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

Not Restricted

S ECI 2015 000325

SSC PLENTY ROAD PTY LTD (ACN 124 197 128) Plaintiff

v

CONSTRUCTION ENGINEERING (AUST) PTY LTD (ACN 392 781 199) & Anor Defendants

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JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	17 SEPTEMBER 2015
DATE OF JUDGMENT:	13 NOVEMBER 2015
CASE MAY BE CITED AS:	SSC PLENTY ROAD v CONSTRUCTION ENGINEERING (AUST)
MEDIUM NEUTRAL CITATION:	[2015] VSC 631 1st Revision 17 November 2015

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act") – Whether a contractual provision in the relevant construction contract that mandates attendance of the parties at mediation is a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii) of the Act – Whether adjudicator valued work in accordance with the Act – Valuation task of adjudicator under the Act considered – Whether terms of construction contract void under s 48 of the Act for inconsistency with the Act.
ADMINISTRATIVE LAW – Judicial review – Determination of an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act") – Whether error of law amounting to jurisdictional error – Robust approach to be taken to review of adjudicator's valuation – Standard of adjudicator's reasons towards the lower end of the scale - Certiorari to quash the decision allowed in part.
STATUTORY INTERPRETATION – Contemporary maxim "Laws must not command the impossible".

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J A F Twigg QC with Dr K Weston-Scheuber	Baker & McKenzie
For the First Defendant	Mr T J Margetts QC	Piper Alderman

HIS HONOUR:

1 This is an application by the Plaintiff, SSC Plenty Road Pty Ltd ("Plenty Road") for judicial review of an adjudication determination made by the Second Defendant (the "Adjudicator") on 21 August 2015 (the "Adjudication Determination") under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act").

2 The Adjudicator agreed to be bound by the decision of the Court, and took no part in the proceeding.

3 By a construction contract entered into on or about 20 December 2013, Plenty Road as the principal engaged the Defendant, Construction Engineering (Aust) Pty Ltd ("Construction Engineering") as the designer and builder to design and construct a shopping centre at 850 Plenty Road, Reservoir in Victoria (the "Project"), for the sum of $35,554,985 (plus GST) (the "Construction Contract").

4 Trevor Main & Associates Pty Ltd was appointed the superintendent under the Construction Contract (the "Superintendent").

5 The Adjudication Determination arises from a payment claim made by Construction Engineering as the claimant purportedly under the Act, by a claim dated 1 July 2015 (the "Payment Claim"). The Payment Claim was served as Progress Claim No 19 in the course of the Project. The amount of the Payment Claim was $4,460,815.06 (including GST).

6 Plenty Road seeks relief by way of certiorari on the ground of jurisdictional error which it says is evident in the Adjudication Determination. There are two grounds relied upon, namely:

> Ground 1 – 'excluded amounts' as defined in the Act were wrongly taken into account; and
>
> Ground 2 – there was a failure to value the work in accordance with the Act.

The Originating Motion filed by Plenty Road particularises these grounds as follows:

First Ground - Excluded amounts

1. At [72] of his determination, the second defendant wrongly determined with respect to disputed variations, included in the first defendant's payment claim and adjudication application, that:
   a) Clause 42 of the Construction Contract was not a method of resolving disputes within the meaning of s 10A(3)(d) of the Act; and
   b) The disputed variations are class 2 claimable variations; and contrary to s 23(2A) the second defendant took into account the disputed variations in the claimed amount.
2. In making this determination, the second defendant:
   a) At [72] of his determination, made an error of law on the face of the record:
      (i) when he found, contrary to law, clause 42.1 of the Construction Contract expressly did not contain a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii) of the Act; and
      (ii) the disputed variations are within the second class of variations under s 10A of the Act.
   b) Further and alternatively, the second defendant fell into jurisdictional error by determining that the disputed variations are to be taken into account in the adjudicated amount.

Second Ground – Basic and essential requirements

1. At [101] of his determination of the value of the construction work in the payment claim, the second defendant fell into jurisdictional error:
   a) by not making a bona fide attempt to exercise the power granted to him as an adjudicator under the Act;
   b) by failing to fulfil the basic and essential requirement of the Act that he value the amount of the claim by determining the work that was done and then valuing that work; and
   c) by making his determination when there was no evidence before him on which he could base his determination.

7 The grounds will be considered below.

Relevant Provisions of the Act

8 Here set out are the relevant provisions of the Act, ordered as they are addressed in these reasons.

9 A section that is unique to Victoria is s 10A of the Act. It makes provision for what are described as "claimable variations". The section sets out the classes of variation to a construction contract (the *claimable variations*) that may be taken into account in calculating the amount of a progress payment under the Act.

10 Section 10A of the Act provides:

Claimable variations

(1) This section sets out the classes of variation to a construction contract (the ***claimable variations***) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree —

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where —

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following —

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into —

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "$5,000,000" were a reference to "$150,000".

11 An example is provided in a footnote to the section in the following terms:

> **Example**
>
> A building contractor enters into a construction contract. The consideration (***contract sum***) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the ***new claim***) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (***disputed variation***). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350,000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150,000 and the contract contains a dispute resolution clause, the disputed variation in the new claim and all subsequent disputed variations under the contract will not be claimable variations under this Act. [Emphasis added]

12 This tortuous statutory mechanism has attracted judicial comment.[1] Nevertheless, its application has important consequences for the administration of the Act.

13 Under ss 23(2A) and (2B), in determining an adjudication application, the adjudicator must not take into account any part of the claimed amount that is an excluded amount. If this is contravened, the adjudicator's determination is void.

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1 See *Branlin Pty Ltd v Totaro* [2014] VSC 492 (7 October 2014) [34]-[35].

14 Subsections 23(2A) and (2B) provide:

> (2A) In determining an adjudication application, the adjudicator must not take into account—
>
> (a) any part of the claimed amount that is an excluded amount; or
>
> (b) any other matter that is prohibited by this Act from being taken into account.
>
> (2B) An adjudicator's determination is void—
>
> (a) to the extent that it has been made in contravention of subsection (2);
>
> (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

15 Section 23(1) of the Act provides in relation to an Adjudicator's determination:

> **Adjudicator's determination**
>
> (1) An adjudicator is to determine—
>
> (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
>
> (b) the date on which that amount became or becomes payable; and
>
> (c) the rate of interest payable on that amount in accordance with section 12(2).

16 Section 10 of the Act provides for the manner in which the amount of a progress payment is to be calculated:

> **Amount of progress payment**
>
> (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—
>
> (a) the amount calculated in accordance with the terms of the contract; or
>
> (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—
>
> (i) construction work carried out or undertaken to be carried out by the person under the contract; or
>
> (ii) related goods and services supplied or undertaken to be supplied by the person under the contract—

as the case requires.

(2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

17 Section 11 of the Act provides for how the valuation of construction work under a construction contract is to be done. It provides:

Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the goods and services; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any goods are defective, the estimated cost of rectifying the defect.

(3) For the purposes of subsection (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

18 Section 14 of the Act provides for the requirements in relation to a payment claim made under the Act. It provides:

Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and

(e) must state that it is made under this Act.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within—

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within —

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

(6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.

(7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if —

(a) a claim for the payment of that amount has been made in respect of that payment under the contract; and

(b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

19 Section 48 of the Act precludes contracting out of the Act by declaring to be void any contractual provision which excludes, modifies or restricts the operation of the Act, or has that effect. Section 48 is in the following terms:

No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not —

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act —

is void.

20 Strict time constraints limit the time within which an adjudicator is to deliver a determination. These are provided by s 22(4), namely:

> (4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case —
>
> (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
>
> (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

Relevant Provisions of the Construction Contract

Dispute Resolution

21 The Construction Contract provided for a dispute resolution process by Clause 42:

> 42 Dispute Resolution
>
> 42.1A Acknowledgement
>
> The parties acknowledge and agree that the process set out in clause 42 is a method for resolving disputes under the Contract for the purposes of section 10A(3)(d) of the SOP Act.
>
> 42.1 Notice of dispute
>
> If a difference or dispute (together called a 'dispute') between the parties arises in connection with the subject matter of the Contract, including a dispute concerning:
>
> (a) a Superintendent's direction; or
>
> (b) a claim made otherwise at law under the law governing the Contract:
>
> then either party shall, by hand or by registered post, give the other and the Superintendent a written notice of dispute adequately identifying and providing details of the dispute.
>
> Notwithstanding the existence of a dispute, the parties shall, subject to clauses 39 and 40 and subclause 42.4, continue to perform the Contract.
>
> 42.2 Conference
>
> (a) If a party delivers a notice of dispute to the other party, then within 10 business days of the date on which the other party receives the notice of dispute, senior representatives of the parties at Project level must meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.

(b) If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to mediation.

42.3A Mediation

If within a further 14 days of the dispute being referred to mediation the parties have not agreed upon a mediator, the mediator shall be nominated by the person in Item 37A.

The party issuing the notice of dispute shall be responsible for convening and organising the mediation.

The mediation shall be conducted on the following basis:

(c) the mediation is to be conducted in accordance with the Institute of Arbitrators and Mediators Australia's Rules for the Mediation of Commercial Disputes; and

(d) each of the parties must pay an equal share of the fees and expenses the mediator is entitled to and any room hire charges.

If the dispute has not been resolved by mediation or is not otherwise resolved within 56 days of service of the notice of dispute, either party may pursue its rights at law.

Payment of Provisional Sums

22 The Construction Contract provided for payment of provisional sums by Clause 3:

3 Provisional sums

A provisional sum included in the Contract shall not itself be payable to the Principal but where pursuant to a direction the work or item to which the provisional sum relates is carried out or supplied by the Contractor, the work or item shall be priced by the Superintendent, and the difference shall be added to or deducted from the contract sum.

Where any part of such work or item is carried out or supplied by a subcontractor, the Superintendent shall allow the amount payable by the Contractor to the subcontractor for the work or item, disregarding:

(a) any damages payable by the Contractor to the subcontractor or vice versa; and

(b) any deduction of cash discount for prompt payment,

plus an amount for profit and attendance calculated by using the percentage thereon stated in Item 13 or elsewhere in the Contract, or, if not so stated, as assessed by the Superintendent.

Pricing

23 The Construction Contract provided for pricing by Clause 36.4:

36.4 Pricing

Other than to the extent a variation relates to the Coles works which shall be dealt with in accordance with Annexure Part HH, where the Contract provides that a valuation shall be made under this subclause 36.4, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal, as the case may require, an amount ascertained by the Superintendent and certified in a relevant progress certificate using the following order of precedence:

(a) Prior agreement;

(b) Applicable rates or prices in the Contract;

(c) Rates or prices in a schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and

(d) Reasonable rates or prices, which shall include the amount for profit and overheads specified at Item 32A, and any deductions shall include a reasonable amount for profit specified at Item 32B but not overheads.

That price shall be added to or deducted from the contract sum.

Progress Claims

24 The Construction Contract provided for progress claims by Clause 37.1:

37.1 Progress claims

The parties agree that the percentages of the contract sum and amounts payable are as follows:

Name of stage		**% of total contract sum**	**$**
Not applicable	Payments are to be made monthly in response to the *Contractor's* claims for payment, pursuant to subclause 37.1	As determined by the *Superintendent*	As certified by the *Superintendent*

The Contractor shall claim payment progressively in accordance with Item 33 (each date being a 'reference date' for the purposes of the SOP Act).

An early progress claim shall be deemed to have been provided on the last day of the relevant month in which the progress claim is submitted.

Except where included in an amount assessed or otherwise approved by the Superintendent under the Contract, the amount claimed by the Contractor must not include any excluded amount.

Each progress claim shall be given in writing to the Superintendent and shall set out, or include as a separate document, as a minimum details of the following:

(a) The value of WUC done;

(b) The total of all adjustments to the contract sum certified by the Superintendent;

(c) The total amount payable for off-site or unfixed materials;

(d) The total amount of all payments paid to the Contractor by the Principal prior to the date of the progress claim;

(e) The value of work to complete WUC; and

(f) Projected cashflow and projected final contract sum.

The Superintendent may request further information from the Contractor in respect of any progress claim. The Contractor shall provide the information requested to the Superintendent within the time and in the form requested by the Superintendent.

Ground 1 – Excluded Amounts Wrongly Taken Into Account

The Issue

25 In his Adjudication Determination, the Adjudicator determined that clause 42 of the Construction Contract was not a method of resolving disputes within the meaning of s 10A(3)(d)(ii) of the Act.[2]

26 Consequently, the Adjudicator found that the disputed variations were class 2 claimable variations and took them into account in determining the amount payable.

27 Plenty Road contended that the Adjudicator made an error of law in making these findings and, further and alternatively, fell into jurisdictional error by determining that:

(a) the process of dispute resolution mandated by clause 42 of the Construction Contract was not a "method of resolving disputes" within the meaning of s 10A(3)(d)(ii) of the Act; and

(b) the disputed variations were class 2 claimable variations and should be taken into account in determining the amount payable.

28 It was submitted that in incorrectly taking the disputed variations into account as class 2 claimable variations, when they were not, the Adjudicator took into account

[2] See [72] of the Adjudication Determination.

part of the claimed amount that was an excluded amount, with the result that, pursuant to ss 23(2A) and (2B) of the Act, to this extent, the Adjudicator's determination is void.

29 In essence it was submitted on behalf of Plenty Road that clause 42 satisfied all of the requirements for a 'method of resolving disputes' under s 10A(3)(d)(ii). In particular, mediation was said to be a method 'capable of resulting in a binding resolution of the dispute'. Furthermore, it was put that the intention of the parties was expressly referred to in clause 42.1A of the Construction Contract, where the parties acknowledged and agreed that the process set out in clause 42 was a method for resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act.

30 In its submissions, Plenty Road referred to *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*,[3] where the Court noted that the purpose of excluding the matters set out in s 10B was to exclude from the interim payment regime matters that regularly arise in construction disputes and are often attended with considerable complexity. It was submitted that the construction of s 10A(3)(d) which best gives effect to that purpose, is driven by the consideration that the adjudicator must not include excluded amounts within his determination. This interpretation, it was said, also gives effect to the evident statutory intention that on large-scale contracts, the parties to the contract are bound by the dispute resolution mechanisms which they have agreed between themselves.

31 The Defendant, Construction Engineering, disputes these contentions, and says that the Adjudicator was correct in his analysis and his application of *Branlin Pty Ltd v Totaro*,[4] where this Court set the basic requirements for a construction contract to provide a 'method of resolving disputes'[5] for the purposes of s 10A(3)(d)(ii).

32 Accordingly, the following question is exposed for determination: whether a contractual provision in the relevant construction contract that mandates attendance

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3 [2011] VSC 183 (6 May 2011).
4 [2014] VSC 492 (7 October 2014).
5 Ibid [65].

of the parties at a mediation, without more, is a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii) of the Act?

Analysis and Conclusion on "method of resolving disputes"

33 In *Branlin Pty Ltd v Totaro* ("*Branlin*") this Court considered the requirements for a construction contract to provide for a 'method for resolving disputes' for the purposes of s 10A(3)(d)(ii) of the Act. The basic requirements for a construction contract to provide a 'method for resolving disputes' were stated as:[6]

a) a process which could be described as a 'method' of dispute resolution;

b) a process which is capable of resulting in a binding resolution of the dispute; and

c) a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

34 Although the Court was urged by Plenty Road to depart from this statement of applicable criteria, by abandoning elements b) and c) on the basis that a plain reading of the sub-section does not reveal this construction, and a lower threshold is to be preferred, I am not persuaded to adopt this course. I adopt and apply the reasoning in *Branlin*.

35 In *Branlin*, the Court had no difficulty in concluding that clause 27 of the Australian Standard 4905-2002 ("AS 4905-2002") did provide a 'method for resolving disputes' for the purposes of s 10A(3)(d)(ii) of the Act[7] (although the Court also concluded that AS 4905-2002 had not been incorporated into the relevant construction contract for the purposes of s 10A(3)(d)(ii) of the Act)[8] or indeed for any purpose.

36 By way of example, AS 4905-2002 provides for a process for dispute resolution which includes facilities for: Notification of a dispute (clause 27.1); a Conference to resolve the dispute (clause 27.2); followed by Arbitration in the event that these

6 Ibid [65].
7 Ibid [61].
8 Ibid [63]-[64].

processes have no achieved a resolution of the dispute (clause 27.2). A mechanism was also provided for the selection of an arbitrator in the event of disagreement (clause 27.3).

37 The operative clause in the construction contract in *Branlin* for present purposes was clause 27.2 which provided:

> Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
>
> If the dispute has not been resolved within 28 days of service of the notice of *dispute*, that *dispute* shall be and is hereby referred to arbitration. [Emphasis added]

38 In the case of a construction contract to which clause 27 of AS 4905-2002 applies, the end point of the dispute resolution process is a reference of the dispute to arbitration, which is mandated by the clause following the failure of a compulsory conference to resolve the dispute.

39 In other words, a third party, the arbitrator in that case, was engaged to hear and determine the dispute and resolve the dispute by delivery of an award which is binding on the parties.

40 Clause 27 of AS 4905-2002 is not the only way of achieving an outcome which results in a resolution of a dispute. For example, the appointment of an expert to make an expert determination which is accepted under the construction contract as binding on the parties will serve the same purpose – and there may be other examples.

41 These approaches to dispute resolution have an element in common, which brings them within s 10A(3)(d)(ii) of the Act. They are mandatory steps prescribed by the construction contract which result in the production of a binding decision by a third party appointed under the contract for the resolution of the dispute.

42 On the other hand, a contractual provision such as that provided in the present Construction Contract, which merely mandates attendance of the parties at

mediation, without more, is not a "method of resolving disputes" for the purposes of s 10A(3)(d)(ii).

43 I arrive at this conclusion on the plain meaning of the words used in the text of s 10A(3)(d)(ii) of the Act, after considering whether, in the extrinsic materials, there is evident purpose disclosed for the sub-section in the context of the s 10A mechanism.

44 As to purpose, the Second Reading Speech demonstrates an intention to limit from the interim payment regime disputed variations on large contracts. These are matters that regularly arise in construction disputes and are often attended with considerable complexity.[9] As was said in the Second Reading Speech:[10]

> Disputed variations on large contracts, initiated by building owners and big contractors will be exempt from the scheme. This addresses the concern that such disputes on major contracts should not be subject to the security of payment scheme and the normal contract methods of dispute resolution should continue to apply.

45 Further, as the Court observed in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*:[11]

> The rationale behind limiting the types of claims which may be made for variations under the Act, lies in the fact that money claims for variations to construction contracts are commonly the subject of dispute. No doubt for this reason, it was considered by the Legislature to be desirable for such claims to be excluded from progress claims made under the Act. In this way, the central object of maintaining an efficient flow of funds to contractors on a project could be optimized by eliminating potential "log jams" to payment claims arising from disputes over variations. Such issues, if they arise, are intended to be deferred to later dispute resolution processes or litigation.

46 In relation to the Payment Claim in issue in this case, the question is whether the variations are 'claimable variations' within the second class of claimable variations provided for under s 10A(3) of the Act. They will fall within this second class if, as here, the parties to the Construction Contract are in dispute as to any of the matters referred to in s 10A(3)(c), and if, as here, the contract is a large construction contract

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9 See also *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 (6 May 2011).
10 *Parliamentary Debates*, Legislative Council, 15 June 2006, 2420 (Marsha Thomson).
11 *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor* [2011] VSC 183 (6 May 2011) [34].

entered into for a consideration in excess of $5,000,000 pursuant to s 10A(3)(d)(ii), but is also a construction contract which does not provide a method for resolving disputes under the contract, including disputes referred to in s 10A(3)(c). If there is such a method of resolving disputes in this large contract, the parties are in effect directed by the Legislature to avail themselves of that process. If on the other hand there is no such method provided for, an Adjudicator, if appointed, is obliged to assume the task of determining and valuing the variation as a claimable variation in the second class.

47 Although the general purpose of s 10A in limiting the types of claims which may be made for variations under the Act is disclosed in the second reading speech referred to above, the precise purpose of s 10A(3)(d)(ii) in the s 10A mechanism is not revealed in the extrinsic materials. It was most likely the product of a policy decision. However, the particular factors which drove the policy decision are left open to speculation. The most that can be done is to describe the mechanism of s 10A and the particular function that s 10A(3)(d)(ii) performs in that mechanism.

48 Whatever, the precise statutory purpose of s 10A(3)(d)(ii), its operation is confined by the four corners of its text, to which I now turn.

49 Notwithstanding that a mediation is capable of, and often does, result in a binding resolution of a dispute between parties, unless agreement is achieved, it will not result in this outcome. A mediation for these purposes is at best a facility to provide a structured negotiation, assisted by a third party mediator, directed to resolving the dispute, which can only be achieved if the parties are able to arrive at a resolution of the dispute by agreement.

50 The 'method' itself, being the mediation, cannot resolve the dispute within the meaning of s 10A(3)(d)(ii) of the Act.

51 Even if engagement in a mediation process is a mandatory requirement of the dispute resolution clause of a construction contract, a mediation, without more, at best provides an opportunity for resolving disputes.

52 For these reasons, the mediation facility provided for in the Construction Contract in this case cannot be a 'method of resolving disputes' for the purposes of s 10A(3)(d)(ii) of the Act. A compulsory mediation may be part of the dispute resolution process prescribed in a constriction contract, and often is. However, without additional mandatory steps being prescribed involving the production of a binding decision by a third party appointed under the construction contract, such as that provided by clause 27 of AS 4905-2002, a dispute resolution process which stops at mediation, will not be a method for resolving disputes for the purposes of s 10A(3)(d)(ii).

Attempt to Contract Out of the Act

53 Plenty Road raised another contention on the issue. It referred to clause 42.1A of the Construction Contract where the parties specifically acknowledged and agreed that the process set out in clause 42 was a method for resolving disputes for the purposes of s 10A(3)(d).

54 I reject this submission. It is not open to parties to a construction contract to agree on an application of the provisions of the Act, which is inconsistent with or contrary to those provisions, in the course of invoking the statutory mechanism and remedies prescribed.

55 Clause 42.1A of the Construction Contract is a superfluity of no force and effect and is void. This is made plain by s 48 of the Act, which is the 'no contracting out' provision of the Act. Clause 42.1A of the Construction Contract is a contractual provision which materially excludes, modifies or restricts the operation of the Act, or has that effect.

Conclusion on Ground 1

56 I find that the Construction Contract in this case did not provide a method for resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act which could operate to deprive Construction Engineering from claiming payment for the variations in its Payment Claim.

57 It follows that the variations claimed by Construction Engineering are appropriately classified as 'claimable variations', were properly included in the Payment Claim, and were properly included in the Adjudicated Amount.

58 Ground 1 therefore must fail.

Ground 2 – Failure to Value the Work in Accordance with the Act

Plaintiff's Contentions

59 Plenty Road further contends that the Adjudicator failed to perform a basic and essential statutory duty under the Act of determining the work completed and its value. It submitted that the Adjudicator fell into jurisdictional error:

(a) by not making a bona fide attempt to exercise the valuation power conferred upon him;

(b) by failing to fulfil the basic and essential requirement of the Act that he value the amount of the claim by determining the work that was done and then valuing that work; and

(c) by making his determination when there was no evidence before him on which he could base his determination.

60 The Plaintiff's case proceeded as follows:

61 Pursuant to s 23(1) of the Act, an adjudicator is to determine the amount of the progress payment (if any) to be paid to the claimant (in this case Construction Engineering) by the respondent (in this case Plenty Road).

62 The amount of a progress payment to which a person is entitled is, pursuant to s 10, the amount calculated in accordance with the terms of the contract, or, *if the contract makes no express provision with respect to the matter*, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person under the contract.

63 Construction work is to be valued in accordance with the terms of the contract under s 11(1)(a), or if the contract makes no express provision with respect to that matter, having regard to the factors set out in s 11(1)(b), namely:

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

64 Plenty Road submitted that the Construction Contract did provide a method of calculating the amount of progress payment payable in respect of variations, and does so by clause 36.4. The amount the claimant was entitled to, it was said, was an amount "ascertained by the Superintendent and certified in a relevant progress certificate …" [emphasis added].

65 Further, Plenty Road submitted that clause 3 of the Construction Contract provided that the Superintendent was to price work carried out to which a provisional sum relates. Thus, the price of any work in the provisional sum is, like variations, was to be ascertained and fixed by the Superintendent.

66 Plenty Road referred to the certification of a progress payment under the Construction Contract being undertaken in accordance with clause 37.1. Again, in valuing or pricing work comprising variations and provisional sums, this was to be ascertained by the Superintendent.

67 It followed from the provisions of the Act, when read alongside the Construction Contract, so it was put, that in undertaking the task of determining the amount of the progress payment, which included the valuation of the construction work, the Adjudicator was compelled to act in accordance with the terms of clauses 36.4 and 3, applying clause 37.1 of the Construction Contract, with the result that in effect the Adjudicator was obliged to adopt the value fixed by the Superintendent.

68 If, however, the Adjudicator was correct in finding that the Construction Contract made no express provision for the pricing of the work, then by operation of ss 10(1)(a) and 11(1)(a) of the Act, the Adjudicator himself was obliged to value the

work carried out under the contract. It was submitted that in undertaking this exercise, the Adjudicator did no carry out the statutory task assigned to him.

69 Plenty Road submitted that the Adjudicator fell into jurisdictional error by merely adopting the claimant's assessment in relation to disputed provisional sums[12] and disputed variation items,[13] rather than undertaking the basic and essential task of determining whether and what work had been done and its value, as he was required to do under the Act. It contended that the Adjudicator found that in the absence of Plenty Road as the respondent establishing a basis for withholding payment, he would simply adopt the valuation put forward by Construction Engineering, the claimant. Accordingly, it was submitted that the Adjudicator erred in law by asking himself an irrelevant question, namely whether the respondent had established a basis for withholding payment, rather than engaging in the task required by the Act, that is to determine whether and what construction work had been done, and if so, its value.

70 Plenty Road further submitted that the Adjudicator failed to apply any process of reasoning in determining the value of construction work carried out or to be carried out.

71 Reference was also made to rates by which the value of such work could have been calculated under the Construction Contract,[14] had the Adjudicator found that the method provided for under the Construction Contract, being the assessment of the Superintendent, was not available for the purposes of conducting a valuation under the Act. It was submitted that the Adjudicator failed to refer to these contractual rates in his Adjudication Determination and failed to apply them, as he ought to have done.

72 On this basis it was contended that the Adjudicator did not value the construction work in accordance with the Act, in that:

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12 See [94] of the Adjudication Determination.
13 See [101] of the Adjudication Determination.
14 Part CC of the Construction Contract – 'Schedule of Rates'.

(a) he failed to do so in accordance with the terms of the Construction Contract;

(b) if he considered and determined that the Construction Contract made no express provision with regard to the valuation, he nevertheless failed to have regard to the price of the work as ascertained by the Superintendent which was said to be the contract price; and

(c) he further failed to have regard to the matters set out in ss 10(1)(b)(ii) [and (iii)] and 11(1)(b)(ii) and (iii) of the Act.

73 It was submitted further that the Adjudication Determination does not expose any relevant and necessary process of reasoning, consistent with a bona fide attempt at the task of valuing the work. Reliance was placed on s 23(3) of the Act which provides that an adjudicator's determination must be in writing and must include reasons for the determination and the basis of any amount that has been decided. The Plaintiff supported its contention with the well-established proposition that a failure to provide adequate reasons constitutes error of law: *470 St Kilda Rd Pty Ltd v Reed Constructions Pty Ltd*.[15]

74 Plenty Road contended that, even taking into account the robust nature of the procedures under the Act, the Adjudicator in this case failed to provide adequate (or any) reasons upon which the adjudicated amounts were determined. This failure, it was submitted, not only constituted an error of law in itself, it is also demonstrative of the failure of the Adjudicator to exercise the powers conferred upon him by the Act in good faith.

Defendant's Contentions

75 Construction Engineering took issue with each of the Plaintiff's contentions.

The Work of an Adjudicator

Legal Principles

76 An adjudication of a payment claim requires as a minimum a determination as to whether the construction work the subject of the claim has been performed and its value (or whether the goods and services have been supplied and their value). Failure to do so is a failure to comply with a basic and essential requirement of the

15 [2012] VSC 235 (7 June 2012) [89].

Act: *Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd & Ors* ("*Asian Pacific*").[16]

77 As Hodgson JA said in relation to the New South Wales Act[17] in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*,[18] as later adopted by Brereton J in *Pacific General Securities Ltd & Anor v Soliman & Sons Pty Ltd & Ors* ("*Pacific General*"):[19]

> [T]he adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of the claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.

What an Adjudicator is Meant to Do

78 The fundamental determinations to be made by an adjudicator as to whether the construction work identified in the payment claim has been carried out, and what is its value, is derived from the provisions of the Act.[20] The matter referred to an adjudicator for determination pursuant to an adjudication application is the adjudication of a payment claim: s 18(1). An adjudicator seized of the matter is required to determine the amount of the progress payment: s 23(1), after considering the matters referred to in the Act: s 23(2).

79 In order to determine the amount of a progress claim, an adjudicator is driven back to the statutory regime for the valuation of construction work and related goods and services. The Act provides for construction work carried out or related goods and services supplied to be valued in accordance with the terms of the construction contract: ss 11(1)(a) and (2)(a).

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16 [2010] VSC 300 (1 July 2010) [21].
17 *Building and Construction Industry Security of Payment Act 1999* (NSW).
18 (2005) 63 NSWLR 385, 399 [52].
19 [2006] NSWSC 13 (31 January 2006) [82].
20 [2010] VSC 300 (1 July 2010) [12]–[20].

80 In the absence of any express provision in the construction contract governing the position, the valuation assessment is to be undertaken in accordance with s 11(1)(b) (for work) and s 11(2)(b) (for goods and services), having regard to the matters set out in those sub-sections, namely:

(i) the contract price for the work or the goods and services;

(ii) any other rates set out in the contract;

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract , is to be adjusted as a result of the variation; and

(iv) if the work or goods are defective, the estimated cost of rectifying the defect.

81 The absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim. As a minimum, the adjudicator is obliged to determine whether the construction work identified in the payment claim has been carried out, and what is its value.[21] The adjudicator is obliged to make these findings on the evidence before him or her.

82 Nevertheless, if the claimant has put on material as to the value of a claim, but the respondent has not, the adjudicator in assessing the value is entitled to draw any necessary inference from the absence of controverting material from the respondent, including an inference that no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may not be conclusive, but it may be taken into account in assessing the evidence of value overall.

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21 Ibid [22].

83 However, there will not be a valid adjudication of a payment claim, within the meaning of the Act, if all the adjudicator does is reject the respondent's contentions and adopt those of the claimant.[22] As Brereton J said further in *Pacific General*:[23]

> … by allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator. In traditional terms, it would be jurisdictional error resulting in invalidity.

84 This position was reinforced in *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd*,[24] where Hodgson JA, in explaining *Firedam Civil Engineering Pty Ltd v KJP Constructions Pty Ltd*,[25] said:[26]

> Further, it appears that in *Firedam* the adjudicator, having decided the respondent's submissions should be disregarded, simply adopted the amount specified by the claimant in the payment claim. If so, that would be a failure to perform the task required of determining the amount of the progress payment (if any) to be paid, having regard to the consideration[s] in s 22(2).

Parameters for an Adjudicator Delivering a Determination and Implications for Judicial Review

85 Strict time constraints limit the time within which an adjudicator is to deliver a determination, provided by s 22(4), namely within 10 days of the adjudicator accepting nomination or within a shortly extended period of 15 days agreed to by the claimant.

86 Further, the Act contemplates that the adjudicator is to consider and determine the Adjudication Application effectively 'on the papers' without the advantage of an oral hearing. This is evident from s 22 of the Act which provides only for a limited facility by sub-section (5) for further submissions in writing from either party and by sub-sections (5)(c) and (5A) for an informal meeting with the parties, if necessary, in

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22 Ibid [23].
23 [2006] NSWSC 13 (31 January 2006) [86].
24 [2008] NSWCA 279 (31 October 2008).
25 [2007] NSWSC 1162 (25 October 2007).
26 *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279 (31 October 2008) (citations omitted). The reference to s 22(2) was a reference to that subsection in the *Building and Construction Industry Security of Payment Act 1999* (NSW). The equivalent section in the Victorian Act is s 23(2).

which legal representation is not permitted unless allowed by the adjudicator. Sub-sections 22(5) and (5A) provide:

> (5) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator —
>
> (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions; and
>
> (b) may set deadlines for further submissions and comments by the parties; and
>
> (c) may call a conference of the parties; and
>
> (d) may carry out an inspection of any matter to which the claim relates.
>
> (5A) Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

87 In this case there was no s 22(5)(c) conference called.

88 The Adjudicator accepted the adjudication application on 29 July 2015 in accordance with s 20(2), and delivered the Adjudication Determination on 21 August 2015 within the limit of the extension period prescribed by the Act, which was 15 days.

89 In Victoria, the claimable variation provisions of the Act, being ss 10A and 10B, were introduced in 2006.[27] These provisions are unique to Victoria. In spite of the potential for adjudicators being required to consider these additional elements of a payment claim, and, as amply demonstrated by this case, the potential for such claims to involve a substantial number of factual issues, as well as involving complex legal matters arising from 'demarcation' issues as to what are, and what are not, claimable variations under the Act, no step was taken by the Legislature to provide additional time under the Act for an adjudicator to deliver the required adjudication determination. An adjudicator who is obliged to assess a payment claim which

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27 Sections 10A and 10B were inserted into the Act by section 11 of the *Building and Construction Industry Security of Payment (Amendment) Act 2006*, Act No 42 of 2006. The Bill received Royal Assent on 25 July 2006. The bulk of the amendments, including the introduction of sections 10A and 10B commenced on 30 March 2007.

includes claimable variations, must continue to do so within the tight time frame prescribed by s 22(4).

90 By way of contrast, the time limits prescribed in Victoria for an adjudicator to deliver an adjudication determination are more liberal in some other jurisdictions. Under Malaysia's *Construction Industry Payment and Adjudication Act 2012* (the "Malaysian Act"),[28] for example, the adjudicator must decide the dispute and deliver the adjudication decision within 45 working days from the service of the adjudication response or reply to the adjudication response, whichever is the later.[29] The basic timeframe under a current Hong Kong proposal[30] is 20 working days from receipt of the responding party's submissions, but the adjudicator may extend the time up to 55 working days after his or her appointment.[31] Both the Malaysian Act and the Hong Kong proposal provide that the prescribed time for determination may be extended with the consent of the parties.[32]

91 There is another element of the security of payment legislation which bears upon the way in which an adjudicator is expected to undertake the statutory valuation task, and that is the qualifications required for the appointment of an adjudicator.

92 Under the Victorian Act, which is derived from the New South Wales Act,[33] an adjudication application must be made to an Authorised Nominating Authority (an "ANA"), which is selected unilaterally by the claimant, and copied to the

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28 The Malaysian Act was passed on 18 June 2012 and came into operation on 15 April 2014. See Jeremy Coggins and Matthew Bell, 'Australia's Security of Payment Experience: A Crystal Ball for Malaysia and Hong Kong?' [2015] *International Construction Law Review* 420, 421.

29 *Construction Industry Payment and Adjudication Act 2012* (Malaysia) s 12(2)(a).

30 Hong Kong has announced that its own legislation is well on its way. The Development Bureau of the Government published a detailed "Proposed Security of Payment Legislation for the Construction Industry Consultation Document" in June 2015, inviting comments by 31 August 2015: Jeremy Coggins and Matthew Bell, 'Australia's Security of Payment Experience: A Crystal Ball for Malaysia and Hong Kong?' [2015] *International Construction Law Review* 420, 421, 430.

31 Hong Kong Proposed Model cl 26(e).

32 *Construction Industry Payment and Adjudication Act 2012* (Malaysia) s 12(2)(c); Hong Kong Proposed Model, cl 26(e).

33 New South Wales was the first Australian jurisdiction to introduce construction industry payment and adjudication legislation. It commenced operation on 26 March 2000. With the exception of Western Australia and the Northern Territory, which enacted legislation more closely based on the UK model, the other five Australian jurisdictions (Victoria, Queensland, Tasmania, Australian Capital Territory and South Australia) progressively enacted legislation closely modelled on the NSW Act.

respondent. ANAs are authorised by a prescribed authority, which in Victoria is the Victorian Building Authority (the "VBA"). There are presently 7 ANAs providing services in Victoria. Each ANA maintains its own panel of adjudicators. When the ANA receives an adjudication application from a claimant, it refers the application to one of its adjudicators. The adjudicator may accept the application by causing notice of the acceptance to be served on the claimant and the respondent, in which case the adjudicator is taken to have been appointed to determine the application.[34]

93 Neither the Act, the regulations made under the Act, nor the Ministerial Guidelines issued under s 44(1) of the Act[35] currently prescribe qualifications for adjudicators.

94 However, the Building Commission – the predecessor to the VBA[36] – under s 44(a) of the Act, has prescribed relevant conditions applicable to Victorian ANAs which set out the key competencies required for the appointment of an adjudicator by an ANA.[37] Pursuant to Appendix 2 of the conditions, entitled "Adjudicator Core Competencies", ANAs are required to ensure that the adjudicators they nominate for the purposes of the Act have the qualifications, knowledge and skills set out in the document. In addition to successfully completing a course of adjudication training, which on its face does not contemplate subjects that include training in the disciplines of architecture, construction, engineering, quantity surveying, building surveying or project management, the conditions prescribe the following "recognised qualifications" and "relevant experience":

> **Recognised qualifications**
>
> 1. At least one of the following –
>
> 1.1) A degree from a university or other tertiary institution in Australia, or an equivalent qualification from outside Australia, in one of the following disciplines:

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34 See the helpful description provided in relation to the mirror NSW legislation in Jeremy Coggins and Matthew Bell, 'Australia's Security of Payment Experience: A Crystal Ball for Malaysia and Hong Kong?' [2015] *International Construction Law Review* 420, 427-8.

35 Minister for Planning (Vic), 'Ministerial Guidelines: Authorisation of Nominating Authorities' in Victoria, *Victorian Government Gazette*, No S 69, 30 March 2007.

36 On 1 July 2013, the Building Commission and the Plumbing Industry Commission were replaced by a single building industry regulator, the Victorian Building Authority.

37 Building Commission, *Authorised Nominating Authorities – Conditions of Authorisation* (2013).

Architecture, Building, Engineering, Construction, Quantity surveying, Building surveying, Law, Project management, or

1.2) Eligibility for registration as a builder under the Building Act 1993 in the class of commercial builder (unlimited) or domestic builder (unlimited), or

1.3) 10 or more years' experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

Relevant experience

2. At least five years' experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

95 For present purposes what is notable is that the conditions do not prescribe, as a basic pre-requisite for appointment, qualifications in the disciplines of one or other of architecture, construction, engineering, quantity surveying, building surveying or project management. For example, it is possible for a tertiary qualified lawyer with 5 years' experience in dispute resolution relating to construction contracts to be appointed as an adjudicator under the Act.

96 This structure has clear implications for the manner in which an adjudicator is required to undertake the valuation task. An adjudicator is not required to act as an expert building valuer by bringing a personal expert opinion to the valuation assessment. What is required is for an adjudicator in each case to consider and assess the valuation evidence presented in the course of the adjudication, and arrive at a rational assessment of value on the basis of that evidence.

97 These considerations expose a tension in the administration of the Act in Victoria.

98 Reference is made to an element of the rule of law coined by the American legal scholar, Professor Lon Fuller in his work *The Morality of Law*.[38] Professor Fuller lists eight characteristics of law which he suggests are necessary for a society aspiring to institute the rule of law. The sixth element is here of relevance: "Laws must not

[38] Lon L Fuller, *The Morality of Law* (Yale University Press, 1964), cited in Mary Arden (The Rt Hon. Lady Justice Arden, a British judge currently serving as a judge on the Court of Appeal of England and Wales, Chancery Division), *Human Rights and European Law: Building New Legal Orders* (Oxford University Press, 2015) 117.

command the impossible". I venture to say that this contemporary maxim is apposite to statute law generally and in particular to the approach which needs to be taken to the application of the *Building and Construction Industry Security of Payment Act 2002* of Victoria to the work of adjudicators, given the inclusion of claimable variations in payment claims introduced into the Act, as provided for by ss 10A and 10B.

99 Taking into account the severe statutory time constraints placed on adjudicators to perform their tasks prescribed under the Act, an analysis undertaken on judicial review of the valuation exercise documented in an adjudicator's adjudication determination in Victoria ought not to be approached from an unduly critical viewpoint.

100 Rather, and providing the adjudicator makes the fundamental determinations earlier described, and does so by arriving at a rational assessment of value on the basis of the evidence, the Act calls for a practical and robust approach to the assessment process on the part of adjudicators and their expressed reasons. If the position was to be otherwise, the adjudication mechanism provided for by the Act, in all but the small cases, could not be made to work.

Summary of the Work of an Adjudicator

101 Drawing the threads together, the following may be said of an adjudicator's assessment of a payment claim under the Act in Victoria:

(a) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law.

(b) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the construction contract.

(c) In addition to the matters to be determined and considered under ss 23(1) and (2), and excluded under s 23(2A) of the Act, an adjudication requires, as a minimum, the following critical findings to be made (the "critical findings"):

(i) a determination as to whether the construction work the subject of the claim has been performed (or whether the relevant goods and services have been supplied); and

(ii) the value of the work performed (or the value of the goods and services supplied).

(d) Construction work carried out or related goods and services supplied are to be valued in accordance with the terms of the construction contract (if the contract contains such terms) pursuant to ss 11(1)(a) and 11(2)(a).

(e) In the absence of any express provision in the construction contract providing a mechanism for an adjudicator to undertake the assessment of value, the valuation assessment is to be undertaken in accordance with s 11(1)(b) (for work) and s 11(2)(b) (for goods and services), having regard to the matters set out in those sub-sections, namely:

(i) the contract price for the work or the goods and services;

(ii) any other rates set out in the contract;

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if the work or goods are defective, the estimated cost of rectifying the defect.

(f) If a construction contract contains a binding schedule of rates within the meaning of s 11(1)(b)(ii) (for work) and s 11(2)(b)(ii) (for goods and services), the adjudicator is required to have regard to the schedule in assessing value if s 11(1)(b) or s 11(2)(b) apply. Further, the adjudicator should state in the adjudication determination whether and how the schedule of rates was

applied in the assessment of value, if it in fact was applied, or state why the schedule of rates was not applied.

(g) However, without measures, evidence or submissions being provided to the adjudicator in a coherent fashion in respect of defined categories of work (or goods and services) the subject of a contractual schedule of rates, in most cases it would not be possible for an adjudicator to safely apply the schedule in assessing the value of the claim. In such circumstances the adjudicator may have regard to a schedule of rates, but would not be remiss in not applying it.

(h) The adjudicator is obliged to make the critical findings on the whole of the evidence presented at the adjudication.

(i) The adjudicator, having decided that the respondent's submissions and material should be disregarded, cannot simply adopt the amount claimed by the claimant (for example, in the payment claim or in the adjudication application).

(j) The adjudicator must proceed to make the critical findings by:

(i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;

(ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;

(iii) arriving at a rational conclusion founded upon the evidence;

(iv) in so doing, is not called upon to act as an expert; and

(v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.

(k) Pursuant to s 23(3) of the Act, the adjudicator must include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided. In providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

102 In the light of these observations I turn to the Adjudication Determination in the present case.

Standard of Adjudicator's Reasons

103 It is well settled that the standard of reasons expected of a tribunal will vary, according to the circumstances.

104 Justice Hargrave in *BHP Billiton & Ors v Oil Basins Ltd*[39] said this in relation to the sufficiency of an arbitrator's success:[40]

> In my view, the standard to be applied in considering the sufficiency of an arbitrator's reasons depends upon the circumstances of the case including the facts of the arbitration, the procedures adopted in the arbitration, the conduct of the parties to the arbitration and the qualifications and experience of the arbitrator or arbitrators. For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge's reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer.
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> I adopt with approval the statement by McPherson and Davies JJA in *Cypressvale Pty Ltd v Retail Shop Lease Tribunal* on this issue:
>
> > The calibre, legal training and experience of members of the judiciary raise expectations that reasons they give for their decisions will attain a high level of sophistication. The same would not always be true of decisions of persons whose primary qualification for decision-making consists of specialist knowledge or experience rather than ability to produce reasons conforming

39 [2006] VSC 402 (1 November 2006).
40 Ibid [21]-[22] (citations omitted).

> to accepted judicial tradition. Reasons that would not be considered adequate if given by a judge may nevertheless suffice for some other decision-makers not chosen for their task because of their resemblance to the judiciary. In the end, the question whether reasons are 'adequate' falls to be considered in the context afforded by the nature of the question which has to be decided and other factors, including the functions, talents and attributes of the tribunal member or the individual in whom the duty of deciding questions of that kind has been vested. Considerations of the cost to litigants and the general public in requiring reasons to be given is another factor which must be weighed.

105 It was also observed by the Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd & Ors*[41] that an ambulatory approach is to be taken. The depth of reasons required to be given will depend on the nature of the decision. In this respect, the Court said:[42]

> The arbitrators' decision in the present case called for reasons of a judicial standard. As with reasons which a judge is required to give, the extent to which an arbitrator needs to go in explaining his or her decision depends on the nature of the decision.

106 The High Court reinforced the position in *Westport Insurance Corporation v Godian Runoff Ltd* where it was said:[43]

> The reference in *Oil Basins* to the giving by the arbitrators in that dispute of reasons to a 'judicial standard' and cognate expressions placed an unfortunate gloss upon the terms of s 29(1)(c). More to the point were observations in *Oil Basins* to the effect that what is required to satisfy that provision will depend upon the nature of the dispute and the particular circumstance of the case.

107 The unique circumstances in which an adjudicator is required to deliver reasons for an adjudication determination under the Victorian Act have earlier been described in some detail. These circumstances do not call for an exacting standard to be applied to an adjudicator's reasons. Indeed, the legislative scheme is such that the standard of reasons delivered by an adjudicator within the time constraints required by the Act, and given the nature of the decision to be delivered in this demanding context, and by persons who are often not legally qualified, of necessity means that it falls towards the lower end of the scale.

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41 (2007) 18 VR 346.

42 Ibid 366 [54] (Buchanan, Nettle and Dodds-Streeton JJA).

43 (2011) 244 CLR 239, 270 [53] (French CJ, Gummow, Crennan and Bell JJ) (citations omitted).

108 In determining the sufficiency of the reasons expressed in the Adjudication Determination, I have applied this standard.

Analysis of the Adjudication Determination on 'Value'

Whether the Construction Contract Provided for Valuation of Work by the Superintendent's Certificate

109 The first question is to determine whether the terms of the Construction Contract made provision for the valuation of the construction work carried out or undertaken to be carried out for the purposes of s 11(1)(a) of the Act. If so, the Adjudicator, having determined that the relevant construction work had been carried out, was required to value that work in accordance with the terms of the Construction Contract.

110 Clause 36.4 provided in relation to pricing, that payment was to be made of:

> … an amount ascertained by the Superintendent and certified in a relevant progress certificate using the following order of precedence:
>
> (a) Prior agreement;
>
> (b) Applicable rates or prices in the Contract;
>
> (c) Rates or prices in a schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and
>
> (d) Reasonable rates or prices, which shall include the amount for profit and overheads specified at Item 32A, and any deductions shall include a reasonable amount for profit specified at Item 32B but not overheads.

111 Further, pursuant to Clause 37.1 in relation to progress claims, the parties agreed that the percentages of the contract sum and amounts payable were to be "As certified by the Superintendent". This clause related specifically to the valuation of "Progress Claims". It is to be further noted that clause 37.1 of the Construction Contract makes specific reference to the Act.[44]

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44 Clause 37.1 of the Construction Contract includes the following phrase: "*The Contractor shall claim payment progressively in accordance with Item 33 (each date being a 'reference date' for the purposes of the SOP Act).*"

112 Section 11 of the Act defines how work carried out or undertaken to be carried out is to be valued for the purpose *inter alia* of assessing "Progress Payments" under s 10.

113 The issue then becomes, whether a contractual provision which states in effect that a progress claim is to be made in accordance with a superintendent's certification, clothes the certificate, when issued, with the status of a means to determine value for the purposes of s 11(1)(a) of the Act, which an adjudicator is in turn obliged to adopt.

114 I do not accept this proposition as correct.

115 An invitation for an adjudicator to merely adopt a superintendent's certificate, without more, is not a contractual provision of the kind contemplated by s 11(1)(a) of the Act. It does not provide any means or basis upon which an adjudicator may independently undertake the valuation exercise, but rather delegates that task *ex post facto* to the contractually appointed superintendent. Such an exercise is not countenanced by the sub-section.

116 Further, the mere adoption of a superintendent's certificate, without more, would be inconsistent with the adjudicator's statutory task of independently assessing the evidence of value. Even if the pricing mechanism under the construction contract could be interpreted as an invitation to an adjudicator to merely adopt and apply the superintendent's 'price' as evidenced by a certificate issued, such a contractual provision would, in my opinion, be void pursuant to s 48 of the Act as being a contractual provision which serves to exclude, modify or restrict the operation of the Act, or has that effect.

117 For these reasons, I find that the Construction Contract made no express provision with respect to the valuation of progress claims for the purposes of s 11(1)(a) of the Act.

118 This is not to say that an adjudicator may not take into account and assess the input of a superintendent as to the value of items of work performed under a construction contract. This may be taken into account, as it was in a number of cases in the

present Adjudication, as part of the body of evidence of value considered by an adjudicator in arriving at an ultimate assessment of value.

Questions as to Adjudicator's Assessments of Value

119 The central questions which arise in relation to the Adjudicator's assessments of value are whether the Adjudicator properly valued the items claimed in the Payment Claim under ss 10((1)(b)(i) and 11(1)(b) of the Act and whether he provided sufficient reasons as required under s 23(3) of the Act as to the basis upon which the amounts determined were decided.

Background Matters

120 The first thing to note in the amount awarded by the Adjudicator when compared with the Payment Claim and the Payment Schedule. The amount of the Payment Claim under consideration was $4,460,815.06 (incl GST). The Payment Schedule, which specified the amount the respondent Plenty Road was prepared to pay on the claim, which was $967,865.02 (incl GST). The Adjudicated Amount which the Adjudicator determined under the Adjudication Determination was due to be paid on the Payment Claim, which was $2,172,837.57 (incl GST).

121 The second thing to note is the number of factual issues in dispute which the Adjudicator had to consider and determine for the purposes of his valuation. The Adjudicator regarded the following matters relating to valuation of the Payment Claim as properly before him for determination:

(a) the proper assessment of the disputed Provisional Sum items;

(b) the proper assessment of the disputed Variation items; and

(c) the proper assessment of the disputed Deduction items.

122 Within the category of disputed provisional sum payments, there were 6 sub-categories of disputed items before the Adjudicator, ranging from "Feature Signage" to "Contamination". There were 5 disputed deduction claims. However, by far the

largest body of issues before the Adjudicator comprised the disputed claimable variations, of which there were 37 in number. Assessment of the disputed claimable variations was a considerable task.

123 The third thing to note is that the Adjudicator was obliged to consider and determine a number of complex legal issues, in addition to making findings on the factual matters before him. These issues included determining whether certain items comprising the Payment Claim were served out of time pursuant to s 14 of the Act; whether the Construction Contract included a "method of resolving disputes" within the meaning of s 10A(3)(d)(ii) of the Act; and the effect of a failure (if there was one) to comply with the variation provisions and/or notice requirements under the Construction Contract. Added to the mix was a claim by the claimant in respect of the respondent's conversion of the bank guarantee. The determination of these issues involved both an analysis and application of the Act and a body of relevant case law.

124 The documentation provided by the parties for the consideration of the Adjudicator was extensive, and comprised some 63 tabs of documentation organised into folders.

125 The Adjudication Determination occupied 220 pages, of which the combined disputed assessments occupied some 176 pages. Although in significant part the Adjudication Determination involved a re-statement of the cases of the parties, preparation of the reasons was a substantial task.

Adjudicator's General Approach to Each Head of Claim

126 The Adjudicator approached his task of assessing the value of the disputed payments in the following way:[45]

> Where the claimant adopts, for the purpose of this adjudication, the amount certified by the Superintendent in the Payment Schedule, I adopt the Superintendent's assessment in respect of that item. In my view, on the material before me, the Superintendent's assessment is based, in respect of those items, on sound methods.

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45 See [93] of the Adjudication Determination.

127 This approach is an acceptable way for an adjudicator to proceed with the assessment of value. Given the payment schedule was prepared by the respondent, Plenty Road, the Adjudicator is doing no more than identifying values for items of work which are not in controversy. Even then, he applies his own mind to the matter when he concludes that, on the material before him, the Superintendent's assessment was based on sound methods in relation to those items.

128 Under each sub-category, the Adjudicator first stated the claimant's case (that of Construction Engineering) followed by the case of the respondent (Plenty Road), followed by the claimant's reply. In each case he identified and summarised what was presented to him as submissions and evidence relied upon by the parties, identified the principal issues for determination, and proceeded to assess the evidence and arrive at a conclusion in each issue based on the evidence.

Disputed Provisional Sum Items

129 The Adjudicator concluded his assessment of the disputed Provisional Sum Claims under each sub-category with the following reasoning:

> Provisional Sum No 1
>
> Feature Signage
>
> On the material before me, I assess this item as follows:
>
> 1. Pursuant to the Superintendent's direction, the claimant carried out and completed the works relating to the feature signage.
>
> 2. The cost of the work was as per Variation Quotation No. 02/055, $179,635.24 plus GST (including the previously omitted the Pylon 2 additional costs which included new light boxes and LED lighting).
>
> 3. Taking into account the provisions of the construction contract, and the provisions of the Act, I assess that the claimant is entitled to payment of $51,054.78 (excl. GST).
>
> Provisional Sum No 2
>
> Kmart Lower Ground Floor Structure
>
> On the material before me, I assess this item as follows:
>
> 1. The substantive dispute is whether the work the subject of the Provisional Sum was performed On the material before me, on balance, it appears to me that both the PS2 works and the VA 02/006 works have been carried out. The PS2 works and the VA 02/006 works are different works carried out in different areas of Kmart.

2. On the material before me, the claimant is entitled to amount claimed, namely $424,251.10 (excl GST).

Provisional Sum No 4

Ceiling to Skylights (Alternative to ME-10)

On the material before me, I assess this item as follows:

1. At a project meeting which took place on 9 October 2014, the respondent and the Superintendent directed the claimant to erect an on-site suspended ceiling sample beneath the now installed skylights for further inspection and sign off by the project group. On 18 December 2014, a further viewing of the ceiling sample with the anti-bird mesh installed took place. The sample was approved by the Superintendent, the respondent and DP Toscano Architects.

2. The cost of PS4 is $159,857.50 plus GST, the claimant is entitled to payment in the sum of $84,857.50 plus GST for PS4.

3. Taking into account the provisions of the construction contract, and the provisions of the Act, I assess that the claimant is entitled to payment of $84,857.50 (excl GST).

Provisional Sum No 11

Consultants Fees

On the material before me, I assess this item as follows:

1. There is no issue as to whether the claimant is entitled to payment, only the amount to be paid.

2. I note that the Superintendent previously notified the claimant that the sum of $12,000 had been deducted in relation to architect and consultant final inspections which were not yet complete.

3. On the material before me, I adopt the amount claimed by the claimant as the actual amount.

4. I assess the amount payable to the claimant in respect of PS11 is $4,930.88 (excl GST).

Provisional Sum No 13

Allowance for Kmart Auto and Gym (incl. preliminaries and margin)

On the material before me, I assess this item as follows:

1. By Superintendent's Instructions SI128 dated 16 September 2014, the Superintendent instructed the claimant to proceed with the gym.

2. At a site meeting which took place on 16 April 2015 to discuss the gym and other outstanding works including defects resolution, the claimant provided a detailed breakdown of the costs of the gymnasium totalling $1,829,012.90. The Superintendent priced the work in relation to the gym in accordance with clause 3 of the Contract. The Superintendent assessed the value of the works completed in relation to the gym, as at 9 July 2015, in the Payment

Schedule to be $1,237,849.52. The claimant's assessment of the value of provisional sum 13 of $1,829,012.90 plus GST is only slightly higher than the estimate given to the Superintendent on 5 March 2014. The claimant substantiated its valuation with supporting documentation. On balance, I conclude that the claimant's assessment is supported by the documents. I adopt that assessment.

3. The claimant currently revises its figure to $1,736,618.76 plus GST, and claims payment of $954,618.76 plus GST for PS13 in respect of PS13.

4. I assess this item at $954,618.76 (excl GST).

Provisional Sum No 14

Dealing with contamination not included in paragraph (e) of the definition of *qualifying cause of delay*

On the material before me, I assess this item as follows:

1. The Contract contemplated that there would be contamination categorised as 'Category C' on site and allows a provisional sum of $250,000.00 to deal with Category C contamination.

2. The Superintendent deducted the sum of $10,000 in relation to Provisional Sum No. 14 because the claimant has not provided the required contamination removal certificate. On the material before me, the respondent does not establish a basis for that deduction.

3. I assess this item at $30,000.00 (excl GST).

130 Although the reasoning was expressed in brief terms, I find no error in the manner in which the Adjudicator assessed the value of the disputed provisional sum items. The Adjudicator in each case, indicated in his reasons that he both considered the material before him and assessed each item at the value he determined. Further, he provided sufficient reasons as required under s 23(3) of the Act as to the basis upon which the amounts determined were decided.

Disputed Variation Items

131 In undertaking this considerable assessment task, in 33 of the 37 cases, which are set out in Annexure "A" to these reasons (the "Disallowed Variation Claims"), the Adjudicator concluded his assessment with a formula, which was followed in all 33 cases of the Disallowed Variation Claims, or in a manner which was to the same effect. An example of the formula used by the Adjudicator in the Adjudication Determination is the analysis of the claimable variation relating to "Kiosk 1 Donut

King" where the claimant claimed $4,738.80 in its Payment Schedule. The Adjudicator concluded his assessment with the following:[46]

> On the material before me, I conclude that the claimant performed the work the subject of the claim, that the work was outside the Contract, and the respondent fails to establish a sufficient basis to withhold payment for this item. I adopt the valuation provided by the claimant. I assess this item at the amount claimed in the Payment Claim, namely $4,738.80 (excl GST).

132 There is nothing wrong with adopting a formula *per se*, and given the extent of the task before the adjudicator in dealing with the number of disputed variations before him, an approach of this kind could only have been expected.

133 Further, the Adjudicator was perfectly entitled, on the material before him, to conclude that the claimant had performed the work the subject of the claim, and that the work was outside the Construction Contract (ie. was a variation), and to express these findings in his Adjudication Determination as he did.

134 However, in the course of dealing with the 33 Disallowed Variation Claims, as exemplified by his reasoning in relation to the claimable variation for the "Kiosk 1 Donut King", the Adjudicator made the following errors:

(a) in effect, he imposed an onus on the respondent to establish a sufficient basis to withhold payment in respect of each item;

(b) he then proceeded to find in each case that the respondent failed to satisfy the onus; and

(c) having rejected the respondent's contentions, he adopted the amount claimed in the Payment Claim.

135 In taking this course in relation to the Disallowed Variation Claims, the Adjudicator did not demonstrate in his Adjudication Determination any process of assessment of the value of the claim other than merely adopting the amount claimed by the claimant. Although the Adjudicator provided sufficient reasons as required under s

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46 See p 127 of the Adjudication Determination.

23(3) of the Act as to the basis upon which the amounts determined were decided, the process of reasoning followed by the Adjudicator, as disclosed in the Adjudication Determination, with respect, is not countenanced by the Act.

136 In the circumstances, it follows that in his assessment of the 33 Disallowed Variation Claims, the Adjudicator fell into jurisdictional error.

137 However, in relation to the four remaining items determined by the Adjudicator in the category of disputed variation claims,[47] the reasoning was expressed both in acceptably brief terms and in the manner which demonstrated that the Adjudicator did undertake the required assessment of the value of these items based on a consideration of the evidence before him.

138 The reasoning of the Adjudicator in respect of these four items, after setting out the material and submissions relied on by the parties, concluded with the following:

> VA 02/075 Works – 'Electrical management changes at Coles'
>
> On the material before me, I assess this Item as follows:
> 1. VA 02/075 relates to misuse of lift in Kmart resulting in a lift call out. The claimant says that this is an excepted risk under the Contract.
> 2. The respondent says that the claimant's entitlement to claim the costs incurred in relation to the lift call out to rectify the damage to the lift therefore only accrues if the rectification works were "*directed by the Superintendent*"
> 3. In my view, the respondent is correct. I take Clause 14.2 to identify that any direction from the Superintendent to rectify the damage is to be valued as a Variation, but, in this case, there was no direction, and/or any request from the Superintendent.
> 4. I assess this item at nil.
>
> VA 02/078 Works – 'Widening of the footpath'
>
> 3. In my view, , in this instance, the failure of the claimant to give notice under Clause 36.2A had the result that the respondent was not warned that the claimant, in constructing in accordance with the original drawings, would consider the Superintendent's email to be a direction to be a vary the works.
> 4. I assess this item at nil.

[47] VA 02/075 Works – 'Electrical management changes at Coles'; VA 02/078 Works – 'Widening of the footpath'; VA 03/076 Works – 'Bored pier to groove train'; and VA 03/080 Works – 'T.14 groove train structural steel alterations'.

VA 03/076 Works – 'Bored pier to groove train'

> 3. On the material before me, I conclude that the claimant performed the work the subject of the claim. However, the respondent missed out on an opportunity to dispute that the work was work outside the Contract I assess this item at nil.

VA 03/080 Works – 'T.14 groove train structural steel alterations'

> 3. On the material before me, I conclude that the claimant performed the work the subject of the claim. However, the respondent missed out on an opportunity to dispute that the work was work outside the Contract I assess this item at nil.

139 Further, I am satisfied that in relation to these four items, the Adjudicator provided sufficient reasons as required under s 23(3) of the Act as to the basis upon which the amounts determined were decided.

Disputed Deduction Items

140 The Adjudicator approached the task of assessing 3 of the 5 disputed deduction claims, which are set out in Annexure "B" to these reasons (the "Disallowed Deduction Claims") by again applying a formula.

141 For example, in relation to the deduction claimed by the respondent for alleged defective work in relation to the "Pebble Finish" where $8,600 was claimed as a deduction, the Adjudicator concluded:[48]

> On the material before me, I conclude that the respondent fails to establish a sufficient basis to deduct an amount in respect of this item. I adopt the valuation claimed by the claimant [which claimed a NIL deduction]. I assess this item at nil.

142 In the course of dealing with the 3 Disallowed Deduction Claims, I find that the Adjudicator made the following errors:

(a) in effect, he imposed an onus on the respondent to establish a sufficient basis to deduct an amount in respect of each item;

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48 See p 201 of the Adjudication Determination.

(b) he then proceeded to find in each case that the respondent failed to satisfy the onus; and

(c) having rejected the respondent's contentions, he adopted the amount claimed by the claimant, which was a NIL deduction in respect of two items Defective Work – Pebble Finish and 037 Telstra connection costs), and a deduction of $7,039.00 (excl. GST) in respect of one item (038 Value management items painting precast CFC).

143 Again, in taking this course in relation to the Disallowed Deduction Claims, the Adjudicator did not demonstrate in his Adjudication Determination any process of assessment of the value of the claim other than merely adopting the amount claimed by the claimant. Although the Adjudicator provided sufficient reasons as required under s 23(3) of the Act as to the basis upon which the amounts determined were decided, the process of reasoning followed by the Adjudicator, as disclosed in the Adjudication Determination, with respect, is not countenanced by the Act.

144 However, it should be noted that the path of reasoning of the Adjudicator in relation to two of the disputed deduction claims, was both unimpeachable and was in each case expressed sufficiently in the Adjudication Determination, as follows:

(a) In respect of a deduction claimed by the respondent for Deletion of tenancy power meters (Item 039) the Adjudicator assessed the deduction of $NIL claimed by the claimant and rejected the respondent's assessment which allowed for a deduction of only $8,394.75, for the following expressed reasons:

> On the material before me, I conclude that this deduction has been dealt with under VA 02/038 above and has been taken into account in the claimant's valuation of VA 02/038. I assess this deduction as nil.

(B) The Adjudicator assessed the deduction of $52,500 claimed by the respondent Plenty Road in respect of "Landscaping (Kmart Auto zone)", and rejected the claimant's assessment (that of Construction

Engineering), which allowed for a deduction of only $6,289, for the following expressed reasons:

> In my view, the claimant's valuation seems very low, relative to the carpark works proposed. Conversely, the Superintendent's assessment seems appropriate, and is supported by an alternative quotation. I adopt the deduction as assessed by the Superintendent, namely $52,500.00 (excl GST).

145 In the circumstances, it follows that in his assessment of the 3 Disallowed Deduction Claims, the Adjudicator fell into jurisdictional error.

Schedule of Rates

146 I here deal with the submission of the Plaintiff that the Adjudicator failed in his Adjudication Determination to refer to the contractual rates set out in the Construction Contract and failed to apply them, as he ought to have done.

147 The concept of "Schedule of Rates" was defined in clause 1 of the Construction Contract to mean:

> … any schedule included in the Contract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;

148 A Schedule of Rates was annexed to the contract as "Part CC" (the "Schedule of Rates"). It provided rates for:

> File Services (Contractor); Mechanical Services (Centre Services Provider/Contractor); Hydraulic; Electrical; Plasterboard/Blockwork Intertenancy wall; Access Panels; Floor tiling works; Demolition, Chasing, Concreting, Doweling; Rubbish Bins; Other; Consultants & Labour Costs; Hoarding; Roof & Shopfront; and Core drilling & Hand washing concrete and asphalt.

149 The Schedule of Rates was also referred to in the Construction Contract in Clause 36.4, which is noted earlier.

150 In the Adjudication Determination the Schedule of Rates is referred to as having been addressed by the parties at various points, for example, by the claimant in the claim for the claimable variation in respect of "T.03 services alterations" (Item 045),

where the Adjudicator noted that the claimant said: "*The cost to relocate the floor waste is based on the rate prescribed in the schedule of rates at Annexure Part CC of the Contract*" and, by way of further example, in the claim for the claimable variation in respect of "Kiosk 1 Donut King" (Item 03/024), where the Adjudicator noted that the respondent said that: "*it valued VA 03/024 in accordance with clause 36.4 of the Contract by applying the Schedule of Rates at Annexure Part CC*."

151 In total, the Adjudicator notes that one or other party addressed the Schedule of Rates in the category of disputed Variation Items in a total of 19 cases. [49] However, in relation to these 19 cases, the Adjudicator did not in his reasons state whether he in fact adopted the Schedule of Rates in assessing the sum payable in respect of the item or state why he would not have regard to the Schedule of Rates, if in fact that is what he did. Either way, I find that the Adjudicator failed in his statutory task under s 23(3) by not properly stating the basis on which the amounts determined to be payable had been decided. In this respect, the Adjudicator fell into jurisdictional error in respect of the 19 items.

152 It should be noted, however, that this is an additional ground for setting aside the Adjudication Determination in relation to these 19 items, because each was a disputed Variation Item falling within the 33 Disallowed Variation Claims, and each has already been determined to be the subject of jurisdictional error on the basis of the reasoning applied.

153 However, in respect of the categories of the disputed Provisional Sum Items and the disputed Deduction Items, no reference is made to the parties having addressed the Schedule of Rates, either in submissions or in evidence. I am not satisfied that the Adjudicator was remiss in not attempting to calculate the value of the work done on the basis of the rates in relation to these items.

154 In particular I am not satisfied that the Adjudicator had before him coherent submissions and material from either party which provided actual measures for

[49] 03/005;03/016;03/022;03/024;03/025;03/026;03/036;03/043;03/045;03/046;03/052;03/053;03/054;03/055;03/056;03/058;03;059;03/061;and 03/084.

these items of work claimed which could be applied to the items designated in the contractual Schedule of Rates. No evidence, for example a report prepared by a quantity surveyor, was before the Adjudicator in relation to these items for his consideration, founded on the Schedule of Rates.

155 Absent measures of these categories of work, it would not be possible for the Adjudicator to apply the schedule of rates to these items, even if the schedule contained categories of work which applied.

156 Further, it does not appear that the parties presented their cases to the Adjudicator based on the contractual Schedule of Rates or the categories of work to which the rates could apply pursuant to "Part CC" of the contractual annexure.

157 In these circumstances, the Adjudicator could not be expected to attempt the exercise of applying the Schedule of Rates, and did not fall into error in failing to do so.

Orders

158 The Plaintiff succeeds in its claim for relief by way of certiorari on the ground of jurisdictional error in respect of the 33 Disallowed Variation Claims and the 3 Disallowed Deduction Claims.

159 I will hear the parties as to the form of the orders to give effect to these reasons, including whether the determination, or any part thereof, in the light of the setting aside of the 33 Disallowed Variation Claims and the 3 Disallowed Deduction Claims, should be remitted back to the Adjudicator or his Authorised Nominating Authority, or to any other adjudicator, or be remitted at all, and as to the question of costs.

Annexure "A"

Disallowed Variation Claims (33)

VA No.	Item
02/008	'Enviroprotect hygienist services'
02/009	'Kmart V1 brief'
02/038	'MSBs 1 & 2 metering alterations'
02/067	'Floor boxes to CML & ATMs in the mall'
02/068	'Telstra fibre optic protection slab'
02/071	'Electrical management changes at Coles'
02/080	'Build-up of access road adjacent to Coles due to contaminated soil'
02/083	'Kmart auto preparation of pad site for future use'
02/086	'Coles internal fitout design/documentation'
03/001	'Design document alterations as per TMA SI T001 (Part 2)'
03/005	'T.03 services alterations'
03/016	'T.19 services alterations'
03/022	'T.26 services alterations'
03/024	'Kiosk 1 Donut King'
03/025	'Kiosk 2'
03/026	'Kiosk 3-5'
03/027	'Kiosk floor boxes'
02/031	'Detention tanks'
03/034	'T.10 Brumby's CAT1 works'
03/035	'FFH services alterations'
03/036	'T.10 Brumby's hydraulic services alterations'
03/043	'T.10 Brumby's saw cutting and slab reinstatement'
03/045	'FFH additional inground point'
03/046	'T.24 butcher additional inground hydraulics points'
03/052	'T.17 sawcutting and slab reinstatement'
03/053	'T.18 sawcutting and slab reinstatement'
03/054	'T.21 sawcutting and slab reinstatement'
03/055	'Kiosk 2 sawcutting and slab reinstatement'
03/056	'T.25 sawcutting and slab reinstatement'
03/058	'T.27 sawcutting and slab reinstatement'
03/059	'T.29 sawcutting and slab reinstatement'
03/061	'T.31 sawcutting and slab reinstatement'
03/084	'T.24 mechanical and fire services work'

Annexure "B"

Disallowed Deduction Claims (3)

TM No.	Description
-	Alleged defective work – pebble finish
037	'Telstra connection costs'
038	'Value management items painting precast CFC'