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SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2018 0026

IAN STREET DEVELOPER PTY LTD — Applicant

v

ARROW INTERNATIONAL PTY LTD — First Respondent

and

JONATHAN SMITH — Second Respondent

JUDGES:	MAXWELL P, McLEISH and NIALL JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	16 October 2018
DATE OF JUDGMENT:	13 November 2018
MEDIUM NEUTRAL CITATION:	[2018] VSCA 294
JUDGMENT APPEALED FROM:	[2018] VSC 14 (Riordan J)

STATUTORY INTERPRETATION – Legislative intention – Non-compliance with statutory requirement – Whether legislature intended non-compliance to invalidate act purportedly done – Construction industry progress payments scheme – Provision for adjudication of amount claimed – Time limit within which adjudication determination must be made – Time limit breached – Whether determination invalid – Express provisions inconsistent with invalidity – Adjudicator's non-compliance beyond claimant's control – Invalidity would create inconvenience – Invalidity not intended – *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 applied – *Building and Construction Industry Security of Payment Act 2002* ss 22, 23, 28.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr R Andrew with Mr N J Phillpott	Noble Lawyers
For the First Respondent	Mr C M Caleo QC with Mr B Reid	Thomson Geer
For the Second Respondent	No appearance	

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MAXWELL P:

Summary

1 In October 2016, the applicant ('proprietor') entered into a construction contract with the first respondent ('builder') for the construction of apartments on a site in Noble Park. The dispute between them concerns a progress claim issued by the builder under s 14 of the *Building and Construction Industry Security of Payment Act 2002* (the 'Act').

2 The object of the Act is

> to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work.[1]

To secure that object, the Act confers on the claimant a statutory entitlement to the progress payment, provided that it is claimed in accordance with the procedure laid down in the Act.

3 One of the steps in the statutory procedure is the referral of a disputed claim to an adjudicator for a determination.[2] In the present case, the builder's payment claim was referred to an adjudicator, who determined that the proprietor was liable to pay the builder $381,446.78, together with interest and 50 per cent of the adjudicator's fee.[3]

4 As will appear, the Act specifies a time limit within which an adjudication must be completed. In this case, the adjudication was completed outside that time limit. The question for resolution is whether the adjudicator's non-compliance with the time limit has the effect that the adjudication decision is void.

5 The Act is silent on that question. That being so, the interpreting court must seek to discern the legislature's intention with respect to the consequences of non-

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1 The Act s 3(1).

2 Ibid s 18.

3 *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSC 14 [32] ('Reasons').

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compliance by examining the statutory scheme in its entirety. The question is 'whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.'[4] To that end, the court must consider the function of the adjudication time limit within the scheme established by the Act, and the consequences for the parties of a conclusion that breach of the time limit rendered the adjudication void.[5]

6 The contention for the proprietor is that, on its proper construction, the Act discloses a legislative intention that a decision delivered after the expiry of the statutory time limit is void. Put differently, the proprietor contends that, upon the expiry of the time limit, the adjudicator ceased to have jurisdiction to determine the adjudication application.

7 The judge at first instance rejected the proprietor's contention. His Honour held that, on the proper construction of the Act, non-compliance with the time limit was not intended to render the adjudication decision invalid.[6] The proprietor now seeks leave to appeal from that decision.

8 For the reasons which follow, I respectfully agree with the judge's conclusion. To hold that non-compliance with the time limit invalidated the adjudication decision would be inconsistent both with the express provisions of the Act governing the adjudication process and with the objects of the statutory scheme as a whole.

9 As discussed below, the task of statutory interpretation required in a case such as this is of an unusual character. In short, the court has to divine the legislative intention with respect to a matter about which the legislature has said nothing. (I distinguish, of course, the familiar question of whether a general provision should be construed as applying to a particular, unspecified, circumstance.)

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4 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390 [93] ('*Project Blue Sky*').

5 Ibid 388–9 [91].

6 Reasons [95].

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10 As the High Court has acknowledged, the conclusion arrived at the end of this process of construction 'often reflects a contestable judgment'.[7] The inevitable result is uncertainty of interpretation and unpredictability of outcome. Since these are most often questions going to jurisdiction,[8] that seems an undesirable state of affairs.

11 I suggest below that the task of construction is more accurately characterised as a 'gap-filling' exercise, to be embarked on only in the most exceptional circumstances. Adopting a more stringent approach of that kind would promote certainty and predictability, and emphasise that the consequences of non-compliance are a matter for legislative provision, not judicial divination.

12 Before I set out the facts of the case, it is necessary to set out the relevant parts of the statutory scheme.

The statutory scheme

13 As noted earlier, the object of the Act is to provide a statutory right for a builder to recover progress payments due under a construction contract by establishing a procedure in which disputed claims are referred to an adjudicator for determination. Thus, s 3 of the Act provides:

> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
>
> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves —

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7 *Project Blue Sky* (1998) 194 CLR 355, 388–9 [91].

8 See *Wei v Minister for Immigration* (2015) 257 CLR 22, 32–33 [23]–[26]; *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1, 8–9 [27], [31], 18 [66]; William Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 168–73.

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(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

14 The right to progress payments is established by s 9(1) of the Act, which provides:

On and from each reference date under a construction contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

15 The procedure for recovering progress payments is established under pt 3 of the Act and, relevantly, s 14 provides with respect to claims:

(1) A person referred to in s 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

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(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.

16 The person served with the payment claim may reply to the claim by providing a payment schedule to the claimant which:

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make ('scheduled amount'); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

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

(e) must contain the prescribed information (if any).[9]

17 The claimant may apply for adjudication of a payment claim if:

(a) the scheduled amount in the payment schedule is less than the claimed amount;

(b) the respondent fails to pay the scheduled amount; or

(c) the respondent fails to provide a payment schedule and does not pay the whole or part of the amount claimed.[10]

18 The adjudication application must be made to an 'authorised nominating authority' within 10 business days after the claimant receives the payment schedule.[11] The authority must then refer the application to an adjudicator as soon as practicable.[12] The adjudicator accepts an adjudication application by serving a notice of acceptance on both the claimant and the respondent.[13]

19 The provision which imposes the time limit on the adjudicator is s 22, which relevantly provides as follows:

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9 The Act s 15(2).

10 Ibid s 18(1).

11 Ibid s 18(3)(c).

12 Ibid s 18(7).

13 Ibid s 20(1).

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22 Adjudication procedures

(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.

…

(3) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge the response.

(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.

(4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).

20 With respect to the adjudicator's determination, s 23 of the Act provides as follows:

(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 s 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;

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(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.

…

(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.

(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.

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—

(a) the value of any construction work carried out under a construction contract; or

(b) the value of any related goods and services supplied under a construction contract—

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

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21 Section 28(2) deals with the circumstance where the adjudicator fails to determine the application within the time allowed by s 22(4) of the Act. In that circumstance:

> (2) … the claimant—
>
> (a) may withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and
>
> (b) may make a new adjudication application under section 18.

Progress claim under the Act

22 On 31 May 2017, the builder issued a progress claim under s 14 of the Act in the sum of $882,608.14 (excluding GST) ('claim').

23 On 14 June 2017, the superintendent nominated under the contract issued a payment schedule under s 15 of the Act, in which it scheduled a zero amount for payment. In accordance with s 15(4)(b)(ii) of the Act, the payment schedule was provided within 10 business days after the payment claim was served.

24 On 28 June 2017, the builder made an application to RICS Dispute Resolution Centre for adjudication of the claim under s 18 of the Act. The adjudication application was made within 10 business days of receipt of the payment schedule as required by s 18(3)(c) of the Act. On the same day, the adjudication application was served on the proprietor in accordance with s 18(5) of the Act.

25 On 30 June 2017, RICS Dispute Resolution Centre notified the parties of the appointment of the adjudicator. On the same day, the adjudicator notified the parties that he accepted the adjudication application and was therefore appointed to determine the application pursuant to s 20(3) of the Act.

26 On 5 July 2017, the proprietor served an adjudication response on the adjudicator and the builder, which was within five business days of receiving a copy of the adjudication application as required by s 21(1)(a) of the Act.

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27 On 7 July 2017, the adjudicator:

(a) served a notice under s 21(2B) of the Act, stating that the builder had two business days to lodge a response to the reasons in the adjudication response which had not been included in the payment schedule; and

(b) requested that the builder agree to an extension of time in which to determine the adjudication application to 31 July 2016 pursuant to s 22(4)(b).

28 On 7 July 2017, the builder agreed to extend the time for the determination of the adjudication application to 31 July 2017.

29 On 11 July 2017, the builder served its response to the s 21(2B) notice on the adjudicator and the proprietor, which was within two business days as provided by that sub-section.

30 On 16 July 2017, the adjudicator requested additional information from the proprietor pursuant to s 22(5). On 17 July 2017, the proprietor served its response to the request, and on 18 July 2017, the builder commented on that response.

31 On 28 July 2017, the RICS Dispute Resolution Centre informed the proprietor and the builder that the adjudicator had made the determination and that it would be released to the parties on payment of the adjudicator's fees. On 1 August 2017, the adjudicator's fees were paid by the builder and the determination was served on the parties.

32 The adjudicator determined that the proprietor was liable to pay the builder $381,446.78 (exclusive of GST) plus interest and 50 per cent of the adjudicator's fee.

33 On 11 August 2017, the RICS Dispute Resolution Centre issued an adjudication certificate in the amount of $402,152.78.

34 On 12 September 2017, the builder entered judgment against the proprietor in the County Court of Victoria in the sum of $405,638.30 (including interest up to and including that date) plus costs of $918.00.

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The judge's reasons

35 His Honour's starting-point was the following passage from the joint judgment in *Project Blue Sky*, where the majority (McHugh, Gummow, Kirby and Hayne JJ) said:

> 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. ... 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.[14]

36 His Honour then referred to *MPM Constructions,*[15] where McDougall J held that an out of time determination was not invalid. McDougall J concluded that invalidity was inconsistent with the object of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('NSW Act') as set out in s 3 of the NSW Act.[16] In particular, his Honour considered that it would be anomalous if the result of:

(i) the adjudicator not complying with the time limit; and

(ii) the claimant not withdrawing the application and seeking a new adjudication application within five business days after the expiration of the adjudication time limit;[17]

was that the claimant would be unable to obtain an adjudication of the disputed claim.[18]

37 McDougall J noted that the Act expressly provided for two consequences of non-compliance with the adjudication time limit being that:

(i) the claimant 'may withdraw the application';[19] and

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14 *Project Blue Sky* (1998) 194 CLR 355, 388–9 [91]; see also Reasons [86].

15 *MPM Constructions v Trepacha Constructions* [2004] NSWSC 103 (*'MPM Constructions'*).

16 Section 3 of the NSW Act is in substantially similar terms to s 3 of the Act.

17 Pursuant to s 26(3) of the NSW Act.

18 See *MPM Constructions* [2004] NSWSC 103 [17].

19 Pursuant to s 26(2) of the NSW Act.

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(ii) the adjudicator becomes disentitled to his fees.

The Act did not provide, however, for an out of time determination to be invalid.[20] In his Honour's view, if the effect of an adjudication not being given within the adjudication time limit was that:

(i) any subsequent purported determination was a nullity; and

(ii) the adjudicator would effectively become functus officio,

there would be no purpose in the Act providing that the claimant may withdraw the application.[21] Subsequently, in *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd*,[22] McDougall J confirmed his view that a determination was valid notwithstanding that it was given out of time.

38 In *Cardinal Project Services*,[23] Basten JA expressed the view that an out of time determination was not invalid because the statutory scheme 'envisages that delay will affect the claimant adversely and thus confers on it a right to make a further adjudication application …'.[24] Tobias AJA disagreed, holding that an interpretation that resulted in an out of time determination being ineffective was not anomalous.[25] Macfarlan JA gave separate reasons and did not deal with the question.[26]

39 In *Cranbrook School v JA Bradshaw Civil Contracting*,[27] McDougall J noted the difference of opinion between Basten JA and Tobias AJA and confirmed his view that an out of time determination was not invalid.[28] In support of this view, McDougall J said:

> To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the

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20 *MPM Constructions* [2004] NSWSC 103 [18], [22].

21 See the NSW Act s 26(2).

22 [2010] NSWSC 453.

23 *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716 (Basten and Macfarlan JJA and Tobias AJA).

24 Ibid 729 [49].

25 Ibid 740–1 [115].

26 Reasons [90].

27 [2013] NSWSC 430 ('*Cranbrook*').

28 Reasons [91].

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> [NSW] Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit.[29]

40 McDougall J further noted that the primary obligation imposed by the New South Wales equivalent of s 22(4) 'is to determine an adjudication application as expeditiously as possible'.[30] He said that if this requirement was jurisdictional, 'then an adjudicator might act outside jurisdiction if, for example, he or she decided within the 10 business day period but not as quickly as could have been done.' He considered that an 'unlikely proposition'.[31]

41 In *MT Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*,[32] Hammerschlag J noted the view of Tobias AJA, but preferred McDougall J's conclusion that an out of time determination was not invalid. He added to the considerations against invalidity to those identified by McDougall J:

> [U]nder s 31 [of the NSW Act], an adjudicator is exempt from liability for anything omitted to be done in good faith. This would undoubtedly extend to a failure to deliver on time. If the time limit in s 29(4) is a guillotine, the obligation on an adjudicator to deliver a determination, whilst it may have been breached, would come to an end with no redress against her or him unless the failure was not in good faith. The adjudicator would be relieved of the burden of producing, albeit that she or he could not charge for work done. If a later adjudication is nevertheless valid, the adjudicator's duty would continue and the sanction of not being paid is more real. This position is more conducive to the prompt delivery by adjudicators and fulfilment of the overall objects of the Act.[33]

42 In the present case, the trial judge concluded as follows:

> I agree with McDougall J and Hammerschlag J that a failure to comply with the time limits for determining an adjudication application does not invalidate the adjudication determination for the reasons given by them, referred to above. In my opinion, I can have regard to this reasoning in interpreting the Victorian Act because the relevant provisions are substantially identical. I would also add the following considerations:

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29 *Cranbrook* [2013] NSWSC 430 [63].

30 Ibid [61], [64].

31 Ibid [64].

32 [2017] NSWSC 1121.

33 Ibid [61].

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(a) Section 22(4) of the Act regulates 'the exercise of functions already conferred on [the adjudicator], rather than impos[ing] essential preliminaries to the exercise of those functions'. This is a strong indicator of an intention that non-compliance does not deprive the adjudicator of his or her jurisdiction.

(b) Section 23(2B) of the Act provides that the adjudicator's determination is void in certain circumstances, arising out of post-appointment conduct, which do not include non-compliance with s 22(4). As Kirby J said in *Berowra Holdings Pty Ltd v Gordon*:

> Where Parliament has enacted a provision in language which holds back from attaching consequences of nullity and voidness to the acts of a person in breach, it requires a very strong indication elsewhere in the Act that this is Parliament's purpose, if the Court is to derive an implication that this is so. This is because of the drastic consequences that can follow conclusions of nullity and voidness in the law.

(c) Section 22(4A) provides that a claimant must not unreasonably withhold consent to an adjudicator's request for an extension of time. If a claimant refuses an adjudicator's request for an extension of time, but nevertheless the adjudicator makes the determination outside the 10 days, but before the claimant withdraws the application under s 28, then the validity of the delivered determination would not be able to be finally determined until after the question of the reasonableness of the claimant's refusal is known. This is another example of why the assessment of compliance with s 22(4) does not have a 'rule-like quality which can be easily identified and applied'.[34]

Consideration

43 Ordinarily, the task of statutory interpretation involves construing provisions which deal affirmatively with a particular subject-matter. The task for the court is to discern from the statutory language used, and its context, the legislature's intention with respect to that subject-matter.

44 In a case like the present, however, the interpretive task is quite different. The question addressed in *Project Blue Sky* — whether non-compliance with a statutory requirement results in invalidity — arises only because the legislature has *not* addressed that subject-matter.[35] It is precisely because there is no express provision addressing the consequences of non-compliance that the Court must look elsewhere

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34 [2018] VSC 14 [95] (citations omitted).

35 *R v Soneji* [2006] 1 AC 340, 350 [15] ('*Soneji*').

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in the statute to discern the relevant intention.

45 The inevitable result is a high degree of interpretive uncertainty and, as a consequence, unpredictability of outcome. As Mahoney JA said more than 40 years ago in *Hatton v Beaumont*:

> [Where] such an intention is not expressed … the Court's task is, by the application of the appropriate principles, to divine or impute that intention … ; and this frequently leads, not merely to litigation, but also to uncertainty in the day-to-day operation of the legislation.[36]

46 The frequency of litigation on such questions is well illustrated by the recent judgment of the English Court of Appeal in *Osman v Natt*.[37] That case concerned the effect of non-compliance by tenants with statutory requirements for the giving of a notice of acquisition of the leased property. Describing the 'modern approach' to such questions as having been 'elegantly stated' in *Project Blue Sky*, Sir Terence Etherton C noted counsel's reliance on 'a great many reported cases' concerning the effect of non-compliant notices. More than 20 of those cases are cited in the judgment, most of them decided at high appellate level.[38]

47 The decision in *Project Blue Sky* has not made — did not purport to make — the interpretive task any easier or more certain of outcome. The majority in that case frankly acknowledged that

> 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.[39]

48 Recent decisions illustrate these features of contestability and unpredictability. In *Minister for Immigration and Citizenship v SZIZO*[40] and again in

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36 (1977) 2 NSWLR 211, 225 (citations omitted).

37 [2015] 1 WLR 1536.

38 Ibid 1542–6.

39 *Project Blue Sky* (1998) 194 CLR 355, 388–9 [91] (citations omitted).

40 (2009) 238 CLR 627.

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Forrest & Forrest Pty Ltd v Wilson,[41] the High Court — unanimously in the first case and by 4-1 majority in the second — reversed the decision of a unanimous intermediate court of appeal on a *Project Blue Sky* question. In both cases, the question was one of jurisdiction. And the dissenting judgment of Nettle J in *Forrest*, based on a detailed examination of the legislation in question, further demonstrates the scope which exists for divergence of views.

49 That questions of this kind are attended by uncertainty has long been recognised. In 1861, Lord Campbell L C said:

> No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of Justice to try and get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.[42]

50 In 1877, Lord Penzance said:

> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.[43]

51 In those decisions, of course, the court was employing the mandatory/directory classifications, which the High Court in *Project Blue Sky* described as having 'outlived their usefulness'.[44] But the disappearance of those classifications has not altered the essential nature of the task. The court must endeavour to discern, from what the legislature *has* said, its intention with respect to something about which it has said nothing.

52 Another atypical feature of this interpretive task is that judges are called on to

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41 (2017) 346 ALR 1 ('*Forrest*').

42 *Liverpool Borough Bank v Turner* (1861) 30 LJ 379, 380.

43 *Howard v Bodington* (1877) 2 PD 203, 211; see *Hall v Minister for Immigration and Multicultural Affairs* (2000) 97 FLR 387, 390 [11].

44 (1998) 194 CLR 355, 390 [93]. In *Soneji* [2006] 1 AC 340, the House of Lords followed *Project Blue Sky* in doing likewise. But see now *Wei* (2015) 257 CLR 22, 33 [25].

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weigh up matters which would ordinarily be the subject of legislative judgment. Thus, the quest for legislative purpose in such cases will typically require the court to consider such things as:

- the importance of the requirement in question, viewed as part of the relevant legislative scheme;
- the consequences of the particular non-compliance for those affected by it;[45] and
- the extent of any inconvenience, whether private or public, which would be caused if the non-compliance were held to result in invalidity.[46]

Unsurprisingly, judicial views are likely to differ as to the respective weight to be attached to factors such as these, and as to their relative weight as against textual indications.[47]

53 As Mahoney JA also suggested in *Hatton v Beaumont*, one solution to these difficulties would be for the legislature to ensure that, whenever a statutory requirement is imposed, the consequences of non-compliance are addressed explicitly.[48] As it happens, the Western Australian equivalent of the legislation presently under consideration contains just such a provision. Section 31(1) of the *Construction Contracts Act 2004* (WA) specifies the time within which the adjudicator must either dismiss or determine the adjudication application. Sub-section 31(3) provides as follows:

> If an application is not dismissed or determined … within the prescribed time, or any extension of it … , the application is taken to have been dismissed when the time has elapsed.

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45 *Soneji* [2006] 1 AC 340, 349–50 [15], 353 [23].

46 *Wei v Minister for Immigration* (2015) 257 CLR 22, 33–4 [27]–[28]; see generally G Hill, 'Applying *Project Blue Sky* — When Does Breach of a Statutory Requirement Affect the Validity of an Administrative Decision?' (2015) 80 *AIAL Forum* 54, 70.

47 Ibid 61, pointing out the divergence of view between the members of the Full Federal Court in *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14; see also *Nature Conservation Council of New South Wales Inc v Minister Administering the Water Management Act 2000* (2005) 137 LGERA 320, 348 [91]–[93].

48 See *Hatton v Beaumont* [1977] 2 NSWLR 211, 225 (Mahoney JA).

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54 To different effect, s 501G(4) of the *Migration Act 1958* provides that a failure to comply with the requirement to give reasons for a decision to cancel (or refuse to grant) a visa 'does not affect the validity of the decision'. In *Re Minister for Immigration and Multicultural Affairs v Palme,*[49] a majority of the High Court viewed that express 'no invalidity' provision as demonstrating that a failure to give reasons was not intended to invalidate the decision.[50]

55 In the absence of such a provision, however, the starting-point for the *Project Blue Sky* enquiry is neutral. That is, the absence of an express statement as to the consequences of non-compliance is not treated as creating any presumption that non-compliance was not intended to lead to invalidity. Instead, the interpreter begins from the assumption that there are two possible conclusions — that non-compliance was intended to result in invalidity, or that it was not — and that the two conclusions are equally available. Which will turn out to be the correct conclusion can only be determined after a detailed examination of the statute, and an evaluation of the practical implications of invalidity for those affected.

56 The neutrality, or open-endedness, of the inquiry seems anomalous. After all, this process of interpretation is — properly characterised — a process of necessary implication. That is, the interpreting court is being asked (by the party contending for invalidity) to imply words to address the consequences of non-compliance. On ordinary principles, however, words cannot be implied into a statute unless those words are essential to make the express provisions workable.[51] Axiomatically, to read words into any statute 'is a strong thing and, in the absence of clear necessity, a wrong thing'.[52]

57 Put another way, the *Project Blue Sky* task should be characterised as a 'gap-

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49 (2003) 216 CLR 212.

50 Ibid 225 [44]–[46], 227 [55].

51 See, eg, *Norton v Long* [1968] VR 221, 223.

52 *Thompson v Goold & Co* [1900] AC 409, 420, cited in *Western Australia v The Commonwealth* (1975) 134 CLR 201, 251; see also *Marshall v Watson* (1972) 124 CLR 640, 649 and *Holden & Co v Crown Prosecution Services [No 2]* [1994] 1 AC 22, 33.

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filling' exercise. That is, the court is being asked to read words into a statute in order to 'fill a gap'. The gap exists because no provision was made with respect to the consequences of non-compliance. On this characterisation, too, there is a very high hurdle before judicial intervention is permissible.[53] So much is clear from the line of authority which begins, in the UK, with *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[54] and, in Australia, with *Kingston v Keprose Pty Ltd*,[55] and culminates in the recent decision of this Court in *Director of Public Prosecutions v Leys*.[56]

58 In the last of these, the Court of Appeal conducted an extensive review of the authorities, before adopting the 'three conditions' set out by Lord Diplock in *Wentworth Securities Ltd v Jones*[57] and repeated by McHugh JA in *Kingston*. In short, the court can only 'fill a gap' where it:

(a) knows the mischief with which the Act was dealing;

(b) is satisfied that, by inadvertence, Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act was to be achieved; and

(c) is able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.[58]

The Court in *Leys* identified a further requirement, in these terms:

> It must be possible to 'read in' or imply the additional words into the relevant statutory provision without giving to the provision an unnatural, incongruous or unreasonable construction, and the provision as modified must produce a construction that is in conformity with the statutory scheme.[59]

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53 *DPP v Walters (a pseudonym)* (2015) 49 VR 356, 359 [4].

54 [1971] AC 850 ('*Kammins*').

55 (1987) 11 NSWLR 404 ('*Kingston*').

56 (2012) 44 VR 1 ('*Leys*').

57 [1980] AC 74.

58 *Leys* (2012) 44 VR 1, 38 [109].

59 Ibid.

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59 The judgment in *Leys* was subsequently considered by the High Court in *Taylor v The Owners – Strata Plan No 11564*,[60] where the majority rejected an argument that a statutory provision should be read as if it contained additional words. The New South Wales Court of Appeal had held that to read the provision without the additional words would produce a result inconsistent with its purpose. In allowing an appeal from that decision, the majority (French CJ, Crennan and Bell JJ) said:

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. *It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'*.[61]

60 Although disagreeing in the result, Gageler and Keane JJ expressed similar views about the limits of statutory construction:

> Statutory construction involves attribution of legal meaning to statutory text, read in context. 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always.' Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. *The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair*.[62]

61 In my respectful opinion, the statements in *Taylor* should be applied with equal force to the present task. The proprietor is asking the Court to read the relevant provisions of the Act (ss 22 and 28) as if they included additional words, to the effect that an adjudicator's determination is void if made after the expiry of the time limit. On the authority of *Taylor,* the Court should refrain from doing so, because the constructional task is not to fill 'gaps disclosed in legislation', nor to 'divine unexpressed legislative intention or to remedy perceived legislative

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60 (2014) 253 CLR 531.

61 Ibid 548 [38] (citations omitted, emphasis added).

62 Ibid 556–7 [65] (citations omitted, emphasis added).

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inattention'.[63]

62 Plainly enough, applying strictures of that kind would radically alter the interpreting court's approach to the *Project Blue Sky* question. The starting-point would be that, there being no provision stating that non-compliance results in invalidity, Parliament must be taken not to have intended that consequence. Only if the conditions identified in the 'gap-filling' cases were satisfied would it be open to the interpreting court to take the — exceptional — step of reading into the Act additional words to the effect that non-compliance with the relevant requirement would result in invalidity.

63 In my respectful opinion, adopting this more stringent approach would have several clear advantages. First, it would introduce an important element of coherence into the law of statutory interpretation, by assimilating the *Project Blue Sky* task with other interpretive tasks of the same character. Secondly, it would be conducive to much greater certainty for those who have to advise, or adjudicate, on the effect of non-compliance with a particular statutory requirement.

64 Thirdly, it would emphasise in the clearest terms that it is for the legislature to determine the consequences of non-compliance and that, if the legislature says nothing, the court will not (except in the most exceptional case) step in to fill the gap. Finally, this approach would adhere much more closely to the fundamental rule of law conception that it is for the legislature to enact and for the courts to interpret.[64]

65 That is not, of course, the present state of the law. This Court is bound to approach the task in accordance with the prescriptions in *Project Blue Sky*, and I now turn to the task at hand.

Non-compliance does not mean invalidity

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63 See also *R v Secretary of State for Health* [2003] 2 WLR 692, 697 [7]–[8].

64 *Taylor* (2014) 253 CLR 531, 549 [40]; *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143 [101].

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66 As already noted, the time limit for the making of the adjudication decision is prescribed in these terms:

> An adjudicator is to determine an adjudication application as expeditiously as possible and, in any case, within [the number of days calculated in accordance with sub-s (4)].[65]

As counsel for the applicant correctly pointed out, the phrase 'is to determine' should be read as imposing an obligation on the adjudicator to determine the adjudication application within the specified period. That is, the words 'is to' should be read as meaning 'must'. It is well established, however, that the use of imperative language is not determinative of the point at issue here.[66]

67 With the exception of those words of obligation, I see nothing in the Act itself to indicate that Parliament intended non-compliance with the time limit to render the adjudication decision invalid. All of the indications are to the contrary, in my view.

68 First, Parliament has dealt specifically with the circumstances in which an adjudicator's determination will be void. The relevant provision is s 23(2B) (inserted by amendment in 2006), which provides that a determination 'is void' if, or to the extent that, the adjudicator:

(d) fails to take into account any of the matters specified in s 23(2) as matters which must be taken into account; or

(e) takes into account any matter specified in s 23(2A) as a matter which must not be taken into account.

69 Here the legislature has identified two specific requirements — one positive, one negative — non-compliance with which will result in invalidity. They are both requirements concerned with the adjudicator's actual decision-making, not with procedural matters. On ordinary principles of interpretation, the Court should conclude that this provision was intended to be an exhaustive statement of the

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65 See [19] above.

66 *Adams v Lambert* (2006) 228 CLR 409, 414 [14], 420 [29].

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circumstances in which non-compliance by the adjudicator with requirements governing the adjudication task will result in invalidity.

70 Secondly, the legislature has specifically addressed the consequences of the adjudicator's non-compliance with the adjudication time limit. Far from providing that non-compliance brings the adjudicator's jurisdiction to an end, or renders any subsequent decision invalid, s 28(2)(a) permits — but does not require — the claimant to withdraw the application.

71 Plainly enough, the conferral of the option to withdraw has the necessary corollary that the claimant may decide not to withdraw but instead choose to wait for the adjudicator's decision, notwithstanding the expiry of the time limit. The conferral of the option to withdraw, and the possibility of its non-exercise, would be unintelligible if — as the applicant contends — the adjudicator's jurisdiction automatically came to an end, by operation of law, at midnight on the last day of the specified time period.

72 These intrinsic aids to interpretation would be a sufficient basis, in my view, to uphold the conclusion of the trial judge. They were, of course, central to his Honour's consideration. But, consistently with the authorities, it is appropriate also to consider the significance of the time limit in the context of this legislative scheme, and the consequences for the parties to the adjudication if non-compliance were held to render the adjudication decision invalid.

73 The scheme is avowedly established for the benefit of claimants. So much is clear from the emphatic language of s 3.[67] The stated object of the Act is to *ensure* that a person entitled to a progress payment is able to recover it, and the procedure laid down by the Act is said to be 'the means by which this Act *ensures* that a person is able to recover a progress payment'.[68]

74 Naturally, there are procedural requirements with which a claimant must

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67 See [13] above.

68 The Act s 3 (emphasis added).

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comply, in order to ensure fairness to a respondent. But the statement of legislative purpose is strong and clear. To hold that the expiry of the time limit terminated the adjudicator's jurisdiction would frustrate that purpose. It would potentially work great inconvenience on a claimant — and, for that matter, on a respondent. Counsel for the applicant properly conceded that this was so.

75 It seems highly improbable, in my view, that Parliament intended to allow the completion of the adjudication process to be frustrated — as it were, at the last minute — by reason of the adjudicator's having failed to make a decision within time. I respectfully agree with the views expressed by McDougall J in the decisions cited by the trial judge.[69]

76 Obviously enough, the adjudicator's conduct is wholly beyond the control of the claimant. A consideration of that kind has consistently been viewed in the authorities as militating against a conclusion of invalidity.[70]

77 Counsel for the applicant argued that considerations of commercial certainty supported the view that Parliament did intend invalidity to follow from a breach of the time limit. It would be conducive to certainty for all concerned, it was said, if it was known in advance that the adjudicator's jurisdiction would automatically lapse at the end of the statutory period. If that were not so, it was submitted, there was likely to be 'mayhem'.

78 I am not persuaded by that submission. In my opinion, the effectiveness of this scheme, and the maintenance of the confidence of participants in the building industry, would be much more detrimentally affected if an adjudicator's delay — involving no fault on the part of the claimant — operated to nullify the process of adjudication.

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69 See [37] above.

70 See, eg, *Montreal Street Railway Co v Normandin* [1917] AC 170, 175, cited in *Project Blue Sky* (1998) 194 CLR 355, 392 [97]; see also *Accident Compensation Commission v Murphy* [1988] VR 444, 448, 452; *Ryan v The Grange at Wodonga Pty Ltd* [2015] VSCA 17 [34]; cf *Fernando v Minister for Immigration* (2000) 97 FCR 407.

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Notice of contention

79 The judge's conclusion that the time limit had been breached turned on his Honour's construction of s 22(4). As already noted, that provision requires the adjudication application to be determined:

> 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 s 20(2); or
>
> (b) within any further time, not exceeding 15 business days after that date to which the claimant agrees.

80 The judge concluded as follows:

> In my opinion, a reading of the text, in its legislative context, indicates that the legislative intention was that s 22(4)(b) of the Act permits the extension of the determination of the adjudication application (with the claimant's agreement) for a further time, which does not exceed 15 business days from the date of the adjudicator's acceptance (being 5 days after the expiry of the period provided in para (a)). In particular, I consider this construction 'has a powerful advantage in ordinary meaning and grammatical sense' for the following reasons:
>
> (a) The meaning of s 22(4) must be determined 'by reference to the language of the instrument viewed as a whole'. Sections 22(4) and 28I(10) are cognate sub-sections of the Act, which should be read consistently unless the context requires a different result. The adopted construction provides a reading of the provision in issue consistent with the manner in which s 28I(10) is expressed.
>
> (b) Section 22(4)(b) refers to 'that date', which would ordinarily be read as a reference to the date expressly referred to in the immediately preceding paragraph (ie: 'the date on which the acceptance by the adjudicator of the application takes effect'). By comparison, and on a plain reading, the 10 days expressed in s 22(4)(a) set a period, rather than any particular date. If the draftsman had intended the 15 days to extend from the period set by para (a), she or he could easily have so stated.[71]

81 On this application, the builder filed a notice of contention which argues that, on its proper construction, s 22(4)(b) allows for a period of up to 25 business days after the date on which the acceptance by the adjudicator of the application takes effect. In other words, the 15 days referred to in sub-para (b) should be taken to

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71 Reasons [83] (citations omitted).

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commence at the expiry of the 10 days referred to in sub-para (a).

82 In his reasons, the judge referred to the following extrinsic materials:

(f) a report to the Minister for Planning by the 'Security of Payment Working Group';[72]

(g) the Government response to the recommendations of that Working Group;[73] and

(h) explanatory memoranda to the *Building and Construction Industry Security Payment (Amendment) Bill 2006*.[74]

83 The submission for the builder was that the inferences which the judge had evidently drawn from these extrinsic materials were not warranted. In order to make this point good, counsel for the builder provided the Court with a number of additional materials of the same character and made detailed submissions about the light which they might shed on the legislature's intention.

84 In my respectful opinion, there was no occasion in the present case to have recourse to extrinsic materials. As the High Court emphasised in *Saeed v Minister for Immigration and Citizenship*,

> it is necessary to keep in mind that when it is said the legislative 'intention' is to be ascertained, 'what is involved is the "intention *manifested*" by the legislation'. Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.[75]

More particularly, the Court said,

> it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.[76]

85 In this case, the words of the provision are clear. I respectfully agree with the

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72 Ibid [72].

73 Ibid [73].

74 Ibid [74].

75 (2010) 241 CLR 252, 264 [31] (emphasis in original).

76 Ibid 265 [33]; see also *CNK v The Queen* (2011) 32 VR 641, 649 [27].

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judge's analysis as set out above. There can be no doubt, in my view, that the phrase 'that date' in sub-para (b) is a reference back to 'the date' referred to in sub-para (a). The word 'that' is plainly enough a reference back to something already mentioned,

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and the phrase 'that date' is plainly enough a reference back to something earlier described as a 'date'.

86 Exactly the same drafting approach was adopted in s 28I(10), which provides as follows:

> The review adjudicator must complete the adjudication review and provide a copy of the review determination to the authorised nominating authority that appointed him or her —
>
> (a) within 5 business days after his or her appointment; or
>
> (b) within any further time, not exceeding 10 business days after that appointment, to which the applicant for the adjudication review agrees.

As counsel for the builder properly conceded, the phrase 'that appointment' in sub-para (b) is unarguably a reference back to the 'appointment' referred to in sub-para (a).

87 The notice of contention must be dismissed.

McLEISH JA:

88 I have had the considerable advantage of reading in draft form the reasons of the President. I agree with him, for the reasons he gives, that the appeal should be dismissed and the notice of contention dismissed.

89 As the President observes, this Court is bound by the High Court's decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[77] and the present case is resolved by application of the principles articulated in that decision. In those circumstances, I would leave for another day the question whether the interpretive task faced by a court in a case such as the present is properly characterised as a gap-filling exercise. The President suggests that, because Parliament has not specified that non-compliance results in invalidity, the starting point in deciding whether to fill the gap is that Parliament is taken not to have intended that result.

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77 (1998) 194 CLR 355.

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90 If this issue arises for consideration in the future, in my view it would need to be questioned whether resort to cases on gap-filling would materially assist, or alter the task of statutory construction required. On one view, Parliament has not only refrained from providing that non-compliance results in invalidity; it has also refrained from stipulating that non-compliance does not affect validity. Provisions of both kinds are commonly found in legislation.[78] It might therefore be said that cases such as the present, where the legislation does not expressly address the position, always involve a 'gap' but that, even so, this does not guide the court to any particular starting-point in the analysis. The question would remain, how is the gap to be filled? In the circumstances, it is not necessary to enter further into these matters.

NIALL JA:

91 I agree with the President, for the reasons he gives, that the appeal should be dismissed.

92 As explained by the President, applying the approach propounded by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*[79] yields the result that the appeal must fail. There is nothing in the text of the *Building and Construction Industry Security of Payment Act 2002*, or the context in which it appears, that would support the conclusion that a decision delivered after the expiry of the statutory time limit is void. Whether the constructional exercise might be approached in a different way may be left for another time. In that respect, I agree with the additional observations of McLeish JA.

93 I also agree with the President that the notice of contention must be dismissed.

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78 The present case affords an example of the former, in s 23(2B) of the Act. Examples of the latter include ss 91(4) and 307A(5) of the *Water Act 1989* and s 55 of the *Sex Offenders Registration Act 2004*.

79 (1998) 194 CLR 355.

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