on or before the relevant date, a respondent fails to do one or the other of the following –
>
> (a) to pay the whole or any part of the adjudicated amount to a claimant;
>
> (b) to give security for payment of the whole or any part of the adjudicated amount to a claimant
>
> (2) In those circumstances, the claimant -
>
> (a) may recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction –
>
> (i) the unpaid, or unsecured, portion of the adjudicated amount; and
>
> (ii) interest at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* on the adjudicated amount calculated from the relevant date until judgment is entered in respect of the debt; and
>
> (b) may serve notice on the respondent of the claimant's intention –
>
> (i) to suspend carrying out construction work under the construction contract; or
>
> (ii) to suspend supplying related goods and services under the construction contract
>
> (3) A notice referred to in sub-section (2)(b) must state that it is made under this Act.
>
> (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).
>
> (5) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.
>
> (6) In this section, **"relevant date"** means –

(i) the date occurring 4 business days after the date in which the relevant determination is made under section 23; or

(ii) if the adjudicator determines at a later date under section 23(1)(b), that later date.

32 Upon the repeal of s. 27 of the Old Act by the amending Act No. 42/2006, in its place, a new statutory mechanism for the entry of judgment is provided by ss. Division 2B of Part 3 of the New Act. By way of summary, the new regime not operates as follows: if an adjudicator or a review adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date provided for: s.28M and s.28N; if the respondent fails to pay the whole or any part of an adjudicated amount in accordance with s.28M or 28N, the claimant may request the authorised nominating authority, to whom the adjudication application or the adjudication review application was made, to provide an adjudication certificate: s.28O; a similar facility is provided where it is the claimant that has not paid an adjudicated amount found due to a respondent: s.28P; following these procedures, an adjudication certificate in the prescribed form is to be issued by the relevant nominating authority: s.28Q.

33 Following compliance with the above process, s.28R of the New Act is enlivened. This section is of central importance in the present case. It provides:

28R. Proceedings to recover amount payable under section 28M or 28N

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

(2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court-

(a) the adjudication certificate; and

(b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.

(4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

(5) If a person commences proceedings to have the judgment set aside, that person-

(a) subject to subsection (6), is not, in those proceedings, entitled-

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

(6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

(7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.

(8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

34 In introducing the Bill in relation to what became the amending Act No. 42/2006, the Attorney General Mr Hulls said of the new enforcement provisions:[7]

> Furthermore, the bill creates an expedited process for enforcing statutory liability through the courts. This is modelled on the New South Wales system. It applies where a respondent fails to pay an adjudicated amount by the due

7 Vic Hansard - Building and Construction Industry Security of Payment (Amendment) Bill, second reading, 9 February 2006, pp. 220–221.

> date. A claimant will be able to request a certificate (stating the adjudicated amount) from the authorised nominating authority, and lodge the certificate in an appropriate court, as an application for judgment debt. This process avoids the time and costs of a court hearing, while also preventing a respondent from delaying payment by raising inappropriate defences and counterclaims.
>
> Cash flow is the lifeblood of the construction industry. It is critical that industry participants obtain prompt interim payment, pending a final determination of the matters in dispute.
>
> …
>
> Clause 28R sets out a procedure for the bringing of proceedings in a court of competent jurisdiction for judgment to enable recovery of an unpaid adjudicated amount. It also provides that a person who brings proceedings to have that judgment set aside cannot challenge the adjudication determination or review determination made by the adjudicator or review adjudicator except on specified grounds. The reason for this restriction is to provide a timely, streamlined process for enforcing the adjudicated debt. This provision will not prevent a person from bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress payment process. Section 47 of the principal Act preserves this right.

35 Section 25 of the New South Wales Act, being the *Building and Construction Industry Security of Payment Act 1999* (NSW), is the Act referred to by the Attorney General upon which the amended enforcement provisions, which include s.28R, were modelled. Section 25 of the New South Wales Act provides expressly for the filing of an adjudication certificate as a judgement for the debt in question. The adjudication certificate is to be accompanied by an affidavit by the claimant, stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed. It is plain that the judgment entered is pursuant to an ex parte process, but with a facility provided to a respondent to set aside the judgment on limited grounds. Section 25 of the New South Wales Act provides:

> **25. Filing of adjudication certificate as judgment debt**
>
> (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
>
> (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
>
> (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

36 In Victoria, in my opinion, the procedure reflected in s.28R of the New Act is the same as that set out in s.25 of the New South Wales Act, save that in Victoria, the reference to "proceeding" in s.28R(2) requires the commencement of a proceeding under the rules of the court of competent jurisdiction in which the judgment is sought under s. 28R(1).

37 There is a very clear intention reflected in the express words of the New Act in Victoria to provide a fast track procedure for the entry of judgment which may be undertaken ex parte. In the first place, s. 28R(2) now provides for two specific documents to be filed in the relevant court to found the judgment, namely (a) the adjudication certificate, containing the information referred to in s. 28Q(1); and (b) an affidavit stating that the whole or part of the adjudicated amount has not been paid at the time of filing the certificate. No other evidence is necessary. Second, provision is made for the respondent to set the judgment aside, but only on limited grounds which are not excluded by s. 28R(5). In particular, in taking any such proceeding, the respondent is not entitled to challenge an adjudication determination or a review determination: s. 28R(5)(a)(iii). This points strongly to the adjudication certificate as a document which is intended to provide prima facie evidence the outcome of the adjudication determination or a review determination, upon which the court may act in entering judgment. Then procedure in my view is clearly designed to enable a court to enter judgment 'on the papers' on the basis of the documents provided under s. 28R(2), upon being satisfied of the matters referred to in s. 28R(4), namely that the

respondent has failed to pay the whole or any part of the adjudicated amount to the claimant. This will be able to be readily gleaned from the papers if they are in proper form.

38 In the Supreme Court of Victoria, the appropriate process which most closely approximates the New South Wales procedure and gives effect to the intended operation of the New Act in Victoria, is the issue of an originating motion in Form 5D pursuant to Order 5.02 *Supreme Court (General Civil Procedure) Rules 2005*. An originating motion in Form 5D is the proper form where there is no defendant: Order 4.05(a). In my opinion, it is not intended by the legislation in its amended form that any process to enter judgment pursuant to s.28R should be undertaken on notice to the party which has not paid the full sum comprised in the adjudicated amount. The terms of s.28R(5) underline this construction by providing a specific facility for the party which is subject to a judgment entered under the section, to have that judgment later set aside, other than on the grounds excluded by s. 28R(5). Upon issue of the Form 5D originating motion, judgment may be immediately entered on application to an Associate Justice. Judgment may be entered "on the papers" comprising the s.28R(2)(a) adjudication certificate and the s.28R(2)(b) affidavit, without the necessity for any appearance, upon the Court being satisfied of the matters referred to in s.28R(4).

39 It was in accordance with this process that I was prepared to enter the judgments for Phoenix in the Resources and Jetoglass matters on 4 September 2008 subject to the filing of an originating motion in each matter, upon reading the adjudication certificates and the supporting affidavits filed in each matter, and upon being satisfied that s.28R(4) had been complied with.

40 However, on hearing argument in the application made before me by Resources and Jetoglass on 11 September 2008, it was confirmed that the dates when the relevant construction contracts were entered into, meant that it was the Old Act which applied, not the New Act. This submission also highlighted the differences in procedure for the entry of judgment under the Old Act and the New Act and raised the question as

to the appropriate procedure which should have applied to the entry of judgment pursuant to s.27 of the Old Act.

41 As I said in *Martino Developments v Doughty*[8] there is high authority for the proposition that the terms of an amending enactment can throw light on the intention of an earlier enactment.[9] The generally accepted foundation for the learning in Australia is the judgment of Dixon J in *Grain Elevators Board (Vic) v Dunmunkle Corp*.[10] In 1942 the *Grain Elevators Act 1942* (Vic) was enacted as an Act to amend the *Grain Elevators Act 1934* (Vic). This was only three weeks after the striking of the municipal rate which was in issue in the proceeding. The amending Act provided a specific exemption from the liability to pay certain rates. The question was whether the exemption already existed under the earlier legislation which operated prior to the introduction of the amending Act. His Honour said:[11]

> Although the provision was passed too late to apply to the present case, I think that it may be considered on the question of interpretation. It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile.

42 In *Hunter Resources Ltd v Melville*,[12] Dawson J[13] expanded upon the approach in *Grain Elevators* with the following observations:

> In *Grain Elevators Board (Vict) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70, at p 86 Dixon J. expressed the view that an amending Act might be taken into account in the interpretation of the prior legislation, at least to avoid a result that would render the amending legislation unnecessary or futile. I would add that it is but a short step to take, having regard to the expanded scope of the materials which now may be considered, to adopt the same approach in order to avoid rendering the amending legislation deficient. After all, what lies behind the observation of Dixon J. in *Dunmunkle* is that it is permissible to ascertain the intention of the legislature with regard to prior legislation by reference to amending legislation. No doubt there are limits to this approach for as the House of Lords said in *Ormond Investment Co v Betts*

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8 [2008] VSC 517.

9 *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539 per McHugh J citing *Grain Elevators Board (Vic) v Dunmunkle Corp* (1946) 73 CLR 70, and the earlier English case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403 at 414.

10 (1946) 73 CLR 70.

11 *Supra* at 86.

12 (1988) 164 CLR 234.

13 *Supra* at 254–255.

> (1928) AC 143, at p 154 it is not permissible to construe an unambiguous phrase in an earlier Act by an erroneous assumption of its effect contained in a later Act which did not purport to amend or alter the earlier Act.

43 In *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd*[14] Callinan J, in citing both Dixon J in *Grain Elevators* and Dawson J in *Hunter Resources*, said:[15]

> That a legislature has subsequently made particular provision to cover relevant events or circumstances may provide an indication that the legislation as earlier enacted was not intended to cover those events or circumstances at an earlier time.

44 Kirby J (in dissent) in *Cook v Benson & Ors*[16] adopted a similar approach in expressing the following view on the issue:[17]

> Although subsequent amendments to legislation do not necessarily control the construction of statutory language as it existed prior to the amendment, in some cases the perceived need for a specific exemption may reinforce an impression, derived from the pre-amendment statutory provisions, that they did not go so far as the later amending provisions did.[18]

45 Consistently with the prevailing authority in Australia, I accept that an amending Act might be taken into account in the interpretation of the prior legislation in the manner described in the authorities cited.

46 In my opinion, the procedure contemplated by s.27 of the Old Act, as it continues to operate in respect of construction contracts entered into in Victoria between 31 January 2003 and 30 March 2007, requires notice of the proceeding pursuant to which judgment is proposed to be entered, to be given to the respondent to the application.

47 *Commissioner of Police v Tanos* [19] is on point. In this case the High Court was called upon to consider the appropriate procedure to be applied when a judge of the Supreme Court of New South Wales was petitioned to make a declaration that

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14 (2002) 209 CLR 651.

15 *Supra* at 670.

16 (2003) 214 CLR 370 (annotations omitted).

17 *Supra* at 394

18 Kirby J in this passage cited the following supporting authority: *Grain Elevators Board (Vict) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70 at 85-86; *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; (1996) 187 CLR 310 at 351.*Taikato v The Queen* [1996] HCA 28; (1996) 186 CLR 454 at 471-472; *Trust Company of Australia* [2003] HCA 23 at [89]- [91]; but compare [87], [92].

19 98 C.L.R. 383

premises be declared the be a disorderly house pursuant to the *Disorderly Houses Act 1943* (NSW). Section 3(1)(b) of the *Disorderly Houses Act* 1943 (NSW) provided:

> 3. (1) Upon the affidavit of a Superintendent or Inspector of Police showing reasonable grounds of suspecting that all or any of the following conditions obtain with respect to any premises, that is to say –…(b) that liquor or a drug is unlawfully sold or supplied on or from the premises or has been sold or supplied on or from the premises and is likely to be sold again on or from the premises…any judge of the Supreme Court may declare such premises to be a disorderly house.

Further, Regulation 1 of the Disorderly Houses Regulations provided:

> (1) An application to declare a premises a disorderly house under section 3(1) shall be made to the judge taking non-contentious matters in private chambers, upon an affidavit filed in the Prothonotary's Office setting out the grounds as required by the section. At the same time an order in or to the effect of Form No. 1 in the Schedule hereto shall be submitted for signature by the judge, and if granted a copy of the order shall be filed in the Prothonotary's Office forthwith. If the judge is of the opinion that reasonable grounds have been shown – (i) he may make the declaration immediately and ex parte if this seems to him necessary or desirable, or (ii) if he thinks that an opportunity should be given to the owner or occupier or both to oppose the making of the declaration he may direct them to be served with a copy of the affidavit and to be notified of the day on which the matter will be dealt with, such service and notification to be effected in such manner as may seem to him sufficient: when the matter comes on, the Superintendent or Inspector of Police or counsel or solicitor on his behalf may attend and be heard, and the matter shall be disposed of in public chambers.

48 In holding that prima facie the course provided for in r. 1 para (ii) should be followed and only in exceptional or special cases should an immediate declaration be made ex parte, Dixon CJ and Webb J said: [20]

> But so far it has been assumed that the order declaring the Cedar restaurant to be a disorderly house was regularly made. To anyone unfamiliar with the practice that has grown up in the administration of the *Disorderly Houses Acts* 1943 the fact that it was made ex parte cannot but appear anomalous and must cause some question. For it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard. In *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 [143 ER 414] Byles J. (at p.194) said that a long course of authority established "that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". The older authorities ever recur to the lines from Seneca's Medea which apparently were introduced into the subject by *Boswel's Case* (1583) 6 Co. Rep. 48b at 52a [77 ER 328 at p. 331]: *Quicunque aliquid statuerit, parte inaduita altera, Aequum licet statuerit haud aequus fuerit;* cf. *Bonaker v Evans* (1850) 16 QB 162 at p.171; *In re Hammersmith Rent-Charge* (1849) 4 Ex. 87, at p. 97 [154 ER 1136, at p. 1140]. The general principle has been restated in this Court with a citation of authority in *Delta*

[20] *Ibid* at 395

> *Properties Pty. Ltd. v Brisbane City Council* (1955) 95 CLR 11, at p. 18. It is hardly necessary to add that its application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment. In the present statute no such evidence of a contrary intention is discoverable.

49 In contrast to s.28R of the New Act, s.27 of the Old Act does not provide any specific statutory facility for the filing of supporting material in aid of an application for the entry of judgment. Further, and unlike the procedure provided for in s.28R of the New Act, s.27 of the Old Act provides no statutory procedure for the setting aside of a judgment pursuant to its provisions. Indeed, s.27(2)(a) merely provides that, where a respondent fails to pay the whole or part of the adjudicated amount to the claimant or give any security for that sum, the claimant may "recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction – the unpaid, or unsecured, portion of the adjudicated amount ...": s.27(2). The legislature in this instance has left it up to the claimant to comply with the procedures which relate to the entry of judgment for a debt in the relevant court in which the judgment is proposed to be entered.

50 In arriving at this construction of s.27 of the Old Act, I am aided by the form of the procedure which has now been introduced by the amending Act No. 42/2006, and in particular the procedure for the entry of judgment described in s.28R of the New Act. The perceived need for this amendment, which introduced a "fast track" procedure for the entry of judgment, reinforces my view that the procedure contemplated by s.27 in the Old Act was intended to apply conventional court procedures applicable to debt recovery.

51 In the Supreme Court of Victoria, a judgment for a debt can only be obtained on the filing and service of an originating process and a hearing upon appropriate notice to the defendant, or alternatively, by entry of a default judgment if the defendant, having been duly served, fails to take an essential step in the proceeding, such as entering an appearance.

52 Given the objects and purposes of the legislation, the special procedure provided for in Order 45.05 *Supreme Court (General Civil Procedure) Rules 2005* would be appropriate to the entry of judgment pursuant to s.27 of the Old Act. This procedure may be invoked, inter alia, "to save time and expense for the parties": r.45.05(3)(b). A proceeding by originating motion appropriate to be dealt with under r.45.05 is brought by originating motion in Form 5C. A summons in the Form 45A must also be issued: r.45.05(6).[21] The summons gives the other party notice of when, and before which Associate Judge, the plaintiff will apply for the judgment and seek the necessary ancillary orders. Orders under r.45.05(2) and (4) must also be made under this procedure. These orders may be made by the Associate Judge before whom the application for entry of judgment is made and at the same time. The originating motion, the summons and the affidavit or affidavits in support should be all served upon the respondent to the application for judgment, who is the defendant in the proceeding, in a reasonable time prior to the application for entry of judgment being made. An Associate Judge[22] must hear and determine the application.[23] An order may be made for the entry of judgment in the presence of the other party, or if the other party is absent, upon the Associate Judge being satisfied of service of the originating motion and summons and the material in support by an affidavit of service.

Disposition of the Matters

53 The right to be heard before a court pronounces an order or judgment adverse to the party concerned is fundamental. It is a principle which yields only to legislation which clearly manifests a contrary intention. If the principle is not observed, and the court has nevertheless been led to purport to determine the matter, the determination will be a nullity.

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21 See: Williams Supreme Court Practice [45.05.20].

22 See: Williams Supreme Court Practice [45.05.25].

23 An application not made in the first instance to an Associate Judge but to the Judge in the Practice Court is liable to be dismissed with costs. See: Williams Supreme Court Practice [45.05.20].

54 Rich J in *Cameron v Cole* expressed the principle in the following terms: [24]

> It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside. In such a case there has been no valid trial at all. The setting aside of the invalid determination lays the ghost of the simulacrum of a trial, and leaves the field open for a real trial.

55 It follows that the judgments which have been entered in the Resouces and Jetoglass matters are not only irregular but also a nullity and should be set aside.

56 There are exceptions to the general rule that, except on appeal, a judgment or order, once authenticated cannot be amended other than to correct a clerical mistake or error arising from an accidental slip or omission.[25]

57 One such exception arises in the case where the original order was obtained ex parte. The Court has jurisdiction to set aside or vary an order made without notice to the party affected by it, on the application of that party [26]: *Re Reid Murray Acceptance Ltd* per Adam J. [27]

58 Further, as has already been observed in the passage cited from the judgment of Rich J in *Cameron v Cole* [28], the Court has inherent jurisdiction to declare void and set aside a judgment given in a proceeding that is so irregular as to amount to a nullity, as in this case [29].

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[24] 68 C.L.R. 571 at 589
[25] See: Williams Supreme Court Practice [36.07.5].
[26] See: Williams Supreme Court Practice [36.07.25] and the cases there cited
[27] [1964] V.R. 82 at 90
[28] *Supra* at 589-590
[29] See: Williams Supreme Court Practice [36.07.50] and the cases there cited

59 In the Resources and Jetoglass matters, I propose to set aside all of the orders made in each case both on 4 September 2009 and 7 September 2009. Consequently, paragraph 2 of the orders made in each case on 11 September 2009 should also be set aside because there will no longer be any valid order upon which the stays can operate.

60 As to the application for entry of judgment in the Gantley matter, that application is refused.

61 It is to be noted that, pursuant Order 2.02 *Supreme Court (General Civil Procedure) Rules 2005*, the Court shall not wholly set aside any proceeding or originating process by which a proceeding was commenced on the ground that the proceeding was commenced by a wrong process.

62 I propose to make directions which will facilitate the further disposition of the present matters and minimise the costs for the parties. I propose to direct in each of the three matters that:

1. The requirements of Rules 5.03(1) and 8.02 be dispensed with.

2. The plaintiff is authorised to commence a proceeding by originating motion in Form 5C.

3. The originating motion already filed by the plaintiff stand as the originating motion in Form 5C and the proceeding continue as if it had been commenced by an originating motion in Form 5C.

4. In each case, Resources Combined No. 2 Pty Ltd, Jetoglass Pty Ltd and Gantley Pty Ltd be added as defendants to the respective proceedings.

5. Any affidavit filed in the proceeding stand as an affidavit filed in support of the originating motion in Form 5C.

6. The plaintiff, if it has not already done so, forthwith serve a copy of its originating motion which it has filed in the proceeding, on the defendant,

together with the affidavit filed in the proceeding in support of the application for entry of judgment and the exhibits thereto.

7. The plaintiff within 7 days of the date hereof file and serve a summons in Form 45A making the application for the entry of judgment returnable before an Associate Judge.

8. The plaintiff within 7 days of the date hereof file and serve any further affidavit upon which it seeks to rely in making its application for the entry of judgment.

63 I will hear the parties on the question of costs.
