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

Not Restricted

No. 2782 of 2013

SUGAR AUSTRALIA PTY LTD — Plaintiff

v

SOUTHERN OCEAN PTY LTD & ANOR — First Named Defendant

and

PHILIP MARTIN — Second Named Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 SEPTEMBER 2013
DATE OF JUDGMENT:	15 OCTOBER 2013
CASE MAY BE CITED AS:	SUGAR AUSTRALIA PTY LTD v SOUTHERN OCEAN PTY LTD & ANOR
MEDIUM NEUTRAL CITATION:	[2013] VSC 535

ADMINISTRATIVE LAW – Certiorari – Jurisdictional error – *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 considered and applied – *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 considered and applied – *Grocon Constructors v Planit Cocciardi Joint Venture [No. 2]* [2009] VSC 426 not followed in part – Fraud as a ground to found certiorari.

PRACTICE AND PROCEDURE – Subpoena issued under r 42 *Supreme Court (General Civil Procedure) Rules 2005* seeking production of a computer – Statement of a preliminary question for determination under r 47.04 of the *Rules* – Allegation of fraud – Risks of alleging fraud.

PREROGATIVE WRITS – Certiorari – Jurisdictional error – *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 considered and applied – *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 considered and applied – *Grocon Constructors v Planit Cocciardi Joint Venture [No. 2]* [2009] VSC 426 not followed in part – Fraud as a ground to found certiorari.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr T Shnookal SC	Herbert Geer
For the First Defendant	Mr R Andrew	A. J. Macken & Co.
For the Second Defendant	No Appearance	

HIS HONOUR:

Introduction

1. This proceeding is an application for judicial review of a determination of an adjudicator invoking certiorari to quash a decision of an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002* (the "Act") to conduct an adjudication pursuant to Division 2 of Part 3 of the Act.[1]

2. The immediate issue for determination arose out of the proposed issue of two subpoenas by the Plaintiff directed to the First Defendant and its Principal. The issue and service of a subpoena is a serious step. The process invokes the compulsory powers of the Court. If a subpoena is not complied with, the failure can result in heavy sanctions.[2] As was said in *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No. 4)*:

> The seriousness with which the Court views these procedures is underlined by the sanctions that are open to be applied in the event of their breach. First, disobedience of a subpoena is a prima facie contempt of court. Second, procuring a person to disobey a subpoena is an interference with the administration of justice and is a contempt of court in itself. Third, a subpoena served in another State pursuant to the *Service and Execution of Process Act 1992* (Commonwealth) under s 29, if not complied with, may be enforced by warrant of apprehension issued by the court of the place of issue of the subpoena, pursuant to s 37(1) of that Act.[3]

3. Usually documents are what are called for under a subpoena issued under r 42 of the *Supreme Court (General Civil Procedure) Rules 2005* (the "Rules"). However, in this case a thing, being a computer, is sought to be produced through the process pursuant to r 42.02(1)(b) of the Rules, which compels the addressee to produce, inter alia, any "thing" as directed by the subpoena. This gives rise to a range of issues.

4. First, what is sought to be produced on the subpoena is akin to an electronic filing cabinet of information, whereas what is contemplated in the usual case is narrowed to a defined document or groups of documents.

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1 *Building and Construction Industry Security of Payment Act 2002* (Vic).
2 *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No. 4)* [2011] VSC 269, [55]-[60].
3 *Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No. 4)*[2011] VSC 269, [60].

5. Second, a computer might contain private information of all sorts, some of it totally irrelevant to a process before the Court, and could include confidential and privileged information in this category.

6. Third, unless properly managed, the production of a computer before the Court might be oppressive to the possessor of the machine, who would be denied its use during the period of its production to the Court.

7. Fourth, the Court needs to be satisfied that any examination of the computer delievered into its custody pursuant to the subpoena is conducted with due care, so that the computer record of the person subpoenaed is not destroyed or tampered with or otherwise compromised.

8. In this case, however, a more fundamental issue arose for determination. The application for judicial review in this case is founded upon an alleged error which was said to be amenable to certiorari on one or more of the well recognised grounds.

9. It is well established in the case law, including for example *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* ("*Grocon*"),[4] that errors of fact in the usual case, where the question in issue is referred by the empowering statute to a tribunal to determine, are not regarded as errors of law, which are capable of review on an application on certiorari. In other words an adjudicator charged with the making of an adjudication determination under the Act is entitled to make an error of fact and not have that decision reviewed judicially. This is sometimes described as the "power to make a wrong decision".[5]

10. For certiorari to run to quash an impugned decision, it must be founded upon on one or more of the well recognised grounds, most importantly: jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud, and what is known as "error on the face of the record". See: *Craig v South Australia* ("*Craig*").[6]

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4 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426.

5 Michael J. Detmold, *The Unity of Law and Morality: A Refutation of Legal Positivism* (Routledge Kegan Paul, 1978) p 171.

6 *Craig v South Australia* (1995) 184 CLR 163, [16]-[17].

11. What is sought by the Plaintiff in this case is a challenge to a finding of fact made by the adjudicator as to the validity of the payment claims (the "Payment Claims") purportedly made under ss 9 and 14 of the Act, and pursuant to which the adjudicator assumed his jurisdiction. Prosecution of this allegation resulted in the perceived need to examine the computer system of the First Defendant and its Principal Nikolas Karantzis. This was alleged to contain documents in electronic form which the Plaintiff said were relevant to its challenge to the finding of fact made by the adjudicator as to the validity of the payment claim. It was conceded that these electronic documents, if they existed, went beyond the documents that were before the adjudicator when he made his adjudication determination.

12. The trial of the proceeding was set down for hearing on Monday 2 September 2013. The issue relating to the subpoenas arose for determination at a directions hearing called for Friday 30 August 2013.

13. In order to resolve the question to determine whether the proposed subpoenas should be directed to be issued, I stated a question for preliminary determination pursuant to r 47.04, which provides:

> **47.04. Separate trial of question**
>
> The Court may order that;
>
> (a) any question in a proceeding be tried before, at or after the trial of the proceeding, and may state the question or give directions as to the manner in which it shall be stated;
>
> (b) different questions be tried at different times or places or by different modes of trial.

14. The separate question which I stated for preliminary trial was:

> Is it open on this application for judicial review to consider the findings of fact made by the adjudicator as to the validity of the payment claims in the circumstances of this case which include allegations of misleading conduct and fraud which are pressed by the applicant for relief by way of certiorari?

15. The separate question was alive in any event for determination at the trial.

16. I took the view that the determination of the separate question was consistent with the *Civil Procedure Act 2010*, in that, depending on the outcome of the hearing of that question, the parties could, at least potentially, be spared the cost of the engagement of computer experts, in the context of a claim involving $181,000, which in any event by operation of s 47 of the Act, was awarded by the adjudicator on account only, and may await adjustment following any civil proceedings which may be issued before a Court or Tribunal.

17. I gave directions that the trial of the preliminary question be heard on Monday 2 September 2013, after which I proposed to adjourn the balance of the trial, and upon determination of the preliminary question, make any appropriate orders as to the subpoenas and the hearing of the balance of the trial.

Background Facts

18. Relevant background facts stated below for the purposes of determining this application are drawn from three Adjudication Applications submitted by the First Defendant and claimant, Southern Ocean Pty Ltd ("Southern Ocean") to the Authorised Nominating Authority, Adjudicate Today, on or about 15 March 2013. Southern Ocean made claims for final progress payments from the Plaintiff, Sugar Australia Pty Ltd ("Sugar"), as the respondent.

19. Mr Karantzis is the Executive Director of the claimant, Southern Ocean.

20. The parties, Southern Ocean and Sugar, entered into three Contractors Agreements in 2011 in relation to Sugar's refined sugar station project, which was an upgrade of its sugar refinery at Yarraville, Victoria. Under these agreements, Southern Ocean was engaged by Sugar to provide key personnel for the project.

21. Pursuant to what is known as the "Huxley Agreement", Southern Ocean provided Key Personnel (Huxley - as OH&S Coordinator and later as a field supervisor) and the services as described in a schedule to the agreement.

22. Pursuant to what is known as the "Murray Agreement", Southern Ocean provided Key Personnel (Murray – construction manager) and the services as described in a schedule to the agreement.

23. Pursuant to what is known as the "Karantzis Agreement", Southern Ocean provided Key Personnel (Karantzis – as project director and Sugar's representative) and the services as described in a schedule to the agreement.

24. Sugar appointed a new Chief Executive Officer in or about mid February 2013, Mr Scott Weitemeyer. On 22 February 2013 Mr Weitemeyer advised Mr Karantzis by telephone that each of the Southern Ocean agreements were to be terminated.

25. In email exchanges between the parties on 22 February 2013 Mr Karantzis says that he sent payment claims on behalf of Southern Ocean to Sugar in relation to each of the agreements, being outstanding sums claimed to be due under the agreements.

26. Further, as a consequence of emails sent on 22 February 2013 which passed between the parties, Sugar exercised a contractual right to terminate the three agreements between it and Southern Ocean.

27. By letter dated 8 March 2013, from Sugar to Southern Ocean, Sugar provided its reasons for withholding payment of Southern Ocean's claims under the three agreements. Part payment was also received on the 8 March 2013, together with Sugar's letter.

28. The balance of the payments claimed by Southern Ocean from Sugar in relation to all three agreements are in dispute.

29. Applications for adjudication in relation to the three contracts were received by the Authorised Nominating Authority, Adjudicate Today, on 15 March 2013. The Adjudication Applications (the "Adjudication Applications") submitted by Southern Ocean made claims for payment in different amounts, but otherwise generally followed a similar form.

30. On 21 March 2013 Adjudicate Today gave notice of its acceptance of the Adjudication Applications and nominated the Second Defendant, Philip Martin, as the adjudicator.

31. In the Adjudication Applications submitted in each case, Southern Ocean disputed that Sugar's letter of 8 March 2013 constituted a valid payment schedule under the Act.

32. There are three adjudication determinations (the "Adjudication Determinations") which are sought to be set aside by the Plaintiff, Sugar.

33. The first relates to the Huxley Agreement. This adjudication determination was dated 4 April 2013. The payment claim was for $25,312.32 (incl. GST). The adjudicated amount was $12,566.40 (incl. GST).

34. The second relates to the Murray Agreement. This adjudication determination was dated 8 April 2013. The Payment Claim was for $58,190.70 (incl. GST). The adjudicated amount was $28,922.08 (incl. GST).

35. The third relates to the Karantzis Agreement. This adjudication determination was also dated 8 April 2013. The Payment Claim was for $213,603.52 (incl. GST). The adjudicated amount was $126,320.16 (incl. GST).

36. The total of the sums adjudicated in favour of the claimant, Southern Ocean, was $167,808.64.

The Adjudicator's Determinations

37. In each of the three cases the adjudicator referred to the Adjudication Applications and the documents which founded his jurisdiction in a common form as follows:

> **5.1 Adjudication application**
>
> The Claimant sent a Payment Claim on 22 February 2012 by email to the Respondent which was received by the Respondent on 22 February 2012. The claim is in accordance with the Act in that it identifies the construction work to which it relates, indicates that the amount claimed and states that it was made under the Act.
>
> The Respondent provided a payment schedule in reply to the Payment Claim on 8 March 2013. The payment schedule is in accordance with the Act in that it

> identifies the Payment Claim to which it relates, indicates the amount of payment that the Respondent proposes to make and provides reasons for withholding payment from the claimed amount. The payment schedule was issued within 10 business days after the payment of claim was served.
>
> The Claimant applied for adjudication of the Payment Claim on 15 March 2013 in accordance with the Act in that the application was made to Adjudicate Today Pty Ltd. Within 10 business days after the Claimant received the payment schedule. The Adjudication Application was sent to the Respondent by email on 15 March 2013.

38. Although reference was made in clause 5.1 of each adjudication determination to the relevant Payment Claim as having been "sent" on "22 February 2012", I infer this to have been intended to refer to 22 February 2013, to accord with the Payment Claim described on the cover sheet to each adjudication determination and the supporting documentation. No issue was taken by the parties as to this.

39. In any event it was common ground between the parties that in each case the Payment Claim was not in fact served on 22 February 2013.

The Case of the Plaintiff on Adjudicator's Jurisdiction

40. Sugar alleges that the assertion of Southern Ocean that the Payment Claims were posted on 22 February 2013 is "false and is a fraud". It refers to the statutory declaration of Mr Karantzis declared on 13 March 2013, which was in a common form and filed with each of Southern Ocean's Adjudication Applications. In paragraph 25 of each statutory declaration Mr Karantzis says:

> Subsequently, and on the same day, I communicated with Mr Glasgow in a series of emails. The emails included the Payment Claim for the Karantzis Agreement, in addition to the Payment Claim for the separate Murray and Huxley agreements. At no stage did Mr Glasgow notify a purported breach of contract, nor that any misconduct had occurred or was alleged.

41. Further, in an affidavit dated 28 June 2013 and filed in the proceeding, Mr Karantzis says as to his preparation and posting of the Payment Claims:

> I prepared the payment claims under the Act, using PDF invoice files, which I had earlier created with the MYOB accounting system. I edited the MYOB created standard PDF invoices using Adobe Professional, which provides a "typewriter" function to overlay text on existing PDF files.
>
> To comply with the requirements of the Act, I overlayed the text onto each of the invoices, which had been previously submitted by email to Mr Glasgow

and, before him, Ms Singline. When editing the invoices, I became aware that I had not properly applied GST to invoices 780 and 783. I used MYOB to create two new payment claim invoices 788 and 789 to correct the omission. I then generated a MYOB summary statement to assist me with an overall check.

I hand marked the MYOB statement as a summary, initially for my information, to ensure that all outstanding payment claims has been prepared.

…

I then drafted a cover letter at approximately 4:30 pm, which I addressed to Sugar Australia at 265 Whitehall Street, Yarraville marked to the attention of Ms Singline and marked for copy to Mr Glasgow. The metadata attached to the document indicates that it was initially saved at 5.38 pm. Now produced and shown to me marked **NJK-2** at the time of swearing this affidavit is a file copy of he covering letter prepared by me.

I then used these JPEG files to create a master PDF file of payment claims, which was complete and printed at 5:49 pm on 22 February 2013.

Payment claims posted to Sugar Australia on 22 February 2013.

I compiled and printed the payment claims, which I had prepared, and the covering letter. I signed the covering letter and I posted the letter and the attached payment claim by regular post at approximately6:45 pm that evening at the Australia Post post office box located in Rowena Parade, Richmond

I telephoned Mr Murray at approximately 8 pm that evening. I told him that the payment claims had been prepared and posted by me. I told him that I was hopeful that Sugar Australia was going to pay the invoices earlier submitted in any event.

Later that night, I sent further email to Ms Singline enclosing the additional invoices, which I had prepared to recover the GST that I had omitted to charge in respect of some of the earlier invoices submitted that day. These emails were sent quite late at night, after 9.00 pm.

42. As pointed out by Mr Shnookal SC, who appeared for Sugar, a contradiction is apparent between the statutory declaration of Mr Karantzis, where it is said that the Payment Claims were emailed to Sugar on 22 February 2013, and his affidavit where he swears they were posted on 22 February 2013. One possibility is that Mr Karantzis both emailed and posted the Payment Claims on 22 February 2013, but this, at least for the present, is unclear.

43. Sugar's case is that if Southern Ocean's Payment Claims in each case were posted on 22 February 2013 (a Friday), as Mr Karantzis says, then applying s 50 of the Act, would mean that they were technically served on Sugar on 26 February 2013 (the following Tuesday).

44. Section 50(2)(a) of the Act relevantly provides:

> **50. Service of notices**
>
> (1) …
>
> (2) The giving of, or service of, a notice or document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected-
>
> (a) in the case of posting-2 business days after the day on which the notice or document was posted;
>
> (b) …

45. However, Sugar says that the first time it saw the Payment Claims, properly endorsed as payment claims under the Act, was on 6 March 2013 when they were received by email on that date. It relies upon the affidavit of legal counsel and secretary Duncan Glasgow, dated 27 August 2013 who swears that in his role he has "day to day involvement in the affairs of the Plaintiff". At paragraph 19 of his affidavit Mr Glasgow swears:

> I refer to paragraph 32 of the Karantzis Affidavit. I did not receive the letter from Southern Ocean dated 22 February 2013, which was purportedly copied to me. I have made enquiries with all appropriate personnel at Sugar Australia and can confirm that no one at Sugar Australia ever received the letter from Southern Ocean dated 22 February 2013.

46. Being payment claims in respect of progress payments that were final, they were required to be served within 3 months after the relevant reference date, as provided under s 14(5)(b) of the Act. Service of these particular Payment Claims was within the three month period, and therefore within time under the Act.

47. Sugar says that it duly responded to the Payment Claims in each case with delivery of a payment schedule under the Act.

48. Had it not done so, sub-sections 18(1)(b) and (2) may have become relevant.

> **18. Adjudication applications**
>
> (1) A claimant may apply for adjudication of a payment claim (an Adjudication Application) if-

(a) the respondent provides a payment schedule under Division 1 but-

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim; or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount; or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An Adjudication Application to which subsection (1)(b) applies cannot be made unless-

(a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

49. Thus, in the event that Sugar failed to provide a payment schedule to Southern Ocean and failed to pay the whole or any part of the claimed amount by the due date for payment of the amount, the operation of s 18(2) would be triggered.

50. Nevertheless, Sugar says that what the adjudicator did was to assume jurisdiction based on the Payment Claims before him dated and served apparently on 22 February 2013, when in relation to service, this was not the case. Sugar submits that the claimant, Southern Ocean, asserted its claims for payment before the adjudicator founded on payment claims dated 22 February 2013, when it says further as to these payment claims that they were not properly endorsed pursuant to s 14(2)(e) of the Act to the effect that the Payment Claims were made under the Act. Section 14 under sub-sections (1) and (2) provides:

14. 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.

51. It is to be noted that each of the requirements listed in sub-s 14(2) are mandatory for a valid payment claim made under the Act, including the requirement in sub-s 14(2)(e).

52. Sugar says that what was attached to Southern Ocean's email of 22 February 2013 was not endorsed as a payment claim under s 14(2)(e), it was simply an invoice. As such, it was not a payment claim made under the Act, because it did not comply with an essential requirement for a valid payment claim. It says it was for this reason that Sugar did not respond to those documents with a payment schedule under the Act.

53. Mr Andrew, who appeared for Southern Ocean, referred to the principle, which has received considerable judicial attention, that an unsuccessful party that is being sued to judgment, is not permitted to challenge the judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence, which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered. For present purposes, I do not find this principle to be directly applicable to an application for the issue of certiorari founded upon jurisdictional error alleged to arise from a fraud. When and under what circumstances the applicant comes across the evidence which may justify relief in the nature of certiorari on the ground of jurisdictional error, is arguably not relevant, except possibly to the extent that it may bear upon the exercise of the discretion as to whether or not to grant the relief sought, in the event of excessive delay, for example.

Certiorari - Reviewable Errors and Evidence Which May Be Considered

54. Where certiorari runs, it enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds. These grounds most importantly include: jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record".

55. Where issue of the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior Court entertaining an application for certiorari may, subject to applicable procedural and evidentiary rules, take account of any relevant material, including new material, placed before it. In contrast, where relief is sought on the ground of "error of law on the face of the record", the superior Court is confined to the "record" of the inferior Court or Tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

56. These principles are derived from the observations of the High Court in *Craig*,[7] where it was said:

> Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.[8]

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7 *Craig v South Australia* (1995) 184 CLR 163.

8 *Craig v South Australia* (1995) 184 CLR 163, [16]–[17].

Error on the face of the Record

57. The question as to what constitutes the "record" of an inferior tribunal, such as that constituted by an adjudicator appointed under the Act, was considered in *Grocon*.[9]

58. However, the Plaintiff does not rely on any error of the face of the record. It relies on jurisdictional error.

Jurisdictional Error

59. The question of jurisdictional error was considered in Grocon.10

60. Subsequently the High Court considered the question in *Kirk v Industrial Relations Commission* ("*Kirk*")[11] and following that decision, the New South Wales Court of Appeal in turn considered the application of *Kirk* in *Chase Oyster Bar v Hamo Industries* ("*Chase Oyster Bar*").[12]

Kirk

61. In *Kirk*, the High Court observed that the two principal grounds for grant of relief in the nature of certiorari are usually described as "error of law on the face of the record" and "jurisdictional error".[13]

62. The Court further observed that the concept of jurisdictional error was somewhat fluid, noting that:

> References to "error of law on the face of the record" and "jurisdictional error" suggest a degree of certainty about what is the relevant "record" and what is meant by "jurisdictional error" that examination of the decided cases reveals to be unwarranted. The decided cases reveal a degree of uncertainty about both what is the "record" on the face of which error must appear, and what is meant by "jurisdictional error". Moreover, allowing the one remedy on two different bases may suggest the existence of some singular unifying principle underpinning both grounds. But no principle can readily be identified that would unify or explain both grounds.[14]

63. The High Court in *Kirk* also considered international precedents to like effect:

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9 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [150]-[160].
10 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [103]-[117].
11 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; [2010] HCA 1.
12 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.
13 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 567 [56].
14 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 567 [56].

> The work of each of Wade, de Smith and Jaffe would support the observation of Diplock LJ that" '[j]urisdiction' is an expression which is used in a variety of senses and takes its colour from its context". It is a "generic" term or, as Frankfurter J wrote in *United States v L A Tucker Truck Lines Inc* in the Supreme Court of the United States, " 'jurisdiction' ... is a verbal coat of too many colors".[15]
>
> [Footnotes omitted]

64. In *Kirk*,[16] the High Court cited with approval Professor Aronson's collection of jurisdictional errors in his chapter "Jurisdictional Error without the Tears" in *Australian Administrative Law: Fundamentals, Principles and Doctrines* ,[17] where a number of categories of jurisdictional error are compiled, the High Court noting in the process that: "It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error".[18]

65. Professor Aronson's list of possible jurisdictional errors is derived from *Craig* and is as follows:

> (1) A mistaken assertion or denial of the very existence of jurisdiction.
>
> (2) A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.
>
> (3) Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances (e.g. a civil Court trying a criminal charge).
>
> (4) A catalogue continued, with a list of things which are unauthorised (albeit, 'less obviously') even though the decision makers are acting within their 'general area of jurisdiction'. Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact (commonly called a jurisdictional fact) or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion.
>
> (5) Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions as to the validity of the decision maker's act or decision. These mistakes constitute one form of error in

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15 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 570 [62].

16 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 573.

17 Aronson, "Jurisdictional Error without the Tears", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330, 335-336.

18 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 573.

law. For the same reasons as apply to item 6 below, an inferior Court's 'relevancy' errors will ordinarily be non-jurisdictional errors of law, whereas the same error by a tribunal is more likely to be jurisdictional.

(6) Misconstruing the decision maker's Act (another form of error in law) in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers.[19]

66. Of these, the category most relevant for present purposes is:

> "Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact (commonly called a jurisdictional fact) or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion".[20]

67. The High Court in *Kirk* also noted the difficulty, recognised in *Craig*,[21] of distinguishing between jurisdictional and non-jurisdictional errors, but nevertheless, maintained the distinction, referring to the following passage derived from *Re Refugee Review Tribunal; Ex parte Aala*:

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not. [22]

68. After identifying the constitutional foundation of the supervisory jurisdiction of the Supreme Courts of the States, the High Court confirmed and entrenched the distinction between jurisdictional and non-jurisdictional error in Australian law in the following passage of *Kirk*:

> [T]he observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued

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19 *Craig v South Australia* (1995) 1884 CLR 163, 177.

20 Aronson, "Jurisdictional Error without the Tears", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330, 336.

21 (1995) 184 CLR 163, 177-180. See also *Aala* (2000) 204 CLR 82, 141 [163]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 81-82 [80]-[81].

22 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163].

need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context.[23]

Chase Oyster Bar

69. The facts of *Chase Oyster Bar* arose out of an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (the "NSW Act").[24] The NSW Act establishes an equivalent payment regime to that provided for in the Victorian Act, and for present purposes is materially the same.

70. The Plaintiff ("Chase Oyster Bar") contracted with the First Defendant ("Hamo Industries") for Hamo Industries to carry out fitout work for Chase Oyster Bar. On 31 December 2009, Hamo Industries served on Chase Oyster Bar a payment claim. The due date for payment of the claimed amount was 13 January 2010. Chase Oyster Bar did not provide a payment schedule in response to the payment claim. Chase Oyster Bar became liable, pursuant to s 14(4) of the NSW Act, to pay the claimed amount to the First Defendant by the due date, but did not do so. Hamo Industries made an adjudication application.

71. Section 17 of the NSW Act, which finds its equivalent, although not identical, provision in s 18 of the Victorian Act,[25] relevantly provided:

> (1) A claimant may apply for adjudication of a payment claim (an "Adjudication Application") if:
>
> …
>
> (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
>
> (2) An Adjudication Application to which subsection (1)(b) applies cannot be made unless:
>
> (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

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23 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, [100].

24 *Building and Construction Industry Security of Payment Act 1999* (NSW).

25 The time periods in s 18(2)(a) and (b) in the Victorian Act are set at (a) "10 business days" and (b) "2 business days" cf. s 17(2)(a) and (b) of the NSW Act which provides for "20 business days" and "5 business days" respectively.

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

72. Hamo Industries did not give notice until 11 February 2010: outside the 20 business day period for which s 17(2)(a) provided, but nonetheless made an adjudication application. The Second Defendant, who was the adjudicator, was appointed. The adjudicator made a determination that Hamo Industries was entitled to payment of the claimed amount, together with interest. Although there was no payment schedule, the adjudicator nonetheless considered whether Hamo Industries' notice pursuant to s 17(2)(a) had been given within the time required, and concluded that it had. Chase Oyster Bar submitted before the trial judge that compliance with s 17(2)(a) of the NSW Act was essential if the adjudicator were to have jurisdiction, and that the adjudicator's finding amounted to jurisdictional error.

73. By order made on 23 April 2010, three questions were removed into the New South Wales Court of Appeal:

1. Whether the determination of the Second Defendant (the Adjudicator) on 16 March 2010 that he could hear and determine the First Defendant's Adjudication Application pursuant to the *Building and Construction Industry Security of Payment Act* (the [NSW] Act) should be set aside or quashed for jurisdictional error in circumstances where the adjudicator incorrectly concluded (on the facts found by him and on the facts subsequently found by the Court) that the notice required by s 17(2)(a) of the [NSW] Act had been served on the Plaintiff in the time required by the [NSW] Act.

2. Whether in light of the decision of the High Court in *Kirk v Industrial Relations Commission* [2010] HCA 1 the decision in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 should not be followed or was incorrectly decided so far as it held that:

   (a) the Supreme Court of New South Wales was not required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the [NSW] Act;

   (b) an order in the nature of certiorari was not available to quash or set aside a decision of an adjudicator under the [NSW] Act;

   (c) the Act expressly or impliedly limited the Supreme Court of New South Wales's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the [NSW] Act.

3. Whether the Act, so far as it expressly or impliedly limits the power of the Supreme Court of New South Wales to review an adjudicator's determination for jurisdictional error, is inconsistent with the requirement of the Constitution that there be a State Supreme Court with jurisdiction to grant relief in the nature of certiorari.

74. The New South Wales Court of Appeal held:

In relation to Question 1:

1 Determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error.

2 The Supreme Court, in exercise of its supervisory jurisdiction:

(a) has power to determine that –

(i) an Adjudication Application has not been made in compliance with s 17(2)(a) of the NSW Act;

(ii) the determination of the adjudicator, made in the absence of a valid Adjudication Application, was invalid, and

(iii) there was non-compliance in the present case;

(b) has power to grant relief in the nature of certiorari and set the determination aside.

In relation to Question 2:

3 To the extent that *Brodyn Pty Ltd v Davenport* held, in relation to an Adjudication Application which was not in compliance with s 17(2)(a) of the NSW Act, the matters set out in the question at (a), (b) and (c), it was in error.

In relation to Question 3:

4 The Act contains no such limitation.

5 In any event, *Kirk* has determined that it is not permissible for a State legislature to enact a privative clause which prevents the exercise by the Supreme Court of its supervisory jurisdiction with respect to jurisdictional error.

75. Spigelman CJ in *Chase Oyster Bar* identified the issue to be determined in the following way:

The issue to be determined is whether the adjudicator had jurisdiction to determine an "application" which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section

> is not addressed to the adjudicator and is not a matter which he is directed to "determine" within s 22(1) of the Act. It may be that it is a matter which he must "consider" as one of the "provisions of the Act" within s 22(2)(a). However, that section confers no power to determine the issue.

76. His Honour the Chief Justice proceeded to consider the character of s 17(2) of the NSW Act, observing that the section was a "procedural requirement" of the kind to which the High Court referred in *Project Blue Sky Inc v Australian Broadcasting Authority*,[26] in the following passage:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> Traditionally, the Courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.
>
> The joint judgment of the High Court in *Project Blue Sky* in the course of its reasoning approved *Tasker v Fullwood*, and concluded:
>
> > A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. … In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'. [27]
>
> [Footnotes omitted]

77. Spigelman CJ then proceeded to consider the time limits provided for in s 17(2) of the NSW Act in the light of the learning in *Project Blue Sky*, by first considering the textual

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26 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

27 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [37]-[38].

indicators in the NSW Act,[28] followed by a consideration of the structure of the legislative scheme,[29] where his Honour observed:

> This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value.
>
> Subject only to those provisions which can be varied downwards by the contract and one provision which permits the parties to agree to an extension, there is no indication that Parliament intended the dates for which it provided to be flexible. This significantly reinforces the conclusion available from the mandatory language of s 17(2).[30]
>
> …
>
> [T]he structure of the legislative scheme, that I have set out above, strongly suggests that Parliament intended the time limits to operate precisely in accordance with their terms. Such an operation ensures that, at every stage, each party knows exactly where s/he stands on any day.

78. It was on this basis that the Chief Justice found himself in agreement with Basten JA in determining that the Supreme Court, in exercise of its supervisory jurisdiction:

> (a) has power to determine that –
>
> (i) an Adjudication Application has not been made in compliance with s 17(2)(a) of the NSW Act;
>
> (ii) the determination of the adjudicator, made in the absence of a valid Adjudication Application, was invalid, and
>
> (iii) there was non-compliance in the present case;
>
> (b) has power to grant relief in the nature of certiorari and set the determination aside.

79. In arriving at his determination to the same effect, Basten JA in *Chase Oyster Bar* provided reasons which were, for the most part, in conformity with the reasoning of McDougall J. His Honour Basten JA commenced his reasoning with an analysis as to the amenability of an adjudicator appointed under the NSW Act to relief in the nature of certiorari, in which his Honour analysed the nature of the function being exercised

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28 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [39]-[41].
29 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [42]-[55].
30 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [47]-[48] and [50].

by an adjudicator and its relationship with government power,[31] and then proceeded to consider whether an adjudicator acts judicially.[32]

80. In the course of considering the first element, the nature of the function being exercised by an adjudicator and government power, his Honour concluded that given the statutory scheme under which an adjudicator is appointed and carries out his or her duties, this is not undertaken as an officer of the government. It followed, that:

> "…for the adjudicator to be amenable to relief in the nature certiorari, such relief must be available on the basis only that the adjudicator is exercising a statutory function".[33]

81. His Honour Basten JA approved and followed *Grocon*, observing:

> In *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426 ("Grocon"), Vickery J concluded that an adjudicator operating under equivalent legislation in Victoria (the *Building and Construction Industry Security of Payment Act 2002* (Vic)) was subject to judicial review and to relief by way of certiorari and declaration. In the result, his Honour found that there was neither jurisdictional error nor other error of law: at [283] and [284], with the result that certiorari was refused. However, it is clear that his Honour considered such relief would be available in an appropriate case.[34]

82. It should be noted however, that his Honour did not approve or follow the secondary reliance in *Grocon* on *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc*,[35] finding that it was in any event unnecessary to the conclusion in *Grocon*.[36]

83. Basten JA then considered the further question as to whether it was necessary to determine that an adjudicator appointed under the NSW Act had a duty to "act judicially",[37] in order to be amenable to the public law remedies of certiorari and prohibition, noting that the criterion of a duty to act judicially is drawn from the judgment of Atkin LJ in *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd*.[38] Atkin LJ described the writs as operating wherever;

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31 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [64]-[81].
32 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [82]-[84].
33 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [65]-[66].
34 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [71].
35 *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815.
36 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [74].
37 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [82] – [84].
38 *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171.

> "any body of persons having legal authority to determine questions affecting the rights of subjects, and having a duty to act judicially, act in excess of their legal authority".[39]

84. His Honour observed that "There has been a significant weakening of the nature of the affectation of legal rights since Lord Atkin wrote".[40] Further Basten JA agreed with the analysis of Spigelman CJ where it was earlier observed by the Chief Justice in *Chase Oyster Bar*:

> The matter on which I have a reservation arises from references in this case law to the concept of a "duty to act judicially", derived from *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171, 205. This formulation has long since been superseded by the development of administrative law over the course of the last half century…
>
> The critical issue is whether the relevant decision-maker is exercising public power, relevantly, a statutory power. There is no longer a requirement that there be an identifiable, additional element that the relevant decision-maker has a duty to act judicially before that decision-maker is amenable to the prerogative writs.[41]

85. In any event, Basten JA determined that an adjudicator, in exercising the statutory function of determining the amount of a progress payment and the date on which such amount becomes payable, would fall comfortably within the scope of being required to "act judicially".[42]

86. Basten JA concluded his reasoning with the following analysis:

> As McDougall J has determined, the adjudicator correctly identified the dates on which various events had occurred. However, the adjudicator's conclusion that the Adjudication Application was valid depended either on a miscalculation of the period identified in s 17(2)(a), or a misreading of the statute. If the error fell into the former category, the conclusion was one which not only lacked support in, but was inconsistent with, the primary facts as found. If in the latter category, the error involved a misconstruction of the statute in relation to the conferral of authority. On either view, the error was jurisdictional and is one in respect of which this Court can intervene.[43]

87. Accordingly, the determination of the adjudicator was found to be amenable to orders in the nature of certiorari for jurisdictional error.

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39 *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171, 184.

40 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [83].

41 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [9]-[10].

42 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [84].

43 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [103].

88. Other relevant elements of the reasoning in *Chase Oyster Bar* will be considered below.

Analysis in *Grocon* in the Light of *Kirk* and *Chase Oyster Bar*

89. It remains to consider the effect, if any, of *Kirk* and *Chase Oyster Bar* on the authority of *Grocon*.

Construction of the Act

90. The starting point is the statement of Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte*,[44] in discussing jurisdictional pre-conditions which may apply to a court:

> It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed. [45]

91. The critical question of construction for present purposes is whether the Victorian Act, insofar as it provides for steps and requirements to confer jurisdiction on an adjudicator, makes the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts which evidence that the steps and requirements have been complied with, as distinguished from an adjudicator's opinion or determination as to whether those facts do exist.

Purpose of the Act

92. In undertaking this construction exercise I take into account that the central purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. As was said in *Grocon*:

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44 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369.
45 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391.

> To advance that purpose, the Act sets up a unique form of adjudication of disputes over the amount due for a claimed progress payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided in separate proceedings, either by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.[46]

93. As was also said in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*:

> The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedeviled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.[47]

94. Reference may be made to the observations of Einstein J in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*, where his Honour said in relation to the similar New South Wales legislation:

> What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution *critically* does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders.[48]
>
> [Italics in original]

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46 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [110].

47 *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* [2009] VSC 156, [46] (citations omitted).

48 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2003] NSWSC 1019, [14].

95. In *Chase Oyster Bar*,[49] McDougall J sitting with the Court of Appeal (NSW), echoed the central object of the legislation in the following passage:

> The *Security of Payment Act* [NSW] operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract. As Keane JA said, of the not dissimilar Queensland statute, the *Building and Construction Industry Payments Act* 2004 (Qld), in *RJ Neller Building P/L v Ainsworth* [2008] QCA 397, [40], the statute "seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's … inability to repay could be expected to eventuate". It followed, his Honour said, that the risk of inability to repay, in the event of successful action by the other party, must be regarded as one that the legislature has assigned to that other party. The same is true of the regime established by the *Security of Payment Act* [NSW]. [50]

96. His Honour proceeded to observe that the *Security of Payment Act* [NSW] operates in a way that has been described as "*rough and ready*"[51] or, less kindly, as "*Draconian*"[52] by reference to the following characteristics:

> It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, Adjudication Applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents (see, for example, my decision in *Laing O'Rourke Australia Construction v H&M Engineering and Construction* [2010] NSWSC 818, [8]).[53]

97. At the same time, McDougall J in *Chase Oyster Bar*,[54] made it clear that in his view the *Security of Payment Act* [NSW] gives very valuable, and commercially important, advantages to builders and subcontractors, saying:

> At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* [NSW] lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.[55]

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49 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.
50 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [207].
51 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [208].
52 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [208].
53 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [208].
54 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [209].
55 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [209].

98. To similar effect is the analysis of the Chief justice in Chase Oyster Bar, where his Honour, after reviewing the various statutory time limits required under the NSW Act, made the observations referenced earlier in these reasons.[56]

99. In my opinion, in the light of these observations on *Chase Oyster Bar*, similar considerations ought now to be taken into account and given similar force in construing the equivalent legislation in Victoria. This will also serve the secondary purpose of fostering a desirable level of uniformity between the security of payment legislative regimes of the various States in the construction industry of the country.

Text of the Victorian Act

100. The Victorian Act makes provision for what the adjudicator is to determine and the matters to be considered in the making of the determination.

101. Section 23 in ss (1) and (2) relevantly provides:

> **23. 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).
>
> (2) In determining an Adjudication Application, the adjudicator must consider the following matters and those matters only-
>
> (a) the provisions of this Act and any regulations made under this Act;
>
> (b) subject to this Act, the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

56 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [47]-[48] and [50].

> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.[57]

102. I construe sub-section (2) not to expand the subject matter of the adjudicator's determination, which is prescribed in sub-section (1). Sub-section (2) merely prescribes, and limits, the matters to be considered by the adjudicator in determining the matters defined in sub-section (1).

103. Sub-section (1) defines very clearly the matters which the adjudicator is to determine, namely (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.

104. Reference is also made to the reasons for the making of the adjudication determination, which is provided for in s 23(3) of the Act as follows:

> (3) The adjudicator's determination must be in writing and must include-
>
> (a) the reasons for the determination; and
>
> (b) the basis on which any amount or date has been decided.[58]

105. Section 22 of the NSW Act[59] is materially the same as s 23 of the Victorian Act. [60]

106. In considering s 22 of the NSW Act in *Chase Oyster Bar*, McDougall J drew a distinction between the actual "determination", which is the decision on the three matters referred to in s 22(1) (the equivalent of s 23(1) of the Victorian Act) and the "reasons for that decision", as required by s 23(3)(b). In this regard his Honour said:

> Section 22(1) sets out what it is that an adjudicator is to do and s 22(2)–(4) set out how the adjudicator is to carry out that task. The "determination" is the performance of the tasks described in subs (1). What is determined is the

57 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23(1) & (2).
58 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23(3).
59 *Building and Construction Industry Security of Payment Act 1999* (NSW) s22.
60 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23.

> amount of the progress payment, its due date for payment and the rate of interest payable. The issues of fact and law dealt with in the reasons required to be given pursuant to s 22(3)(b) are not "determined" in that sense, although undoubtedly they may (and in the ordinary case will) explain the determination that was made.[61]

107. Critically, an adjudicator is given no express power in s 23 of the Victorian Act, or anywhere else in the Act, to decide facts which may go to his or her jurisdiction.[62]

108. In *Chase Oyster Bar*, Basten JA determined that the power to determine compliance with the jurisdictional requirements which work to confer jurisdiction on the adjudicator is not given to the adjudicator. Further, the Court is not bound by any finding that these requirements have been met.

109. Basten JA said in this regard:

> The power to determine compliance with the essential requirements of an Adjudication Application could lie with the authorised nominating authority (to whom the application is made), the adjudicator (to whom the application is referred) or the Court exercising its supervisory jurisdiction.
>
> The structure of the Act might suggest that it would be inappropriate to refer an invalid Adjudication Application to an adjudicator; there would then be an implied obligation on the authorised nominating authority to consider the validity of the application made to it. Arguably the duty to refer an application to an adjudicator (see s 17(6)) is limited to a valid Adjudication Application. However, as no party before this Court argued for that construction, it may be put to one side.
>
> The second possibility is that power to determine the validity of an Adjudication Application lies with the adjudicator. In a practical sense, there is much to recommend the view that the adjudicator is able to determine whether the application complies with provisions such as s 17(2)(a), as the adjudicator sought to do in the present case. However, there are factors which support a contrary view. First, s 22(1), identifying that which the adjudicator is to determine, makes no reference to the validity of the Adjudication Application. Secondly, s 22(2), limits the matters which the adjudicator is entitled to consider to the Act, the provisions of the construction contract, the payment claim, the payment schedule, submissions in support of either and the results of any inspection. In a provision which renders the consideration of any other material impermissible, the absence of any reference to the circumstances in which the Adjudication Application was made is highly significant.
>
> Thirdly, the descriptions of the matters to which payment claims and payment schedules must relate and hence (at least implicitly) the matters to which the

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61 *Chase Oyster Bar* [2010] NSWCA 190, [192]; See too [239].

62 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23.

> submissions in support can properly refer, do not expressly identify any aspect of the circumstances in which the Adjudication Application was made.
>
> For these reasons, the proper construction of the *Security of Payment Act* is that it does not permit the adjudicator to determine the validity of the Adjudication Application. The challenge in the present case must therefore be determined on the basis of facts found by the Court. [63]

110. These observations of Basten JA were expressly adopted by McDougall J in *Chase Oyster Bar*.[64]

Grocon after Kirk and Chase Oyster Bar

111. In the light of *Kirk* and *Chase Oyster Bar*, the statements referred to in paragraphs [115]-[116] of *Grocon*,[65] call for some clarification and qualification.

112. In *Grocon* it was said:

> With the exception of the case where the basic and essential requirements of the Act for a valid determination are not satisfied, or where the purported determination is not a *bona fide* attempt to exercise the power granted under the Act, if the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.
>
> For these reasons, in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an adjudicator the capacity to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on adjudicators jurisdiction to make an incorrect decision in relation to such jurisdictional facts which will not be overturned by certiorari.[66]

113. For the purposes of s 18 of the Victorian Act,[67] it appears to me that the elements of the section which serve to confer jurisdiction on an adjudicator to make a valid determination under s 23, on the proper construction of the Act, do not permit the adjudicator to finally determine the validity of the adjudication application.[68] If there

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63 *Chase Oyster Bar* [2010] NSWCA 190, [97]-[101].
64 *Chase Oyster Bar* [2010] NSWCA 190, [238].
65 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [115]-[116].
66 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [115]-[116].
67 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 18.
68 *Building and Construction Industry Security of Payment Act 2002* (Vic) s 23.

be any challenge to the jurisdiction assumed by the adjudicator it must finally determined on the basis of facts found by the Court on judicial review, in the course of determining whether a jurisdictional error has been exposed which calls for the exercise of the Court's discretion to grant relief in the nature of certiorari and, if necessary, mandamus. The Court may grant relief on such relevant evidence as may be adduced before it, whether or not such evidence was before the adjudicator at first instance. Further, the Court may grant such relief without regard to any determination which may have been made on the issue of jurisdiction by the adjudicator. The Court is obliged to arrive at its own conclusion as to jurisdiction based on the law and on the facts as found by it.

114. This is not to say that an adjudicator should not make any findings of fact or rulings on law if a question of jurisdiction is raised in the course of determining an adjudication application. Clearly if an adjudicator is presented with material or submissions which bring into question the jurisdiction of the adjudicator, he or she should determine the question and give reasons for the findings of fact or rulings on law. If however the adjudicator's decision on jurisdiction is challenged in Court on judicial review, the Court may deal with the matter afresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.

115. To the extent that anything inconsistent with this conclusion appears in paragraphs [115]-[116] of *Grocon*,[69] in the light of the later reasoning of the High Court in *Kirk* and of the New South Wales Court of Appeal which followed it in *Chase Oyster Bar*, I do not follow my earlier ruling.

Fraud

116. As is made clear in *Craig*,[70] there is no doubt that if a decision, which is otherwise amenable to the prerogative writ is proven to have been obtained by fraud, can found relief in the nature of certiorari to quash the decision.

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69 *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture and Ors* [2009] VSC 426, [115]-[116].

70 *Craig v South Australia* (1995) 184 CLR 163, [16]-[17].

117. In *Lazarus Estates Ltd v Beasley* Denning LJ declared:

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever: see as to deeds, *Collins v Blantern*; as to judgments, *Duchess of Kingston's Case;* and as to contracts, *Master v Miller*.[71]
>
> [Footnotes omitted]

118. In *Al-Mehdawi v Secretary of State for the Home Department* [72] Lord Bridge of Harwich gave as an example of "the principle that fraud unravels everything" a line of authority which he described in the following terms:

> In *R v Gillyard* the court quashed by certiorari a conviction by justices shown to have been obtained by fraud and collusion. This was followed in *R v Recorder of Leicester*[73] and extended in *R (Burns) v County Court Judge of Tyrone*[74] to allow the quashing of an affiliation order obtained on the strength of perjured evidence of witnesses called to furnish the required corroboration of the evidence of the complainant, although it was not shown that the complainant herself was party to the perjury.[75]

119. The reach of certiorari in cases of fraud has also been extended to "third party" fraud. An illustration can be found in the observations of Lord MacDermott LCJ in the Northern Ireland case of *R (Burns) v County Court Judge of Tyrone*.[76] There, in the course of considering the application of certiorari to an affiliation hearing conducted in the face of a later found perjury, a question arose as to whether the perjury must be that of a party or to which a party has been proved to be privy. In the course of reasoning, the Lord Chief Justice said:

> The supervisory jurisdiction of this court is not at large; but the general aim of that jurisdiction is to promote the due administration of justice, and if a distinction is to be drawn between cases where a decision is procured by perjury and cases where a decision is procured by perjury to which one of the parties is privy, it ought to rest on some basis of principle. I am unable to discern any such basis here. Litigation between parties, whether civil or

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71 *In Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712-713.

72 *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, 895; cited in *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 197-198.

73 *R v Recorder of Leicester* [1947] KB 726.

74 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167.

75 *R v Gillyard* (1848) 12 QB 527 [116 ER 965].

76 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167.

> criminal, does not necessarily mean that there are not others anxious or interested to sway the issue one way or the other, and it would, I think, be a grave defect in the procedure of this court if one of these forms of fraud could be noticed but not the other. I can find no rational ground for the sort of discrimination which must prevail if we are to accede to the submission under discussion. If certiorari does not lie in such circumstances there is no other redress and an order undoubtedly founded on perjury remains effective. [77]

120. In the end, in *R (Burns) v County Court Judge of Tyrone*, the Court determined that certiorari should issue to quash the affiliation order obtained on the basis of perjured corroborative evidence of witnesses called in support of the complainant, although it was not shown that the complainant herself was party to the perjury.[78] The order was made that a:

> writ of certiorari should issue directed to the County Court Judge of Tyrone, to remove into the Queen's Bench Division for the purpose of being quashed the adjudication and order of the county court judge made on an application under the *Illegitimate Children (Affiliation Orders) Act (Northern Ireland), 1924*I.[79]

121. It remains to consider what is meant by "fraud" in the context of jurisdictional error.

122. Here, "fraud" is used in a broad sense. In *SZFDE v Minister for Immigration*[80] the High Court, following *Craig*,[81] considered a case which resulted in the decision of the Refugee Review Tribunal being vitiated by fraud with the result that it was set aside by issue if the writ of certiorari. In considering "fraud" within the framework of general principle, the Court cited with approval the celebrated speech of Lord Macnaghten in *Reddawy v Banham*[82] where his Lordship spoke of the various guises in which fraud appears in the conduct of human affairs, saying "fraud is infinite in variety". The High Court also noted a colourful corollary, expressed by Kerr in his *Treatise on the Law of Fraud and Mistake*, that:

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77 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167, 172.
78 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167.
79 *R (Burns) v County Court Judge of Tyrone* [1961] NI 167.
80 *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 194.
81 *Craig v South Australia* (1995) 184 CLR 163, 175-176.
82 *Reddawy v Banham* [1896] AC 199, 221.

> The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it ... reserving to themselves the liberty to deal with it under whatever form it may present itself. [83]

123. In *SZFDE v Minister for Immigration*,[84] the High Court recited the note in *Craig*, made by Brennan, Deane, Toohey, Gaudron and McHugh JJ, as to the scope of certiorari, stating: "Their Honours noted, that in this context 'fraud' was used in a broad sense which encompasses 'bad faith' ".[85]

124. The Court in *SZFDE v Minister for Immigration*,[86] was satisfied that a party was relevantly fraudulent in his dealings, noting that:

> In short, while the Tribunal undoubtedly acted on an assumption of regularity, in truth, by reason of the fraud of Mr Hussain, it was disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review. That state of affairs merits the description of the practice of fraud "on" the Tribunal.[87]

125. It followed that a writ in the nature of certiorari was duly issued to set aside the decision and mandamus should issue requiring the tribunal to re-determine the matter according to law.[88]

126. The concern with the due administration of justice manifested in these decisions leads me to the conclusion, where a fraud in the broad sense described is proved, this Court may intervene if necessary by an order of certiorari to set aside a decision which a tribunal had been misled into making.

The Risks of Alleging Fraud

127. It remains to mention the well established risks in alleging fraud in any proceeding.

128. In order to be satisfied that an allegation has been made out, the Court in a civil case must be satisfied that the circumstances raise a more probable inference in favour of

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83 Kerr, *Treatise on the Law of Fraud and Mistake* (6th ed 1929), 1 (citations omitted).
84 *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 197.
85 *Craig v South Australia* (1995) 184 CLR 163, 176, fn 58.
86 *SZFDE v Minister for Immigration* (2007) 232 CLR 189.
87 *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 206.
88 *SZFDE v Minister for Immigration* (2007) 232 CLR 189, 207.

what is alleged than not, after the evidence on the question has been evaluated as a whole.

129. To this must be added the approach laid down in *Briginshaw v Briginshaw*,[89] where Dixon J said:

> But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[90]

130. More recently, the majority (Mason CJ, Brennan, Deane & Gaudron JJ) in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,[91] crystallized the *Briginshaw* approach in the following statement:

> [T]he strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove.[92]

131. Further, a party who alleges fraud must do so clearly and specifically with detailed particulars. This is a matter of fundamental importance.[93]

132. Finally, there may be adverse cost consequences if an allegation of fraud is ultimately found to be unsubstantiated.

Conclusion and Disposition of the Application

133. There is a serious issue to be tried as to whether or not the payment claims, in proper form in compliance with s 14 of the Act, were in fact posted, emailed or otherwise delivered on 22 February 2013, as Mr Karantzis says, or at least about that time, and whether the payment claims before the adjudicator, upon which he made his

89 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
90 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, 362.
91 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449.
92 *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449, 450.
93 Williams, *Civil Procedure in Victoria*, Chapter 1 [13.11.180] and the cases cited therein.

Adjudication Determinations, were in fact those posted, emailed or otherwise delivered on or about 22 February 2013, and were in proper form.

134. In answer to the question: Is it open on this application for judicial review to consider the findings of fact made by the adjudicator as to the validity of the Payment Claims in the circumstances of this case which include allegations of misleading conduct and fraud which are pressed by the applicant for relief by way of certiorari? The answer is: Yes.

135. I will hear the parties further on the directions and orders to be made for the further conduct of the trial.
